

KF

141

A3

v.53



THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
IRVINE

GIFT OF

J. A. C. Grant



Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LIIL.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1897.

K.F.
141
A3
V53

Entered according to Act of Congress in the year 1897,
By BANCROFT-WHITNEY COMPANY,
In the Office of the Librarian of Congress, at Washington.

SAN FRANCISCO:
THE FILMER-ROLLINS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.

AMERICAN STATE REPORTS.

VOL. LIII.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ALABAMA REPORTS Vols. 104, 105.	17-150
CALIFORNIA REPORTS. Vol. 112.	151-231
FLORIDA REPORTS Vol. 37.	232-273
ILLINOIS REPORTS Vol. 162.	274-340
INDIANA APPEALS Vols. 9, 10.	341-406
KENTUCKY REPORTS Vol. 97.	407-453
MICHIGAN REPORTS Vol. 104.	454-476
MISSOURI REPORTS Vol. 132.	477-518
NEBRASKA REPORTS Vol. 47.	519-573
NORTH CAROLINA REPORTS . . . Vol. 117.	574-621
OHIO STATE REPORTS Vol. 53.	622-671
PENNSYLVANIA STATE REPORTS . . Vol. 176	672-693
TEXAS CRIMINAL REPORTS. . . . Vol. 34.	694-729
TEXAS REPORTS Vol. 88.	730-803
VIRGINIA REPORTS Vol. 92.	804-854
WASHINGTON REPORTS Vol. 14.	855-895
WISCONSIN REPORTS Vol. 92.	896-945

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

- ALABAMA.** — (83) **3**; (84) **5**; (85) **7**; (86) **11**; (87) **13**; (88) **16**; (89) **18**; (90, 91) **24**; (92) **25**; (93) **30**; (94) **33**; (95) **36**; (96, 97) **38**; (98) **39**; (99) **42**; (100, 101) **46**; (102) **48**; (103) **49**; (104, 105) **53**.
- ARKANSAS.** — (48) **3**; (49) **4**; (50) **7**; (51) **14**; (52) **20**; (53) **22**; (54) **26**; (55) **29**; (56) **35**; (57) **38**; (58) **41**; (59) **43**; (60) **46**.
- CALIFORNIA.** — (72) **1**; (73) **2**; (74) **5**; (75) **7**; (76) **9**; (77) **11**; (78, 79) **12**; (80) **13**; (81) **15**; (82) **16**; (83) **17**; (84) **18**; (85) **20**; (86) **21**; (87, 88) **22**; (89) **23**; (90, 91) **25**; (92, 93) **27**; (94) **28**; (95) **29**; (96) **31**; (97) **33**; (98) **35**; (99) **37**; (100) **38**; (101) **40**; (102) **41**; (103) **42**; (104) **43**; (105) **45**; (106) **46**; (107) **48**; (108) **49**; (109) **50**; (110, 111) **52**; (112) **53**.
- COLORADO.** — (10) **3**; (11) **7**; (12) **13**; (13) **16**; (14) **20**; (15) **22**; (16) **25**; (17) **31**; (18) **36**; (19) **41**; (20) **46**; (21) **52**.
- CONNECTICUT.** — (54) **1**; (55) **3**; (56) **7**; (57) **14**; (58) **18**; (59) **21**; (60) **25**; (61) **29**; (62) **36**; (63) **38**; (64) **42**; (65) **48**; (66) **50**; (67) **52**.
- DELAWARE.** — (5 *Houst.*) **1**; (6 *Houst.*) **22**; (7 *Houst.*) **40**; (9 *Houst.*) **43**.
- FLORIDA.** — (22) **1**; (23) **11**; (24) **12**; (25, 26) **23**; (27) **26**; (28) **29**; (29) **30**; (30) **32**; (31) **34**; (32) **37**; (33) **39**; (34) **43**; (35) **48**; (30) **51**; (37) **53**.
- GEORGIA.** — (76) **2**; (77) **4**; (78) **6**; (79) **11**; (80, 81) **12**; (82) **14**; (83, 84) **20**; (85) **21**; (86) **22**; (87) **27**; (88) **30**; (89) **32**; (90) **35**; (91, 92, 93) **44**; (94) **47**; (95, 96) **51**.
- IDAHO.** — (2) **35**.
- ILLINOIS.** — (121) **2**; (122) **3**; (123) **5**; (124) **7**; (125) **8**; (126) **9**; (127) **11**; (128) **15**; (129) **16**; (130) **17**; (131) **19**; (132) **22**; (133, 134) **23**; (135) **25**; (136) **29**; (137) **31**; (138, 139) **32**; (140, 141) **33**; (142) **34**; (143, 144, 145) **36**; (146, 147) **37**; (148) **39**; (149, 150) **41**; (151) **42**; (152) **43**; (154) **45**; (153, 155) **46**; (156) **47**; (157) **48**; (158) **49**; (159) **50**; (160, 161) **52**; (162) **53**.
- INDIANA.** — (112) **2**; (113) **3**; (114) **5**; (115) **7**; (116) **9**; (117, 118) **10**; (119) **12**; (120, 121) **16**; (122) **17**; (123) **18**; (124) **19**; (125) **21**; (126, 127) **22**; (128) **25**; (129) **28**; (130) **30**; (131) **31**; (132) **32**; (133) **36**; (134) **39**; (135) **41**; (136) **43**; (137) **45**; (138) **46**; (139) **47**; (140) **49**; (1, 2, 3, *Ind. App.*; 141) **50**; (4, 5, 6, *Ind. App.*; 142) **51**; (7, 8, *Ind. App.*; 143) **52**; (9, 10 *Ind. App.*) **53**.

- IOWA.** — (72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90), 48; (91) 51.
- KANSAS.** — (37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49.
- KENTUCKY.** — (83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 49; (97) 53.
- LOUISIANA.** — (39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La. Ann.) 40; (46, 47 La. Ann.) 49.
- MAINE.** — (79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35; (86) 41; (87) 47; (88) 51.
- MARYLAND.** — (67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 45; (79) 47; (81) 48; (82) 51.
- MASSACHUSETTS.** — (145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162) 44; (163) 47; (164) 49; (165) 52.
- MICHIGAN.** — (60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97) 37; (98) 39; (99) 41; (100) 43; (101) 45; (102) 47; (103) 50; (104) 53.
- MINNESOTA.** — (36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32; (50) 36; (51, 52) 38; (53) 39; (54) 40; (55) 43; (56) 45; (57) 47; (58) 49; (59) 50; (60) 51; (61) 52.
- MISSISSIPPI.** — (65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35; (71) 42; (72) 48.
- MISSOURI.** — (92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28; (108, 109) 32; (110, 111) 33; (112) 34; (113, 114) 35; (115) 37; (116, 117) 38; (118) 40; (119, 120) 41; (121) 42; (122) 43; (123) 45; (124, 125) 46; (126) 47; (127) 48; (128) 49; (129) 50; (130) 51; (131) 52; (132) 53.
- MONTANA.** — (9) 18; (10) 24; (11) 28; (12) 33; (13) 40; (14) 43; (15) 48; (16) 50; (17) 52.
- NEBRASKA.** — (22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 26; (30) 27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38; (37) 40; (38) 41; (39, 40) 42; (41) 43; (42, 43) 47; (44) 48; (45, 46) 50; (47) 53.
- NEVADA.** — (19) 3; (20) 19; (21) 37.
- NEW HAMPSHIRE.** — (64) 10; (62) 13; (65) 23; (66) 49.
- NEW JERSEY.** — (43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19; (47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N. J. Eq.) 31; (54 N. J. L.) 33; (50 N. J. Eq.) 35; (55 N. J. L.) 39; (51 N. J. Eq.) 40; (56 N. J. L.) 44; (52 N. J. Eq.) 46; (57 N. J. L.; 53 N. J. Eq.) 51.
- NEW YORK.** — (107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34; (139) 36; (140) 37; (141) 38; (142) 40; (143) 42; (144) 43; (145) 45; (146) 48; (147) 49; (148) 51; (149) 52.

NORTH CAROLINA. — (97, 98) **2**; (99, 100) **6**; (101) **9**; (102) **11**; (103) **14**; (104) **17**; (105) **18**; (106) **19**; (107) **22**; (108) **23**; (109) **26**; (110) **28**; (111) **32**; (112) **34**; (113) **37**; (114) **41**; (115) **44**; (116) **47**; (117) **53**.

NORTH DAKOTA. — (1) **26**; (2) **33**; (3) **44**; (4) **50**.

OHIO. — (45 Ohio St.) **4**; (46 Ohio St.) **15**; (47 Ohio St.) **21**; (48 Ohio St.) **29**; (49 Ohio St.) **34**; (50 Ohio St.) **40**; (51 Ohio St.) **46**; (52 Ohio St.) **49**; (53 Ohio St.) **53**.

OREGON. — (15) **3**; (16) **8**; (17) **11**; (18) **17**; (19) **20**; (20) **23**; (21) **28**; (22) **29**; (23) **37**; (24) **41**; (25) **42**; (26) **46**; (27) **50**; (28) **52**.

PENNSYLVANIA. — (115, 116, 117 Pa. St.) **2**; (118, 119 Pa. St.) **4**; (120, 121 Pa. St.) **6**; (122 Pa. St.) **9**; (123, 124 Pa. St.) **10**; (125 Pa. St.) **11**; (126 Pa. St.) **12**; (127 Pa. St.) **14**; (128, 129 Pa. St.) **15**; (130, 131 Pa. St.) **17**; (132, 133, 134 Pa. St.) **19**; (135, 136 Pa. St.) **20**; (137, 138 Pa. St.) **21**; (139, 140, 141 Pa. St.) **23**; (142, 143 Pa. St.) **24**; (144, 145 Pa. St.) **27**; (146 Pa. St.) **28**; (147, 150 Pa. St.) **30**; (151 Pa. St.) **31**; (148 Pa. St.) **33**; (149, 152, 153 Pa. St.) **34**; (154, 155 Pa. St.) **35**; (156 Pa. St.) **36**; (157 Pa. St.) **37**; (158 Pa. St.) **38**; (159 Pa. St.) **39**; (160 Pa. St.) **40**; (161 Pa. St.) **41**; (162 Pa. St.) **42**; (163 Pa. St.) **43**; (164, 165 Pa. St.) **44**; (166 Pa. St.) **45**; (167 Pa. St.) **46**; (168, 169 Pa. St.) **47**; (170, 171 Pa. St.) **50**; (172, 173 Pa. St.) **51**; (174, 175 Pa. St.) **52**; (176) **53**.

RHODE ISLAND. — (15) **2**; (16) **27**; (17) **33**; (18) **49**.

SOUTH CAROLINA. — (26) **4**; (27, 28, 29) **13**; (30) **14**; (31, 32) **17**; (33) **26**; (34) **27**; (35) **28**; (36) **31**; (37) **34**; (38) **37**; (39) **39**; (40) **42**; (41) **44**; (42) **46**; (43) **49**; (44) **51**.

SOUTH DAKOTA. — (1) **36**; (2) **39**; (3) **44**; (4) **46**; (5) **49**.

TENNESSEE. — (85) **4**; (86) **6**; (87) **10**; (88) **17**; (89) **24**; (90) **25**; (91) **30**; (92) **36**; (93) **42**; (94) **45**; (95) **49**.

TEXAS. — (68) **2**; (69; 24 Tex. App.) **5**; (70; 25, 26 Tex. App.) **8**; (71) **10**; (27 Tex. App.) **11**; (72) **13**; (73, 74) **15**; (75) **16**; (76) **18**; (77; 28 Tex. App.) **19**; (78) **22**; (79) **23**; (29 Tex. App.) **25**; (80, 81) **26**; (82) **27**; (30 Tex. App.) **28**; (83) **29**; (84) **31**; (85) **34**; (31 Tex. Cr. Rep.; 86) **37**; (86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Crim. Rep.; 88) **53**.

VERMONT. — (60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**; (67) **48**.

VIRGINIA. — (82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89) **37**; (90) **44**; (91) **50**; (92) **53**.

WASHINGTON. — (1) **22**; (2) **26**; (3) **28**; (4) **31**; (5) **34**; (6) **36**; (7) **38**; (8) **40**; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**.

WEST VIRGINIA. — (29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**; (36) **32**; (37) **38**; (38, 39) **45**; (40) **52**.

WISCONSIN. — (69) **2**; (70, 71) **5**; (72) **7**; (73) **9**; (74, 75) **17**; (76, 77) **20**; (78) **23**; (79) **24**; (80) **27**; (81) **29**; (82) **33**; (83) **35**; (84) **36**; (85, 86) **39**; (87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**.

WYOMING. — (3) **31**.

AMERICAN STATE REPORTS.

VOL. LIII.

CASES REPORTED.

NAME	SUBJECT.	REPORT.	PAGE.
Alabama etc. Land Co. v. Thompson.	<i>Alteration of instruments.</i>	104 Ala. 570.....	80
Anderson v. Pacific Bank.....	<i>Banks</i>	112 Cal. 598.....	223
Anderson v. State.....	<i>Homicide</i>	34 Tex. Cr. Rep. 546.....	722
Bard v. Pennsylvania Traction Co.	<i>Street railways</i>	176 Pa. St. 97....	672
Baxter v. State.....	<i>Slander</i>	34 Tex. Cr. Rep. 516.....	720
Bayzer v. McMillan Mill Co.....	<i>Waters</i>	105 Ala. 395.....	133
Beck etc. Lith. Co. v. Houppert....	<i>Fraud</i>	104 Ala. 503.....	77
Board of Trade v. Nelson.....	<i>Board of trade</i>	162 Ill. 431.....	312
Boynton v. Spofford.....	<i>Limits of actions</i>	162 Ill. 113.....	274
Bradford v. State.....	<i>Confessions</i>	104 Ala. 68.....	24
Brown v. Westerfield.....	<i>Deeds</i>	47 Neb. 399....	532
Button v. American etc. Acc. Assn.	<i>Insurance</i>	92 Wis. 83.....	900
Capital City Ins. Co. v. Antrey....	<i>Insurance</i>	105 Ala. 269.....	121
Cason v. Grant County etc. Bank.	<i>Negotiable instr'm'ts</i>	97 Ky. 487....	418
Cass v. Dicks.....	<i>Waters</i>	14 Wash. 75....	859
Chapman v. Chapman.....	<i>Dower</i>	92 Va. 537.....	823
Chapoton, Estate of.....	<i>Descent</i>	104 Mich. 11.....	454
Chase v. Swayne.....	<i>Homestead</i>	88 Tex. 218.....	742
Chesapeake etc. Ry. Co. v. Osborne.	<i>Railroads</i>	97 Ky. 112....	407
Chestnut v. Tyson.....	<i>Landlord and ten't.</i>	105 Ala. 149.....	101
Chicago etc. R. R. Co. v. Champion.	<i>Master and servant</i>	9 Ind. App. 510	357
Chicago etc. R. R. Co. v. State....	<i>Police power</i>	47 Neb. 549....	557
Chicago v. Stratton.....	<i>Statutes</i>	162 Ill. 494.....	325
Citizens' Nat. Bank v. Wintler....	<i>Corporations</i>	14 Wash. 558...	890
Clark v. Hill.....	<i>Sales</i>	117 N. C. 11.....	574
Coal Co. v. Rosser.....	<i>Statutes</i>	53 Ohio St. 12..	622
Cobb v. Garner.....	<i>Probate sales</i>	105 Ala. 467.....	136
Commercial Bank v. Chilberg.....	<i>Garnishment</i>	14 Wash. 247...	873
Cunningham v. Baker.....	<i>Arrest</i>	104 Ala. 160.....	27
Dailey v. Superior Court.....	<i>Contempt</i>	112 Cal. 94.....	160
Daughtry v. Thweatt.....	<i>Probate sales</i>	105 Ala. 615.....	146
Davenport v. Stone.....	<i>Banks</i>	104 Mich. 521....	467
De La Montanya v. De La Montanya.	<i>Mar'ge and divorce</i>	112 Cal. 101.....	165
Dickson v. State.....	<i>Slander</i>	34 Tex. Cr. Rep. 1	694

NAME.	SUBJECT.	REPORT.	PAGE.
Diggs v. Kurtz.....	<i>Boundaries</i>	132 Mo. 250.....	488
Du Bois Borough v. Du Bois etc. } Water Works Co.....	<i>Contracts</i>	176 Pa. St. 430...	678
Duke v. Taylor.....	<i>Corporations</i>	37 Fla. 64.....	232
Dunn v. State.....	<i>Larceny</i>	34 Tex. Cr. Rep. 257.....	714
Eppinger v. Scott.....	<i>Evidence</i>	112 Cal. 369.....	220
Estate of Chapoton.....	<i>Descent</i>	104 Mich. 11.....	454
Evers v. Philadelphia Traction Co.	<i>Street railways</i>	176 Pa. St. 376...	674
Eversmann v. Schmitt.....	<i>Building & loan associations</i>	53 Ohio St. 174.	632
Farmers' etc. Mfg. Co. v. Alber- marle etc. R. R. Co.....	<i>Waters</i>	117 N. C. 579....	606
Festorazzi v. St. Joseph's etc. Church.	<i>Bequests</i>	104 Ala. 327.....	48
First Nat. Bank v. Peltz.....	<i>Banks</i>	176 Pa. St. 513..	686
Fish v. Nethercutt.....	<i>Sheriffs</i>	14 Wash. 582...	892
Ford v. Hill.....	<i>Corporations</i>	92 Wis. 188.....	902
Fountain Spring Park Co v. Roberts	<i>Corporations</i>	92 Wis. 345.....	917
Francis Chenoweth Hardware Co. } v. Gray.....	<i>Sales</i>	104 Ala. 236.....	37
Gates v. Latta.....	<i>Master and Servant</i> .	117 N. C. 189....	584
Goode v. Georgia etc. Ins. Co.....	<i>Insurance</i>	92 Va. 392.....	817
Grand Rapids etc. R. R. Co. v. } Diether.....	<i>Carriers</i>	10 Ind. App. 206	385
Gray v. Elzroth.....	<i>Slander</i>	10 Ind. App. 584	400
Guetzkow Co. v. Andrews.....	<i>Damages</i>	92 Wis. 214.....	909
Hall v. Alabama Terminal etc. Co.	<i>Creditor's suit</i>	104 Ala. 577.....	87
Hansley v. Jamesville etc. R. R. Co.	<i>Damages</i>	117 N. C. 565....	600
Hately v. Pike.....	<i>Corporations</i>	162 Ill. 241.....	304
Hathaway v. Yakima Water etc. Co.	<i>License</i>	14 Wash. 469...	874
Hayes v. Douglas County.....	<i>Street assessments</i> ..	92 Wis. 429.....	926
Herr v. Central Kentucky Lunatic } Asylum.....	<i>States</i>	97 Ky. 458.....	414
Higgins v. Bordages.....	<i>Homestead</i>	88 Tex. 458.....	770
Hocker v. State.....	<i>Forgery</i>	34 Tex. Cr. Rep. 359.....	716
Home etc. Ins. Co. v. Kennedy.....	<i>Insurance</i>	47 Neb. 138....	521
Houston etc. Ry. Co. v. Crawford.	<i>Receivers</i>	88 Tex. 277.....	752
Huber v. La Crosse etc. Ry. Co....	<i>Negligence</i>	92 Wis. 636.....	940
Huff v. Crawford.....	<i>Limitations of act'ns</i> .	88 Tex. 368.....	763
Huffman v. Hendry.....	<i>Executors and administrators</i> ..	9 Ind. App. 324	351
In re Robinson.....	<i>Contempt</i>	117 N. C. 533....	596
In re Williams.....	<i>Legacies</i>	112 Cal. 521.....	224
Jackson v. Brick Assn.....	<i>Partnership</i>	53 Ohio St. 303.	638
Jammison v. Chesapeake etc. Ry. Co.	<i>Railroads</i>	92 Va. 327.....	813
Johnson v. Louisville etc. R. R. Co.	<i>Railroads</i>	104 Ala. 241....	39
Jolliffe v. Brown.....	<i>Railroads</i>	14 Wash. 155...	868
Kellogg Newspaper Co. v. Peterson.	<i>Landlord and ten't.</i> ..	162 Ill. 158.....	300
Kiel v. Choate.....	<i>Neg. instruments</i> ..	92 Wis. 517.....	936

NAME.	SUBJECT.	REPORT.	PAGE.
Kirkpatrick v. Brownfield.....	<i>Officers</i>	97 Ky. 558.....	422
Klein v. State	<i>Assault</i>	9 Ind. App. 365	354
Kling v. Connell.	<i>Executors and administrators.</i> }	105 Ala. 590.....	144
Larsen v. Winder.....	<i>Injunctions</i>	14 Wash. 109...	864
La Selle v. Woolery	<i>Conflict of laws</i> ...	14 Wash. 70....	855
Lindsay v. Mayor.....	<i>Mun. corporations.</i>	104 Ala. 257.....	44
Little v. Barlow.....	<i>Res judicata</i>	37 Fla. 232.....	249
Louisville etc. R. R. Co. v. Stutts..	<i>Master and servant.</i>	105 Ala. 368.....	127
Magnetic Ore Co. v. Markbury }	<i>Deeds</i>	104 Ala. 465.....	73
Lumber Co.....			
Maier v. Freeman	<i>Garnishment</i>	112 Cal. 8.....	151
Mayer v. Thompson-Hutchinson }	<i>Negligence</i>	104 Ala. 611.....	88
Building Co.....			
McBean v. Fresno.....	<i>Mun. corporations.</i>	112 Cal. 159.....	191
Medinah Temple Co. v. Currey.....	<i>Landlord and ten'nt.</i>	162 Ill. 441.....	320
Merchants' etc. Bank v. Frazee.....	<i>Sales</i>	9 Ind. App. 161.	341
Midland Nat. Bank v. Missouri }	<i>Carriers</i>	132 Mo. 492.....	505
Pac. Ry. Co.....			
Miers v. State.....	<i>Arrest</i>	34 Tex. Cr. Rep. 161.	705
Molton v. State.....	<i>Larceny</i>	105 Ala. 18.....	97
Moore v. Jordan.....	<i>Judgments</i>	117 N. C. 86....	576
Morotock Ins. Co. v. Rodefer.....	<i>Insurance</i>	92 Va. 747.....	846
Morton v. Western Union Tel. Co..	<i>Damages</i>	53 Ohio St. 431..	648
Moulthrop v. Hyett.....	<i>Damages</i>	105 Ala. 493.....	139
Moyer v. Sun Ins. Office.....	<i>Insurance</i>	176 Pa. St. 579...	690
Mutual Life Ins. Co. v. Simpson....	<i>Insurance</i>	88 Tex. 333....	757
Neal v. Nelson.....	<i>Adverse possession.</i>	117 N. C. 393....	590
Northside Ry. Co. v. Worthington.	<i>Corporations</i>	88 Tex. 562.....	778
Nye v. Sochor	<i>Judgments</i>	92 Wis. 40.....	896
O'Connor v. Morse.....	<i>Suretyship</i>	112 Cal. 31	155
Oriental Hotel Co. v. Griffiths.....	<i>Mechanics' liens</i>	88 Tex. 574....	790
Payton v. McQuown.....	<i>Negligence</i>	97 Ky. 757.....	437
Pelton v. Schmidt.....	<i>Negligence</i>	104 Mich. 345....	462
People v. Kirk.....	<i>Waters</i>	162 Ill. 138.....	277
Phenix Iron Works Co. v. McEvony.	<i>Replevin</i>	47 Neb. 228....	527
Pickett v. Wilmington etc. R. R. Co.	<i>Negligence</i>	117 N. C. 616....	611
Pillow v. Southwestern Virginia }	<i>Cotenancy</i>	92 Va. 144.....	804
Imp. Co.....			
Porter etc. Hardware Co. v. Perdue.	<i>Attachment</i>	105 Ala. 293.....	124
Powers v. Morrison.....	<i>Descent</i>	88 Tex. 133....	738
Prescott v. Ball Engine Co.....	<i>Master and servant.</i>	176 Pa. St. 459...	683
Pursifull v. Pineville Banking Co..	<i>Banks</i>	97 Ky. 154.....	409
Railroad Co. v. Mackey.....	<i>Negligence</i>	53 Ohio St. 370..	641
Randolph v. East Birmingham }	<i>Trusts</i>	104 Ala. 355.....	64
Land Co.....			
Reid v. Evansville etc. R. R. Co....	<i>Carriers</i>	10 Ind. App. 385	391
Richmond Ry. etc. Co. v. Garthright.	<i>Street railways</i>	92 Va. 627.....	839

NAME.	SUBJECT.	REPORT.	PAGE.
Robinson, In re.....	<i>Contempt</i>	117 N. C. 533....	596
Robinson v. State.....	<i>Burglary</i>	34 Tex. Cr. Rep. 71.....	701
Roekebrandt v. Madison.....	<i>Mun. corporations</i> ..	9 Ind. App. 227	348
Rogers etc. Hardware Co. v. Cleve- land Building Co.....	<i>Mechanic's lien</i>	132 Mo. 442.	494
Rouse v. Donovan.....	<i>Statutes</i>	104 Mich. 234....	457
San Antonio etc. Ry. Co. v. Lim- burger.....	<i>Railroads</i>	88 Tex. 79.....	730
Scott v. State.....	<i>Criminal law</i>	105 Ala. 57.....	100
Shakman v. United States Credit System Co.....	<i>Insurance</i>	92 Wis. 366....	920
Shields v. State.....	<i>Evidence</i>	104 Ala. 35.....	17
Shoobert v. De Motta.....	<i>Mortgages</i>	112 Cal. 215.	207
Simpson v. Ferguson.....	<i>Mortgages</i>	112 Cal. 180.....	201
Smith v. Jones.....	<i>Attorney and client</i> .	47 Neb. 108.....	519
Southern v. State.....	<i>Indictment</i>	34 Tex. Cr. Rep. 144.....	702
State v. Bargus.....	<i>Constitutional law</i> ..	53 Ohio St. 94..	628
State v. Chandler.....	<i>Adultery</i>	132 Mo. 155.....	483
State v. Cushing.....	<i>Homicide</i>	14 Wash. 527...	883
State v. Ellington.....	<i>Parliamentary law</i> .	117 N. C. 158....	580
State v. Murphy.....	<i>Habeas corpus</i>	132 Mo. 382....	491
State v. Sibley.....	<i>Witnesses</i>	132 Mo. 103.....	477
State v. Steinborn.....	<i>Elections</i>	92 Wis. 605.....	938
State v. Tyler.....	<i>Garnishment</i>	14 Wash. 495..	878
Stevens v. Holman.....	<i>Equity</i>	112 Cal. 345.....	216
Stewart v. Thomson.....	<i>Execution</i>	97 Ky. 575.....	431
Stockton Sav. etc. Soc. v. Purvis..	<i>Landlord and ten'nt</i> .	112 Cal. 236.....	210
Strauss v. Carolina etc. Loan Assn.	<i>Building and loan associations.</i>	117 N. C. 308....	585
Strouther v. Commonwealth.....	<i>Larceny</i>	92 Va. 789.....	852
Sullivan v. McMillan.....	<i>Damages</i>	37 Fla. 134.....	329
Summeralls v. State.....	<i>Criminal law</i>	37 Fla. 162.....	247
Tabor v. State.....	<i>Larceny</i>	34 Tex. Cr. Rep. 631.....	726
Tampa Water Works Co. v. Cline..	<i>Waters</i>	37 Fla. 586.....	262
Tate v. Pensacola etc. Develop- ment Co.....	<i>Specific perform'nce</i> .	37 Fla. 439.....	251
Taylor v. Downey.....	<i>Innkeepers</i>	104 Mich. 532...	472
Titus v. Rochester etc. Ins. Co....	<i>Insurance</i>	97 Ky. 567.....	426
Tuttle v. Burgett.....	<i>Contracts</i>	53 Ohio St. 498.	649
Violett v. Alexandria.....	<i>Street assessments</i> ..	92 Va. 561.....	825
Wald v. Pittsburg etc. R. R. Co....	<i>Railroads</i>	162 Ill. 545.....	332
Webster v. Dwelling House Ins. Co.	<i>Insurance</i>	53 Ohio St. 558..	658
Williams, In re.....	<i>Legacies</i>	112 Cal. 521.....	224
Wilson v. Daggett.....	<i>Limitations of act'ns</i> .	88 Tex. 375.....	766
Wimberly v. Windham.....	<i>Agency</i>	104 Ala. 409.....	70
Yeend v. Weeks.....	<i>Fraud. conveyances</i> .	104 Ala. 331....	50
Zanesville v. Fannan.....	<i>Mun. corporations</i> ..	53 Ohio St. 605..	664

AMERICAN STATE REPORTS.

VOL. LIIL

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

SHIELDS v. STATE.

[104 ALABAMA, 35.]

SHERIFFS—SEARCH OF VISITORS TO JAIL.—A sheriff has no legal authority to use force in searching or examining persons who seek to visit prisoners in the jail, although he may suspect them of crime, or of criminal purposes; but he may require them to submit their persons to a proper and orderly search, or be denied access to the prisoners.

EVIDENCE ILLEGALLY OBTAINED—ADMISSIBILITY OF. However unfair or illegal may be the methods by which evidence may be obtained in a criminal case, it is admissible, if relevant, where the accused was not compelled to do any act criminating himself, or where a confession or admission was not extorted from him, or drawn from him by appliances to his hopes or fears.

EVIDENCE ILLEGALLY OBTAINED—ILLEGAL SEARCH. Evidence obtained by an illegal and unauthorized search of one's person is admissible to fix the guilt of a criminal offense upon him, and does not violate a constitutional guaranty that a person accused shall not be compelled to give evidence against himself, or "that the people shall be secure in their persons, homes, papers, and possessions, from unreasonable seizure or searches," etc.

EVIDENCE ILLEGALLY OBTAINED — UNLAWFUL SEARCH—CARRYING CONCEALED WEAPONS.—On a trial for carrying concealed weapons, evidence of the discovery of a pistol found concealed upon the defendant's person by an officer, prior to his arrest, while making a forcible search of his person, is admissible against the defendant, although the search was unauthorized and unlawful.

INSTRUCTIONS—CRIMINAL LAW—REASONABLE DOUBT. A charge to the jury, in a criminal case, that, "if they believe the evidence, they must find the defendant guilty," is erroneous, and justifies a reversal of judgment, because it does not require belief of the evidence to the exclusion of all reasonable doubt.

Prosecution for carrying a concealed weapon, which resulted in a conviction. The defendant, wishing to see his cousin in the jail of Wilcox county, went to the jail, but, as he started toward the prison part of the jail, halted after being informed

by the sheriff that he could not go into that part of the jail until he had been searched, and was then forcibly searched by the sheriff against his consent. A pistol was found concealed on the defendant's person. The defendant moved, on the trial, to exclude the testimony as to the discovery of the pistol, on the ground that the sheriff had no right or authority to search him, and because of the inadmissibility of such testimony, the search having been made without the defendant's consent or permission. The testimony was admitted, and the defendant excepted. The defendant testified that the pistol was a broken one which he was carrying to the gunsmith to be repaired, and that the search made was against his consent. The court charged the jury that "if they believe the evidence they must find the defendant guilty." To this charge, the defendant excepted.

Peter M. Horn, for the appellant.

William L. Martin, attorney general, and Virginius W. Jones, for the state.

³⁶ BRICKELL, C. J. The proposition underlying the ³⁷ objections to the admissibility of the evidence of the discovery of the pistol concealed about the person of the defendant, and which is pressed in the argument of counsel, is, that the search was unauthorized and illegal; and, as it was unauthorized and illegal, the admission of evidence obtained by it, to fix the guilt of a criminal offense upon the person searched, is violative of the constitutional guaranty, that the accused shall not be compelled to give evidence against himself; and of the further guaranty, "that the people shall be secure in their persons, homes, papers, and possessions, from unreasonable seizure or searches," etc. Kindred propositions in varying forms, and under varying facts, have been drawn to the attention and consideration of this court: *Chastang v. State*, 83 Ala. 29; *Terry v. State*, 90 Ala. 635; *Scott v. State*, 94 Ala. 80; *French v. State*, 94 Ala. 93; *Sewell v. State*, 99 Ala. 183. In neither of these cases was the search, or the mode in which the evidence was obtained, deemed illegal. In *Terry v. State*, 90 Ala. 635, which, like the case before us, was an indictment for the offense of carrying concealed weapons, the court observed: "We need not say what would be our ruling, if the pistol had been discovered by the officer in a search of the defendant's person, or if the defendant had surrendered the pistol in obedience to the command of the officer having him in charge. The question is not presented, and we leave it undecided." In the later case, *Sewell v. State*, 99 Ala. 183, a like

indictment, the court said: "We presume the objection [to the admissibility of the evidence] is based upon the proposition that the discovery of the guilt was brought about by the unlawful exercise of official authority and power on the part of the constable, and that it would be against public policy, if not an invasion of the constitutional immunity of the citizen, to suffer information so obtained to be used against the defendant. This case does not call for any decision on that subject, and we declare no rule touching the admissibility of evidence so obtained."

If, as is insisted, the search of the person of the defendant was unauthorized and illegal, the question, a decision of which was heretofore pretermitted, is now unavoidable; and that it was unauthorized and illegal, we cannot doubt.

The sheriff is the jailer, having the legal custody and ³⁸ charge of the county jail, and of the prisoners therein confined. He may commit the custody and charge to a jailer of his appointment, who becomes his deputy or substitute, for whose acts he is civilly responsible: Crim. Code, sec. 4535. Charged with the duty of protecting and preserving the jail, and of keeping the prisoners safely, until of their custody he is relieved by legal authority, of necessity, the jailer, whether he be the sheriff, or a substitute of his appointment, has a large discretion, in determining at what time, under what circumstances, and what persons, not having legal authority, he will permit to enter the jail, or to have access to the prisoners; a discretion it is not contemplated he will exercise arbitrarily or capriciously, but which at last he must exercise according to his own conscience and judgment, uncontrolled by the conscience and judgment of others. If he apprehends injury to the jail, or the introduction therein of things forbidden, or the instrumentalities of escape, or detriment to a prisoner, he may require whoever may seek admission into the jail to submit their persons to a proper, orderly examination or search. The examination or search must be voluntary on the part of such persons. If they do not consent, admission to the jail, or access to the prisoners, may be refused; if they have entered, they may be required to depart. If they persist in remaining, they may be treated as trespassers and ejected, the jailer using no more force than is necessary to eject them. But he is without legal authority by force to search or examine them, or to compel them to submit their persons to search or examination, even though he may suspect them of crime, or of criminal purposes. If, by force, he makes search of their persons, or compels them to submit to it, he becomes a trespasser, and for the wrong is civilly

answerable; and he commits an indictable misdemeanor, the offense being aggravated because of his official relation, and the abuse of its rightful powers.

While it is true the search of the defendant was without legal justification, a trespass, and an indictable misdemeanor, we know of no principle or theory upon which the state may be deprived of the right to employ the evidence of a criminal offense thus obtained. As is observed by the supreme court of Illinois, in *Gindrat v. People*, 138 Ill. 111: "Courts, in the administration of ³⁹ the criminal law, are not accustomed to be over-sensitive in regard to the sources from which evidence comes, and will avail themselves of all evidence that is competent and pertinent, and not subversive of some constitutional or legal right." The state had no connection with, and had no agency in, the wrong committed by the sheriff. The law appoints the remedy for the redress of the wrong, but the exclusion of the evidence criminating the defendant is not within the scope of the remedy, or the measure of redress. Evidence is not infrequently obtained by methods which are reprehensible in good morals, offensive to fair dealing, subjecting it to unfavorable inferences, the party relying upon it must neutralize to entitle it to full credence. And evidence is sometimes obtained under circumstances which meet with the unqualified disapprobation of the courts. The evidence, however unfairly and illegally obtained, is not subject to exclusion, if it be of facts in themselves relevant, except when a party accused of crime has been compelled to do some positive affirmative act inculcating himself; or an admission or confession has been extorted from him by force or drawn from him by appliances to his hopes or fears: 1 *Greenleaf on Evidence*, sec. 254 a; *Commonwealth v. Dana*, 2 Met. 329-37; *State v. Flynn*, 36 N. H. 64; *Gindrat v. People*, 138 Ill. 111.

The extrajudicial confessions or admissions of a defendant, charged with crime, are received in evidence with a degree of caution, not extended to any other species of evidence. Before admitting them, the court must be satisfied that they were made voluntarily, free from compulsion, or appliances of hope or fear to the mind of the accused. Yet, if a confession or admission be made involuntarily, under circumstances which compel its exclusion as evidence, and from it a knowledge of material relevant facts is derived, these facts are admissible evidence: 1 *Greenleaf on Evidence*, sec. 231; *Brister v. State*, 26 Ala. 107; *Sampson v. State*, 54 Ala. 241. Confessions obtained by artifice or deception or falsehood, however reprehensible and dishonorable, if volun-

tary, are also admissible evidence: Wharton on Criminal Evidence, sec. 670; 1 Roscoe's Criminal Evidence, 8th ed., 81; King v. State, 40 Ala. 314; People v. Barker, 60 Mich. 277; 1 Am. St. Rep. 501; Heldt v. State, 20 Neb. 492; 57 Am. Rep. 835. The evidence of an eavesdropper as to statements made ⁴⁰ by the defendant, when he was free from all influences affecting the admissibility of such statements, has been received. The court said: "The defendant has no cause of complaint, either because, if an eavesdropper, the witness may possibly not have heard all that was said in the conversation to which he testified, or on the ground that eavesdropping is disreputable in itself, or was an offense at common law": People v. Cotta, 49 Cal. 166. The evidence of detectives feigning to be accomplices, obtaining and practicing upon the confidence of the accused, is received; and so is the evidence of spies; the manner of obtaining the evidence is directed to its credibility, not to its admissibility: State v. McKean, 36 Iowa, 343; 14 Am. Rep. 530; Wright v. State, 7 Tex. App. 574; 32 Am. Rep. 599; People v. Barker, 60 Mich. 277; 1 Am. St. Rep. 501; Gindrat v. People, 138 Ill. 111. In the latter case, the evidence was obtained by an unlawful intrusion by a detective into, and search of, the dwelling-place of the defendant.

The guaranty of the constitution, that no person accused of crime shall be compelled to give evidence against himself, corresponds to and is drawn from the maxim of the common law, "Nemo tenetur seipsum accusare," and it forever removes from the sphere of judicial investigations any and all compulsion of persons accused of crime, either by subjecting them to physical torture, or to inquisitorial examinations, to which they have been subjected in some countries: 2 Story on the Constitution, sec. 1788. Admissions or confessions imputed to them are inadmissible as evidence, except under the limitations and conditions to which we have referred. It is, as we have seen, of the very essence of their admissibility, that they should be voluntary, proceeding from the unrestrained volition of the accused. The defendant made no admission or confession; he was passive, the unresisting victim of unlawful violence; and if he had made an admission or confession, its exclusion, because not free and voluntary, would have been unavoidable. It is not that which he has said or done which is supposed to offend the constitutional guaranty, but the independent, unlawful acts of the sheriff, by and through which it was discovered that he bore upon his person the "mute witness" of a criminal offense. We quote with approbation from the opinion of the supreme court of New Hamp-

shire, in *State v. Flynn*, 36 N. H. 64: "It seems to us an ⁴¹ unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud, access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. If a party should have the power to keep out of sight, or out of reach, persons who can give evidence of facts he desires to suppress, and he attempts to do that, but is defeated by force or cunning, the testimony given by such witnesses is not his testimony, nor evidence which he has been compelled to furnish against himself. It is their own. It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his.

The case of *Commonwealth v. Dana*, 2 Met. 329, was of the seizure of lottery tickets illegally kept for sale. The seizure was made under a search warrant asserted to be illegal and void. The court sustained the validity of the warrant, but in answer to the objections proceeding on the invalidity of the warrant, and the consequent illegality of the search, said: "Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided ⁴² in the cases of *Legat v. Dollervey*, 14 East, 302, and *Jordan v. Lewis*, 14 East, 304, note; and we are entirely satisfied that the principle on which these cases were decided is sound and well established."

We adhere to the proposition to be extracted from the authorities to which we have referred, that however unfair or illegal may be the methods by which evidence may be obtained in a criminal case, if relevant, it is admissible, if the accused is not compelled to do any act which criminales himself, or a confession or admission is not extorted from him, or drawn from him by appliances to his hopes or fears. The objections to the admissibility of the evidence were properly overruled.

The instruction given the jury is erroneous. I doubt the propriety of such an instruction in any criminal case, whether it be of felony or misdemeanor. There can be but little of necessity for it, and it seems to me, the better practice is for the court to state the law, leaving the effect of the evidence wholly to the consideration and determination of the jury. Such instructions have, however, received the approval of this court, and I yield to precedent, whatever of doubt I may have as to their propriety. If such an instruction be given, it must not be expressed in the terms which would be appropriate in a civil case. A preponderance of evidence, though it may not leave the minds of the jury free from reasonable doubt, requires a verdict in a civil case. But, in criminal cases, there must be the exclusion of all reasonable doubt to authorize a conviction. "Neither a mere preponderance of evidence, nor any weight of preponderant evidence is sufficient for the purpose, unless it generates full belief of the fact to the exclusion of all reasonable doubt": 3 Greenleaf on Evidence, sec. 29. This marked difference between the quantity of evidence which will support a verdict in civil and criminal cases must be observed in instructing the jury. The evidence may have been believed, and yet it may not have excluded from the minds of the jury all reasonable doubt. As was said by Stone, C. J., in *Rhea v. State*, 100 Ala. 119: "Believing from the testimony that the facts exist is not enough. The belief must be so strong as to leave no reasonable doubt of its truth": See, also, *Pierson v. State*, 99 Ala. 148; *Heath v. State*, 99 Ala. 179.

For the error in this instruction, the judgment must ⁴³ be reversed and the cause remanded; the defendant will remain in custody until discharged by due course of law.

Reversed and remanded.

EVIDENCE ILLEGALLY OBTAINED, ADMISSIBILITY OF.—Courts do not pause in the trial of a case to open up a collateral inquiry upon the question of whether a wrong has been committed in obtaining information possessed by a witness. One who is in no way responsible for a tort by which information is obtained may introduce evidence of the facts so ascertained, although trespass has

been committed by the witness in obtaining the information: *Cluett v. Rosenthal*, 100 Mich. 193; 43 Am. St. Rep. 446, and note.

ARREST—SEARCH OF PRISONER.—A prisoner may be lawfully searched, against his will, for evidence of his guilt, which if found, may be used against him: *Rusher v. State*, 94 Ga. 363; 47 Am. St. Rep. 175, and note; *Ex parte Hurn*, 92 Ala. 102; 25 Am. St. Rep. 23, and note.

INSTRUCTIONS—CRIMINAL LAW—REASONABLE DOUBT.—Instructions, in a criminal case, must require belief of the evidence to the exclusion of all reasonable doubt before the jury can convict: See monographic note to *Burt v. State*, 48 Am. St. Rep. 577, on reasonable doubt.

BRADFORD v. STATE.

[104 ALABAMA, 68.]

CRIME AGAINST NATURE—ATTEMPT—INDICTMENT.—An indictment charging that the defendant, "against the order of nature, attempted to carnally know a certain beast, to wit, a cow," is sufficient, without stating any particular act constituting the attempt.

EVIDENCE—CONFESSIONS—ADMISSIBILITY.—In criminal cases, confessions are prima facie inadmissible, and will not be received in evidence until it is shown to the court that they were voluntarily made, unless the objection is waived.

EVIDENCE—CONFESSIONS—WAIVER OF PROOF AS TO THEIR BEING VOLUNTARY.—In criminal cases, where confessions are offered in evidence, and the defendant objects that such evidence is "incompetent and illegal," the court ought to require satisfactory proof that the confessions were voluntarily made before admitting them. Such objection is not so general as to waive the required preliminary proof.

EVIDENCE — CONFESSIONS—ADMISSIBILITY—CORPUS DELICTI.—Confessions are not admissible in evidence, in a criminal case, until the corpus delicti has been proved.

Indictment for an attempt to commit the crime against nature, followed by a trial and conviction. The indictment ran as follows: "The grand jury of said county charge that before the finding of this indictment that Wallace Bradford, against the order of nature, attempted to carnally know a certain beast, to wit, a cow, against the peace," etc. The second count was the same as the first, except that the beast therein referred to was a heifer. This indictment was demurred to, on the ground, among others, that it stated no facts showing that an attempt was made to commit the crime against nature. The demurrer was overruled. A witness for the state, after testifying to facts tending to show the guilt of defendant as charged, further testified that he was standing at his lot gate when the defendant came out of the stable following the heifer, with his private parts exposed. The solicitor for the state then asked the witness the following question: "If there was any conversation between you

and the defendant, as to what he had been doing, just after he came out of the stable, state what the conversation was." This question the defendant objected to on the ground that it was "irrelevant, immaterial, incompetent, and illegal," and because the state had failed to show that the crime charged in the indictment had been committed. The objection was overruled. The witness then answered: "When the defendant came out of the stable, I showed him, and asked him what he had been doing, and he said, 'Well, you have caught up with me.'" The court denied a motion to exclude this testimony from the jury. The defendant moved the court to set aside the verdict of guilty, on the ground, among others, that the jury did not deliver their verdict to the clerk of the court, but to some person not authorized by law to receive it. This motion was overruled, and the defendant appealed.

T. C. Sensabaugh, for the appellant.

William L. Martin, attorney general, for the state.

THE HEAD, J. There is no valid objection to the indictment in this case: *Jackson v. State*, 91 Ala. 55; 24 Am. St. Rep. 860; *Clark's Manual of Criminal Law*, sec. 274, and cases cited.

The defendant's objections to the introduction of his confessions were based upon the grounds that the evidence was irrelevant, immaterial, incompetent, and illegal, and because the state had failed to show that the crime charged in the indictment had been committed. The question is, whether these were sufficient to raise the objection that the confessions were not shown to have been voluntary; or, in other words, whether the prisoner waived the required preliminary proof by the generality of his objections. The rule is well recognized that confessions in criminal cases are prima facie inadmissible; and unless waived, will not be received until the court, proceeding with great care and caution, is made satisfied by evidence that they were entirely voluntary. See the strong language used in following cases: *Bonner v. State*, 55 Ala. 242; *Young v. State*, 68 Ala. 569; *Brister v. State*, 26 Ala. 107; *Owen v. State*, 78 Ala. 425; 56 Am. Rep. 40; *Wilson v. State*, 84 Ala. 426; *Amos v. State*, 83 Ala. 1; 3 Am. St. Rep. 682. In the case last cited, there was a mere general objection to the evidence of the confessions, specifying no ground; and this court reversed the judgment, for error in overruling it, because there had been no proper predicate laid for the introduction of confessions. In the present case, we have seen the defendant objected on the grounds, with others, that the

testimony was incompetent and illegal. When this was done, we hold the court ought to have required satisfactory proof, according to the spirit and intent of the above-named decisions, that the confessions were voluntarily made, before admitting them, and erred in not doing so.

There was sufficient evidence of the corpus delicti, independent of the confessions, to render the latter admissible, if they had been proven voluntarily: *Ryan v. State*, 100 Ala. 94.

We need not pass upon the question raised touching the reception of the verdict, as surely such thoughtless conduct on the part of the jury and bailiff will not be repeated. In the face of an agreement that the jury might ⁷¹ deliver their verdict sealed to the clerk of the court, if found during the recess or adjournment, they delivered it to the person who was attending them as bailiff and separated. This occurrence suggests the propriety of care on the part of the courts to see that juries are well instructed in what they are to do, when they are to act upon agreements of this kind.

For the error mentioned, the judgment is reversed and the cause remanded. Let the defendant remain in custody until discharged by due course of law.

Reversed and remanded.

CRIMINAL LAW—ATTEMPT TO COMMIT CRIME.—AN INDICTMENT OR INFORMATION charging an attempt to commit a crime, in the words of the statute, is generally sufficient: See monographic note to *People v. Moran*, 20 Am. St. Rep. 746, on the crime of attempting to commit a crime. An information charging the crime of sodomy in the statutory language has been held sufficient in some cases; in others not: *State v. Campbell*, 29 Tex. 44; 94 Am. Dec. 251, and monographic note thereto at page 254, on when a crime may be charged in the language of the statute.

EVIDENCE — CONFESSION — ADMISSIBILITY OF — CORPUS DELICTI.—Confessions are not admissible in evidence in criminal cases, when there is any reasonable ground to believe that they were induced by hope or fear: *Green v. State*, 88 Ga. 516; 30 Am. St. Rep. 167. They are admissible only when it is clearly shown that they were freely and voluntarily made: Note to *Lauderdale v. State*, 37 Am. St. Rep. 793. The court must determine whether or not a confession offered in evidence should be received or rejected, and there are cases holding that the court's preliminary hearing for such purpose must, if desired by the defendant, be made outside the hearing of the jury: See monographic note to *Daniels v. State*, 6 Am. St. Rep. 244, on the admission of confessions in evidence: Note to *Green v. State*, 30 Am. St. Rep. 170. A judicial confession is sufficient without proof of the corpus delicti; but extrajudicial confessions of guilt, without proof of the corpus delicti, are insufficient to justify a conviction: Note to *Daniels v. State*, 6 Am. St. Rep. 251. The corpus delicti, however, may be established by circumstantial evidence: *Campbell v. People*, 159 Ill. 9; 50 Am. St. Rep. 134, and note; note to *State v. Harrison*, 44 Am. St. Rep. 867; and if there is sufficient evidence of the corpus delicti to satisfy the minds of the

jury, then the confession of the accused will be sufficient to justify a conviction: Note to Daniels v. State, 6 Am. St. Rep. 251.

Attention was called to the principal case in *Anderson v. State*, 104 Ala. 83, an indictment for seduction, with respect to the admission of extrajudicial confessions of the prisoner, which comprehend any statement made by him out of court, that tends to involve him in guilt of the crime with which he is charged. In that case a witness testified on the trial that, after the defendant's arrest for bastardy, growing out of the alleged seduction, the witness told him that he could not get out of the charge; that it would be better for him to tell witness all about it, and he would buy defendant's crop and assist him to leave the country; and that the defendant replied: "I have no way of proving myself clear, and am going to leave." The officer who arrested the defendant on the charge of bastardy also testified that he told the defendant that the brothers of the prosecutrix were going to force him to leave the country; that it would be lighter on him to own up, as he could not deny the charge; and that the defendant thereupon replied: "I have no witnesses to prove myself out, and it may be that I had better own up." These confessions, instead of being shown by the state to have been voluntary, were expressly and unmistakably shown to have been involuntary, and were, therefore, held not to be admissible in evidence. "There is," said the court, "no necessity, if the trial courts will observe proper care, for doubtful questions being brought before us, touching confessions in those cases where mere formal proof of the voluntary character of, the confessions would obviate all question. Nothing in this or that case is intended to impair the rule that involuntary confessions may be admitted when they point to the discovery of physical facts which are discovered and proven in connection with the confession."

CUNNINGHAM v. BAKER.

[104 ALABAMA, 150.]

ATTACHMENT—WHAT DEMANDS ARE SUBJECT TO GARNISHMENT.—The controlling characteristic of the remedy by garnishment is, that the liability of the garnishee must originate in, and be dependent on, contract. Hence, with the exception of conveyances, transfers, or agreements to defraud creditors, a garnishment cannot be employed to reach or subject any debt or demand, which the debtor, suing in his own name, could not recover in an action *ex contractu*. An unliquidated demand, having in it no element of contract, or unliquidated damages, or the right of action for a tort, is not, therefore, the subject of garnishment.

ARREST AND DETENTION—COMPLIANCE WITH STATUTE.—If the matter of apprehension and detention of a criminal is regulated by statute, the statutory mode of procedure must be observed, and arrest and detention otherwise are illegal.

ARREST FOR CRIME COMMITTED IN ANOTHER STATE—PREREQUISITES.—Conceding that an officer, having authority to make arrests, can, without warrant, arrest a person in this state whom he has reasonable cause to believe has committed a felony in another state, such authority cannot be exercised unless there is reasonable cause to believe that the crime supposed to have been committed is a felony, not a less offense, under the law of the state in which it was committed, that the person arrested committed it, and that he is a fugitive from the justice of that state.

ARREST FOR CRIME COMMITTED IN ANOTHER STATE—WHEN UNLAWFUL.—If two persons are arrested in this state, by a city police officer, upon the strength of a telegram addressed to him by a city police officer of another state, requesting him to see the conductor of an approaching train, and to “keep track of” the pair, and describing them as “swindling commission merchants,” the arrest is illegal and unjustifiable, because the telegram furnishes no reasonable ground to believe that such persons, or either of them, had committed, or intended to commit, a felony.

DEFINITIONS.—THE WORD “SWINDLING” has no legal or technical meaning.

ARREST UPON GROUND OF BELIEF THAT A FELONY HAS BEEN COMMITTED—WHEN JUSTIFIABLE.—An officer cannot justify an arrest upon the ground that he had reasonable cause to believe that the person arrested had committed a felony, unless he has information of facts, derived from those reasonably presumed to know them, which, if submitted to a judge or magistrate having jurisdiction, would require the issue of a warrant of arrest, and the holding of the accused to await further examination.

ARREST—JUSTIFICATION.—An illegal arrest cannot be justified by facts subsequently ascertained; nor can an arrest, made for one purpose, be justified for another.

ARREST.—A SEARCH OF THE PERSON ARRESTED is justifiable only as an incident to a lawful arrest; if the arrest be unlawful, the search is unlawful, and is aggravated by the illegality of the arrest.

ATTACHMENT—UNLAWFUL SEARCH OF PERSON—GARNISHMENT.—If a police officer unlawfully arrests the defendant in an attachment suit, and searches his person, the search is unlawful, and money or other effects thus obtained are not subject to garnishment, in the hands of such officer, by a creditor of the person arrested, as there is no contractual relation between the debtor and the garnishee.

ATTACHMENT—UNLAWFUL SEARCH OF PERSON—GARNISHMENT.—The fact that the plaintiff in an attachment suit had nothing to do with the act of an officer in unlawfully arresting the defendant in attachment, searching him, and taking possession of money, or other effects, found on his person, does not give the plaintiff the right to garnish such property in the hands of the officer.

Garnishment suit. An action of assumpsit was brought by the appellants, Cunningham & Son, against the appellees, Baker, Peterson & Co. This suit was instituted by suing out a writ of attachment against the defendants, which was executed by the service of a sheriff's garnishment upon A. Gerald, the chief of police of the city of Montgomery, who had previously arrested the defendants, Frank Baker and James Peterson, who had been engaged in business in the city of New Orleans under the firm name of Baker, Peterson & Co. The defendants moved for an order to show cause why the writ of attachment and its levy by sheriff's garnishment should not be vacated, annulled, discharged, and quashed. The motion set up, in avoidance of the attachment, by levy of the garnishment and the proceedings thereon, the fact that the defendants were illegally arrested, that their property was taken from them through persons by unlaw-

ful force, by a trespass, that the said property was not, therefore, liable to said attachment, and that the levy was void. The facts alleged in support of this contention were as follows: Baker and Peterson came to the city of Montgomery by railroad, each of them having upon his person certain money, clothing, and other personal property, as well as railroad checks for his baggage; but before their arrival, the city chief of police had received a telegram from the chief of police in New Orleans, Louisiana, to the following effect: "See conductor of Louisville & Nashville train to arrive this evening, and keep track of Baker and Peterson, swindling commission merchants." Upon the arrival of the defendants, they were arrested on the train, and taken from the train to the police station. There each of them was searched; the money and effects which each had upon his person were taken therefrom; the hand baggage of each was taken from him; the checks for the baggage of each were taken from his pockets, and the baggage stopped, and taken to police headquarters. Gerald, the chief of police, took possession of all the property. When such search was made, there was no warrant for the arrest of defendants, no *capias* or other process charging them with any criminal offense, in the hands of the Alabama authorities. There was no requisition or demand for them from any other state, nor did said authorities ever get any process of any kind, during the time of their detention in the city of Montgomery. After the arrest and search, the attachment in this case was sued out and executed as above stated. There was a demurrer to the motion, one of the grounds being that it was not averred therein that the plaintiffs authorized or connived at the arrest of defendants, or that they participated in or had any connection with the arrest. The demurrer was overruled, and the plaintiffs then showed cause for the arrest as follows: A short time before the issuance of the attachment, Baker and Peterson had gone to New Orleans, as strangers, without any visible means, and at once began to advertise themselves very extensively to the public in places distant from that city as dealers in country produce, offering, in some instances, to receive and sell on commission, and in others, to buy directly from the shippers, and offering extra prices. In this manner they obtained large quantities of such goods from the appellants and others, in states near by, without intending to pay, or to account, for the same. They sold nearly all of the goods so procured at any price obtainable, and appropriated the proceeds to their own use, paying the shippers nothing. After so doing and delaying payment for the goods as long

as possible, they suddenly disappeared from New Orleans, under very suspicious circumstances, and boarded a train on the Louisville & Nashville Railroad at a small station, a few miles from that city, en route to Montgomery, Alabama. There was a passenger on this train, at the same time, who knew Baker and Peterson, who had heard of their conduct in New Orleans, and who had noticed their suspicious actions in boarding the train. He wired the chief of police of New Orleans of the same, and that officer at once communicated by wire with Gerald, sending the telegram above described, and which led to the arrest of defendants at Montgomery, where they had separated, having taken trains to different places. A short time afterward, they were delivered to the officers of the law from New Orleans, who returned to that city with them, where they were subsequently indicted for frauds growing out of said business, after which they were released on bond and then left for parts unknown. Baker and Peterson, while under arrest in Montgomery, were taken to the police headquarters and searched by certain police officers; a portion of the property in question was taken from their persons, and a portion was taken out of a trunk belonging to them, but which trunk was received by the officers from the railroad company. All of the property was delivered by the officers to the chief of police, A. Gerald, and while it was in his possession, the attachment was sued out, and executed by service of the sheriff's garnishment on Gerald, and notice thereof given to the defendants. But it was averred that this was done without knowledge or information, on the part of the appellants, as to the manner of the arrest, and without their aiding, procuring, or directing the same in any way. The plaintiffs, in their answer, further averred "that the police officers, in making said arrests, acted in good faith, honestly believing that the said Baker and Peterson had violated the laws of the state of Louisiana as aforesaid, and were fleeing from said state to avoid arrest; that the chief of police of Montgomery was personally acquainted with the chief or superintendent of police of New Orleans, and knew him to be reliable; and that said arrests were made and said property obtained from them for the purpose of preventing the escape of said Baker and Peterson, and honestly believing that the said property might be useful as evidence against them, the said Baker and Peterson, upon a trial of the charges against them growing out of their said fraudulent dealings." This answer of the plaintiffs was demurred to by the defendants upon the grounds: 1. That it was shown therein that,

at the time of the arrest of the defendants, they were guilty of no offense justifying their arrest under the laws of Alabama; 2. That it was shown therein that if any violation of law was committed by the defendants, it was in a foreign state, and that no requisition had been made upon, and no warrant of arrest issued by, the governor of Alabama, authorizing their arrest; 3. That it undertook to set up, in justification of the arrest, the conduct of the defendants in a foreign state; 4. That it showed that the levy of attachment by service of a sheriff's garnishment was unlawful and illegal; 5. That it was not sufficient in law. The court sustained this demurrer, and, as the plaintiffs declined to plead further, the motion to dissolve and quash the attachment and levy was granted, and the cause dismissed. The plaintiffs then appealed, upon the ground that the court erred in overruling their demurrer to the defendants' motion, in sustaining the defendants' demurrer to their answer, and in the judgment rendered.

Farnham & Crum, for the appellants.

Lomax & Ligon, for the appellees.

167 BRICKELL, C. J. The levy of the attachment was made only by the service of a garnishment. The judgment of the court below, from which the appeal is taken, was rendered, sustaining or overruling demurrers the parties interposed. From these rulings, the counsel have evolved, as the principal question of the case, to which they have directed argument, the liability to garnishment of the moneys or effects in the possession of the garnishee, the attaching creditor seeks to reach and condemn.

The nature and office of a garnishment is defined and declared by the code, in these words: "A garnishment, as the word is employed in this code, is process to reach and subject money or effects of a defendant in attachment, or in a judgment or decree, or in a pending suit commenced in the ordinary form, in the possession or under the control of a third person, or debts owing such defendant, or liabilities due him on contracts for the delivery of personal property, or on contracts for the payment of money which may be discharged by the delivery of personal property, or on contract payable in personal property; and such third person is called the garnishee": Code, sec. 2994. This section of the code is but the expression of the nature of a garnishment, as **168** it had been defined and declared in effect by a long course of judicial decisions. It is obvious that under the statute, and under prior judicial decisions, a garnish-

ment has a dual office. The one is, and the one in which it is more usually employed, the subjection of a debt, or of a demand originating in a contract, or moneys coming rightfully and legally into the possession of a garnishee, which it is a legal duty to pay to the debtor of the creditor suing out the garnishment. The other is, the subjection of moneys or effects in the possession or under the control of the garnishee, which it is a legal duty to deliver to the debtor. With the exception of cases of conveyances, or transfers, or agreements made to defraud creditors, a garnishment cannot be employed to reach or subject any debt, or any demand, the debtor suing in his own name cannot recover in an action *ex contractu*, or, as it is generally stated, in "an action of debt, or *indebitatus assumpsit*": 1 Brickell's Digest, secs. 314, et seq, p. 175. And prior to the adoption of the present code, the debt or demand must have been payable or solvable in money only: 1 Brickell's Digest, secs. 220, p. 176; *Jones v. Crews*, 64 Ala. 368. The code, sections 2945, 2946, enlarges the debts or demands which may be reached by garnishment. Not only debts or demands payable or solvable in money, but a liability "on a contract for the delivery of personal property, or for the payment of money which may be discharged by the delivery of personal property, or on a contract payable in personal property," is within the scope of the remedy. The liability must originate in and be dependent on contract. This remains as essentially the controlling element and characteristic of the remedy as it was when debts or demands payable or solvable in money only were within its scope. If either of the several contracts to which the remedy is extended is broken, when the facts are ascertained, the law fixes the measure of damages, the value of the property at the time it should have been delivered or paid, with the interest on such value from that time. An unliquidated demand, having in it no element of contract, or unliquidated damages, or the right of action for a tort, is not the subject of garnishment: 1 Freeman on Executions, sec. 167, and authorities cited.

The moneys and effects of the defendants in attachment, in the possession of the garnishee, were obtained ¹⁶⁹ from the defendants by taking them into custody, imprisoning them, and making search of their persons and trunks. The arrest, imprisonment, and search were without warrant, without any reason to believe that the defendants, or either of them, had committed, or intended the commission of, any offense against the law of this state. The only inducement, or moving cause for it, vouched by the garnishee, was a telegram addressed to him as chief of police

of the city of Montgomery, by the chief of police of the city of New Orleans, requesting that he see the conductor of an approaching railroad train, "and keep track of Baker and Peterson, swindling commission merchants." The statute authorizes the policemen of an incorporated city or town, within the limits of the county, with or without warrant, to make arrests in all cases in which the sheriff is authorized to make them: *Crim. Code*, sec. 4260.

As a general rule, at common law an arrest could not be made without warrant. If a felony was committed or a breach of the peace threatened or committed, within the view of an officer authorized to arrest, it was his duty to arrest without warrant, and carry the offender before a magistrate. Or, if a felony had been committed, and there was probable cause to believe a particular person was the offender, he could be arrested without warrant: *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702; *Burns v. Erben*, 40 N. Y. 463. The matter of arrests is now the subject of statutory regulation, largely affirmatory of the rules of the common law: *Crim. Code*, secs. 4260-4274. The statutes, and the corresponding rules of the common law, have primary, if not exclusive, relation to the administration of the criminal laws of the state. If an arrest be legal, under what conditions, and for what purposes, there may be a search of the person arrested, and what things found upon his person may be taken into possession by the officer making the arrest, was the subject of very full and deliberate examination and exposition in *Ex parte Hurn*, 92 Ala. 102; 25 Am. St. Rep. 23. A repetition of what is there said is not now necessary. A search of the person arrested is justifiable only as an incident to a lawful arrest; if the arrest be unlawful, the search is unlawful, and is aggravated by the illegality of the arrest.

If a person charged with treason, felony, or other ¹⁷⁰ crime, in another state, has fled therefrom, and is found in this state, the statutes provide for his apprehension and detention to await a requisition from the executive of the state in which the crime was committed: *Crim. Code*, secs. 4747-4760. Under these statutes, a warrant of arrest must issue from a magistrate having authority to issue such warrants. In the absence of statutes, upon common-law principles, the apprehension and detention of persons charged with crime in other states was effected through judicial officers, upon probable cause being shown by appropriate evidence: *Morrell v. Quarles*, 35 Ala. 544; 1 Kent's Commentaries, 36, 37. The intervention of a judicial officer and a warrant of

arrest were deemed the more orderly, if not the only, course of legal procedure. The current of judicial decision supports the proposition that when the matter of apprehension and detention is regulated by statute, the statutory mode of procedure must be observed, and that arrest and detention otherwise is illegal: *Malcolmson v. Scott*, 56 Mich. 459; *State v. Shelton*, 79 N. C. 605; *Ex parte Cubreth*, 49 Cal. 435; *Ex parte Thornton*, 9 Tex. 635; *Matter of Heyward*, 1 Sand. 702; *Matter of Leland*, 7 Abb. Pr., N. S., 64; *Matter of Rutter*, 7 Abb. Pr., N. S., 67.

Whether an officer, having authority to make arrests, may not, without warrant, arrest a person in this state whom he has reasonable cause to believe has committed a felony in another state, and to have fled therefrom, is a question upon which this case does not require the expression of an opinion. If the authority exists to support its exercise there must be reasonable cause to believe that the crime supposed to have been committed is a felony, not a less offense, under the law of the state in which it was committed; that the person arrested committed it, that he is a fugitive from the justice of the state. Without the concurrence of these facts the arrest cannot be justified. The telegram which was the moving cause of the arrest, imprisonment, and search, and the only source of all the information the garnishee had, and upon which alone he acted, is incapable of any interpretation or construction, importing that the defendants had been guilty of felony. The only words which can be supposed to impute criminality found in the telegram are the words "swindling commission merchants." ¹⁷¹ The word "swindling" has no legal or technical meaning; and, commonly, it implies that there has been "recourse to petty and mean artifices for obtaining money which may or may not be strictly illegal." The disappointed and vexed creditor not infrequently will apply the term "swindler" to a delinquent debtor, and an absconding debtor is not infrequently spoken of as having swindled his creditors. Words of such uncertain meaning cannot justify or excuse an invasion of the personal liberty of the citizen, or of him who is within the jurisdiction of the state, entitled to the protection of its laws. An officer cannot justify an arrest upon the ground that he had reasonably cause to believe the person arrested had committed a felony, unless he has information of facts, derived from those reasonably presumed to know them, which, if submitted to a judge or magistrate having jurisdiction, would require the issue of a warrant of arrest, and the holding of the accused to await further examination: *Malcolmson v. Scott*, 56 Mich. 459. We do not deem

it necessary to consider the subsequent correspondence with the chief of police of the city of New Orleans. It was not upon this correspondence the arrest, imprisonment, and search of the defendants were made, and what it may import is immaterial. An illegal arrest cannot be justified by facts subsequently ascertained; nor can an arrest made for one purpose be justified for another.

The moneys and effects in possession of the garnishee having been obtained by him illegally, tortiously, the relation of debtor and creditor did not exist between him and the defendants in attachment; the only relation he bore to them was that of a tortfeasor, and from that relation no debt, no demand having in it the element of contract and the subject of garnishment, could arise. But it is contended that while this may be true, the garnishee may be charged because he had in his possession and under his control moneys and effects of the defendants in attachment. The contention cannot be supported. A garnishment, whether it is employed to reach and subject debts or demands due and owing by the garnishee to the attachment or judgment debtor, for the moneys or effects of the debtor in the possession of the garnishee, presupposes a contractual relation existing between the debtor and the garnishee. It is, in effect, ¹⁷² the institution of a suit by a creditor against the debtor of his debtor; the substitution of the creditor to the right and remedy of his debtor; the right and remedy springing from a contractual relation existing between the debtor and the garnishee: 1 Brickell's Digest, sec. 276, p. 173. The debtor may have an election to pursue the garnishee in an action for a tort, or to waive the tort and pursue him for money had and received. The creditor cannot make the election, he cannot waive the tort; the election pertains only and exclusively to the debtor: *Lewis v. Dubose*, 29 Ala. 219. It would be a diversion of a garnishment from its real office and purposes, if it were employed to redress torts committed against the debtor, and to reach and subject moneys or effects the possession of which is not held in his right, but is held adversely and in hostility to him. In *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; it was held that a trespasser in the possession of another's goods cannot be charged as a garnishee. The correctness of this decision has been questioned: 2 Wade on Attachments, sec. 415. But we are assured it is in accordance with the theory of garnishment as it exists under our statutes, and corresponds to the course of our decisions.

Lastly, the contention is, that as the plaintiff in attachment

had no agency in or connection with the tort by which the garnishee obtained possession of the moneys or effects they have the right to pursue them in his hands. Whatever of force there might be in this contention, if there had been a levy of the attachment on the moneys and effects, it is not now necessary to consider. Such levy was not made; instead of it, the garnishment was resulted to, and if there had been a liability resting on the garnishee within the scope of that remedy, he would have become a mere custodian of the property, subject only to the duty of taking care of the property until judgment was rendered in the garnishment suit; and the degree of care he was bound to exercise would have been dependent upon the contractual relation existing between him and the owner from whom possession was derived.

We have considered all the questions presented in the arguments of counsel; we find no error in the judgment of the court below, and it must be affirmed.

ARREST ON SUSPICION OF FELONY—TELEGRAMS.—The arrest and detention of a person in one state upon the authority of telegrams received from the authorities of another state, reciting that they have a warrant for his arrest, a copy of which is given, together with the statement that they have started after him with proper papers, is unauthorized, and he is entitled to his release upon habeas corpus: *Simmons v. Vandyke*, 138 Ind. 380; 46 Am. St. Rep. 414; but, if he is a fugitive from justice and stands charged with a felony or other crime in the state whence he came, the case is different: See monographic note to *Simmons v. Vandyke*, 46 Am. St. Rep. 415, on the arrest and detention of fugitives from justice before demand made. The right of search is incident to a lawful arrest: *Rusher v. State*, 94 Ga. 363; 47 Am. St. Rep. 175; *Ex parte Hurn*, 92 Ala. 102; 25 Am. St. Rep. 23.

ATTACHMENT—GARNISHMENT—PROPERTY OBTAINED BY SEARCH OF PERSON.—A writ of attachment can have no force unless issued in an action on a contract express or implied: *Mudge v. Steinhart*, 78 Cal. 34; 12 Am. St. Rep. 17. In the absence of fraud on the part of the debtor, or of fraudulent collusion between him and the garnishee, only such money demands can be subject to garnishment as the defendant in the judgment could, in his own name and right, recover in an appropriate action: *Nicrosi v. Irvine*, 102 Ala. 648; 48 Am. St. Rep. 92. Demands which may be subjected to garnishment process are such only as the defendant in attachment could himself recover of the garnishee in an action of debt or indebitatus assumpsit: *Teague v. Le Grand*, 85 Ala. 493; 7 Am. St. Rep. 64. Some cases hold that money or other property taken from a prisoner in good faith by an officer is subject to attachment or garnishment in the latter's hands by a creditor of the prisoner, in a civil action against him: *Reifsnyder v. Lee*, 44 Iowa, 101; 24 Am. Rep. 733. Other cases hold that it is not subject to such process: *Morris v. Penman*, 14 Gray, 220; 74 Am. Dec. 675; and a third class of cases hold that if the officer takes the property, acting in good faith, under the belief, or reasonable and probable ground for the belief, that it is connected with the crime charged, or that it may be useful as evidence at the trial, it is subject to attachment or garnishment

while in the officer's hands or while in court; but that, if the arrest is not made in good faith, or if the property is not seized under probable ground for the belief mentioned, or is in no way connected with the crime, and is not used as evidence, it is not subject to attachment or garnishment: *Ex parte Hurn*, 92 Ala. 102; 25 Am. St. Rep. 23, and note; *Commercial etc. Bank v. McLeod*, 65 Iowa, 665; 54 Am. Rep. 36.

FRANCIS CHENOWETH HARDWARE COMPANY v. GRAY.

[104 ALABAMA, 236.]

SALES—NO ABSOLUTE PRICE—INVENTORY TO FIX PRICE.—If a stock of goods is sold, in payment of a debt, and delivered, the sale is complete, especially where the parties so intend, and the title passes, though no absolute price is fixed, and the value of the goods is to be determined by an inventory to be afterward taken, the difference between the amount of the debt and the value of the goods to be paid to the party entitled thereto. Hence, the purchaser's title is not affected by the levy of an attachment, sued out by a creditor of the seller, upon the goods before the completion of the inventory.

Statutory trial of the right of property. The hardware company caused a writ of attachment to be levied on a stock of goods as the property of the defendants in attachment, the Payne Brothers. William Gray interposed a claim to them under the statute, and the trial below was between the plaintiff in attachment and the claimant, on the issue joined by the plaintiff's allegation that the goods levied on were the property of the defendants in attachment. The evidence showed that the Payne Brothers did own the goods, but they were indebted to the plaintiff and other creditors. Gray was indorser, for the defendants, on four notes payable to a bank. The bank was pressing Gray for payment, and he insisted upon the Payne Brothers paying him. The Payne Brothers had no money, but they and Gray entered into an agreement whereby they sold him their stock of goods in consideration that he would pay the bank notes, including one not due. But while the goods were sold in settlement of the debt, there was a disagreement as to the value of the stock. The parties finally agreed to leave this question to appraisers, who were to fix the price of the goods. If their value should exceed the sum to be paid by Gray to the bank, the overplus was to remain the property of the defendants; but, if they should fall short of that amount, the defendants were to make good the shortage, by the transfer of notes and accounts due to them by customers. Gray paid the bank by his check, which was accepted and charged to his account. Gray took charge of

the goods, and the key of the store was delivered to the claimant's appraiser. After the sale, but before the completion of the inventory, the sheriff made his levy of the attachment. The plaintiff, after the court had given its charge to the jury, requested the court to charge that, "If the jury believe the evidence, they will find the issue in favor of the plaintiff." The court refused to give this charge, and the plaintiff excepted. This was the only error assigned.

H. J. Gillam, for the appellant.

Henry A. Garrett, for the appellee.

240 HARALSON, J. The rule is too well settled to require further discussion that the title to personal property may and will pass to a vendee, without fixing an absolute price, if the circumstances attending the transaction satisfactorily show that such was the intention of the contracting parties. And if the articles sold were to be afterward weighed or measured, so as to adjust and fix accurately the price to be paid, and it is clear from the terms of the contract that the parties intended that the sale should be complete before the weighing or measuring should take place, the title to the property will be held to have passed before this was done. An actual delivery of the property sold, such as the evidence, without conflict, establishes was done in this case, manifests an intention of the parties to effect a completed sale, and the inventory provided to be afterward taken must be held to have had reference to the adjustment of the price, without the performance of which it was not completed, and not as a part of the contract of sale. So the title passed at once; and if, for any reason, the inventory had not been afterward taken, and the parties could not agree on the price, such happenings, as we have held, would have made no difference in the character of the transaction: *Foley v. Felrath*, 98 Ala. 176; 39 Am. St. Rep. 39; *Greene v. Lewis*, 85 Ala. 221; 7 Am. St. Rep. 42; *Wilkinson v. Williamson*, 76 Ala. 168; *Shealy v. Edwards*, 73 Ala. 175; 49 Am. Rep. 43; *Allen v. Maury*, 66 Ala. 10.

There was no error in the ruling of the court below.

Affirmed.

SALES—WHEN COMPLETE.—THE PASSING OF TITLE upon a sale of personal property depends upon the intention of the parties to be derived from the contract and its circumstances. Actual delivery, weighing, and setting aside, are only circumstances from which such intention may be inferred: *Commonwealth v. Hess*, 148 Pa. St. 98; 33 Am. St. Rep. 810. A sale of personal property is complete and passes title to the buyer although the thing sold has not been measured or the quantity ascertained in any way, where it is apparent that it is the intention of the seller to transfer the title, and of the

buyer to accept it: *Note to Foley v. Felrath*, 39 Am. St. Rep. 44; *Shaddon v. Knott*, 2 Swan, 358; 58 Am. Dec. 63. If a mass of goods is sold, and must be measured, etc., simply with a view to ascertain its price for the purpose of a settlement, the title passes: *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274.

JOHNSON v. LOUISVILLE & NASHVILLE RAILROAD CO.

[104 ALABAMA, 241.]

NEGLIGENCE—INSUFFICIENT PLEA OF CONTRIBUTORY NEGLIGENCE.—In an action against a railroad company for the negligent killing of the plaintiff's intestate, while he was an employé of the defendant, a plea "that the injuries to plaintiff's intestate now complained of, if any he received, would not have occurred but for his faults or negligence, and that his faults and negligence contributed proximately and directly to produce said injuries," is too general, and is demurrable, on the ground that it does not state the facts relied upon as constituting the alleged negligence of the plaintiff's intestate.

RAILROADS—EJECTING PERSONS—REFUSAL TO PAY FARE.—If a person boards a railroad train, but uses obscene and insulting language, refuses to pay his fare, and is guilty of reprehensible conduct generally, the conductor is justified in ejecting him from the car.

NEGLIGENCE, CONTRIBUTORY.—DRUNKENNESS does not exempt a person from the responsibility of contributory negligence. The law exacts from one voluntarily intoxicated the same care and precaution to avoid injury as it would from a sober person of ordinary prudence under like circumstances; so, if intoxication renders a person reckless or indifferent to consequences, or inadvertent, or thoughtless, and he fails to exercise due care, his failure or omission will not be excused, because superinduced by his intoxication.

RAILROADS—NEGLIGENCE—EJECTION OF DRUNKEN PERSON—LIABILITY.—If the conductor of a railroad train knows that a person on the train is so intoxicated that he does not possess the powers of locomotion, that he is unconscious of danger, and that he cannot appreciate his position and surroundings, or his duty to avoid passing trains, and he puts him off at a place dangerous to one in his condition, and at which he is killed, the conductor is guilty of negligence, and the railroad company is liable for damages resulting from such ejection, although the deceased may have been a trespasser on the train, and might have been legally ejected in a proper manner and at a proper place.

WITNESSES—EXPERT TESTIMONY.—The effect of alcoholic drunkenness upon a person is not a subject for expert testimony.

WITNESSES—WHEN INCOMPETENT.—A witness is incompetent to testify as to whether a person in one end of a railroad car was in "a senseless condition" or "stupidly drunk," where he saw such person in conversation with others, but could not hear anything that was said, had no conversation with him, and occupied a seat at the other end, and on the opposite side of the car.

Action for damages. The plaintiff demurred to the defendant's special plea. The demurrer was overruled. The nature of

the plea, and of the demurrer, appears in the first syllabus above. The evidence tended to show that the plaintiff's intestate was a passenger on the defendant's train, having purchased a ticket from Cullman, Alabama, to Wilhite, Alabama, stations along the line of the road. The plaintiff's intestate, when he boarded the train, had been drinking, and he took several drinks on the train. He was very boisterous and noisy, and used profane, vulgar, and obscene language on the train in the presence of other passengers. He did not get off at Wilhite, but informed the conductor that he was going on to another station. The conductor demanded his fare, which he refused to pay, and he became very profane and boisterous. This continued, and, as he persisted in refusing to pay his fare, the conductor stopped the train and put him off in a cut along the line of the road. He was afterward found dead upon the track some time during the same night. Upon the trial, Dr. Purdon, as an expert, was asked the following question: "Will you please tell us the effect of alcoholic drunkenness upon a person or individual?" The defendant objected to this question, on the ground that the subject was not one for expert testimony. The court sustained the objection. The court gave the general affirmative charge in behalf of the defendant. There was a judgment for the defendant, and the plaintiff appealed.

L. C. Dickey and W. T. L. Cofer, for the appellant.

J. M. Falkner, for the appellee.

244 COLEMAN, J. The plaintiff, as administratrix, sued to recover damages for the killing of intestate, alleged to have been caused by the wrongful negligence of the defendant. The defendant pleaded the general issue, and as a second plea the contributory negligence of the deceased. The plea of contributory negligence was defective **245** in the respect pointed out in the demurrer. It was too general, and the court erred in overruling a demurrer to this plea: *Tennessee etc. R. R. Co. v. Herndon*, 100 Ala. 451. We cannot presume that if the facts relied upon to sustain this plea had been stated, that plaintiff would not have met them with rebutting testimony. It was the plaintiff's right to know the facts, and to have an opportunity to meet them.

So far as the evidence bears upon the question of the right of the conductor to eject the deceased from the car, it is substantially the same as when the case was here on a former appeal: *Louisville etc. R. R. Co. v. Johnson*, 92 Ala. 204; 25 Am. St. Rep. 35. The conduct of the deceased was reprehensible, his language obscene

and insulting, and his refusal to pay his fare justified the conductor in ejecting him from the car. We feel safe in stating that, under the evidence, the death of the deceased was not caused by the car from which he was ejected, nor by any act of violence on the part of the conductor in putting him off. The evidence shows that a freight car running on schedule was following the passenger car about thirty minutes late, both going north, and that a passenger train was due coming south, several hours late, and a passenger going north was due forty minutes after the south passenger had passed the place where the body of deceased was found. It was not known certainly that any person had been killed, until discovered by this last passenger train going north, about 2:25 a. m. The evidence shows that the deceased was put off at night, that it was very dark, and that he was put off in a cut, and that it might have been two hundred yards, either north or south, to the end of the cut. The deceased was familiar with the cut and condition of the adjacent lands, having lived near by for several years. There was room in the cut, by standing near the walls, for trains to pass, and there were places along the cut where a person could get out from the track. There is no evidence tending to show that the officers or employes of the defendant, operating the freight train which followed the train from which deceased was ejected, or the subsequent passenger trains, had any notice or knowledge of the peril of deceased. Negligence cannot be imputed to them. If there were no other facts in this case we would declare as matter of law that plaintiff could not recover.

²⁴⁶ It is contended for plaintiff, that because of deceased's drunken condition, the conductor who ejected him was not justified in putting him off and leaving him at the time and place where he was put off and left. Under the facts in the present record, that is the only issue in the case. What is the rule of law in such cases? Drunkenness does not exempt a person from the responsibility of contributory negligence. If intoxication renders a person reckless or indifferent to consequences or inadvertent or thoughtless, and he fails to exercise due care, his failure or omission will not be excused, because superinduced by his intoxication. The law exacts from one voluntarily intoxicated the same care and precaution to avoid injury as it would from a sober person of ordinary prudence under like circumstances: *Columbus etc. Ry. Co. v. Wood*, 86 Ala. 164; 4 Am. & Eng. Ency. of Law, 78; *Louisville etc. R. R. Co. v. Johnson*, 92 Ala. 204; 25 Am. St. Rep. 35.

There is another principle of law to be observed which requires of all persons in the exercise of a right, or the performance of

duty, that it is done with reasonable regard to the preservation of life and prevention of great bodily harm or the infliction of unnecessary injury to others, and they will be held responsible for the manner in which the right is exercised or duty performed. It is an exceptional case, where the law does not subordinate personal rights to the preservation of life. The conductor has the right, under proper circumstances, to eject a passenger from a car, but he would not be justified in exercising this right while the car was at a high rate of speed, or when upon a high trestle, nor would he be justified in putting off a person who was blind and deaf, knowing his infirmity, except at a safe place. Upon like principles, the law would not justify a conductor in putting off a passenger at a time and place and under conditions and circumstances which would expose him unnecessarily to great peril of life or bodily harm, and this, too, whether the danger arose from the natural infirmity of the person or was self-imposed. If the conductor did not know of the infirmity of the person, and the peril attending the ejection, there would be no liability arising from the exercise of the right and performance of the duty. It is the fact of notice or knowledge of the danger on the part of the conductor ²⁴⁷ under such circumstances that constitutes the act culpable or willful wrong. If the deceased was intoxicated to the degree that he was unconscious of danger, could not grasp his position and surroundings, and his duty to avoid danger from passing trains, or did not possess the power of locomotion, and the place where he was put off and left was dangerous to one in his condition, and these facts were known to the conductor, the conductor would be guilty of such negligence as to render the defendant liable for damages, resulting from such misconduct, although the deceased may have been a trespasser on the train, and might have been legally ejected in a proper manner and at a proper place. Mere intoxication, which did not take away consciousness, and the power to consider and understand the danger to which he was exposed, nor deprive him of physical capacity to take care of himself, and to avoid danger, would not relieve him from the responsibility of exercising due care, after he was put off the train, and, if he was killed in consequence of such neglect of duty on his part, the plaintiff cannot recover. The killing under these circumstances would be the result of his own negligence, which proximately contributed to it. There is some evidence tending to show that deceased had whisky with him on the train. If, after being put off the train, either from the effects of liquor drank before or after his eviction, he became

unconscious and unable to realize his condition and his duty, but was not so at the time of his eviction by the conductor, the defendant would not be liable for the result of such subsequent intoxication. It would be a case of self-imposed intoxication, not known to the employes of the defendant, and which imposed no duty upon them. The facts are to be ascertained by the jury.

The court did not err in sustaining the objections to the question propounded to Dr. Purdon, as an expert.

The liability of the defendant is to be determined by the facts of the case as they were, and appeared to be, to the conductor, in the exercise of reasonable prudence and care, as to the condition of deceased at the time he was put off the train. There was no error in sustaining objection to the question to the witness Orr. This witness was asked if deceased was in "a senseless condition," whether he was "stupidly drunk." This witness had testified that he saw deceased in conversation with ²⁴⁸ others but could not hear anything that was said, and that he had no conversation with deceased; that he, witness, occupied a seat in one end of the car, and the deceased on a different side, in the other end. The facts show he was not competent to answer the questions, independent of the form of the question.

Reversed and remanded.

RAILROADS—NEGLIGENCE IN EJECTING DRUNKEN PASSENGER.—A railroad company has the right to eject a drunken and disorderly passenger, even at night and between stations, putting him off the track out of the way of that train: *Louisville etc. R. R. Co. v. Logan*, 88 Ky. 232; 21 Am. St. Rep. 332. Drunkenness does not exempt a person from the responsibility of contributory negligence; but the fact that a man is intoxicated does not alone deprive him of the right to be upon a railroad car, nor does it free the company from its duty to render him due care. The degree of care due to a drunken passenger is the same as that due to a sober one. The right to eject a passenger for nonpayment of fare must be exercised with proper regard to his physical and mental condition and surrounding circumstances. To eject him when he is in such physical or mental condition from intoxication as that serious bodily harm may result therefrom is culpable negligence, for which a recovery may be had notwithstanding his intoxication: *Louisville etc. R. R. Co. v. Johnson*, 92 Ala. 204; 25 Am. St. Rep. 35, and monographic note thereto on intoxication as contributory negligence; monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 829, on proximate and remote cause. Even a trespasser upon a railroad train cannot be ejected therefrom without a reasonable regard for his safety; and whether he was so ejected or not is a question of fact for the jury: *Arnold v. Pennsylvania R. R. Co.*, 115 Pa. St. 135; 2 Am. St. Rep. 542, and note.

LINDSAY v. MAYOR AND CITY COUNCIL OF ANNISTON.

[104 ALABAMA, 257.]

MUNICIPAL CORPORATIONS—POWER TO REGULATE HACKS.—If the charter of a city confers upon its mayor and city council the power to "regulate hacks," and all other vehicles, an ordinance providing that no agent of any transfer company shall go within the depot of the city for the purpose of soliciting patronage, is a valid exercise of the power conferred to "regulate hacks," and, as such ordinance is, in its nature and essence, a police regulation, its policy or reasonableness cannot be inquired into by the courts.

MUNICIPAL CORPORATIONS—ORDINANCES—EFFECT OF UPON PRE-EXISTING RIGHTS.—If pre-existing private rights are restrained or limited by a city ordinance, passed in the valid exercise of a power with which the municipal authorities are clothed, such restraint or limitation is *damnum absque injuria*, because all contracts and all rights are subject to such regulations as the city may adopt for the promotion of good order and the public benefit.

MUNICIPAL CORPORATIONS—ORDINANCE TO REGULATE HACKS—EFFECT OF, UPON PRIOR CONTRACT.—Though a hackman may, under a contract with a railroad company, owning a city depot, have the right and privilege to enter the premises to solicit patronage, an ordinance subsequently enacted, prohibiting hackmen from going within such depot to solicit patronage, is not unconstitutional and void, as impairing the obligation of a contract, because the contract must be deemed to have been entered into subject to the power of the city to regulate hacks.

Action by a city to recover a penalty for the violation of an ordinance. Lindsay was arrested and convicted for violating an ordinance of the city of Anniston. On his appeal to the city court of Anniston, there was a complaint filed in behalf of the mayor and city council of that city, claiming such penalty, for violating an ordinance prohibiting hackmen from going into the railroad depot of that city to solicit patronage, and requiring them to stand without the entrance to the depot, leaving the passageway clear at said entrance. Lindsay was an employé, transferman, and agent of the Anniston Transfer Company, and, in the discharge of his duties, solicited passengers and baggage for that company. The company claimed the right of soliciting patronage at such depot under a contract with the railroad company executed before the enactment of the ordinance. Judgment was rendered in favor of the plaintiff, fixing the recovery at the same amount as the fine which was imposed by the recorder. The defendant appealed.

Knox, Bowie & Pelham, for the appellant.

Benjamin Micou, for the appellee.

260 BRICKELL, C. J. The amended charter of the city of Anniston confers on the mayor and council of the city large pow-

ers intended to promote good government within the corporate limits, and the public peace, order and convenience. Among other powers is the power "to license, tax, and regulate hacks, carriages, drays, and all other vehicles, and to fix the rate to be charged for the carriage of persons and property within the corporate ²⁶¹ limits of the city, or to the public grounds or property within the city": Pamph. Acts, 1890-91, p. 104. The ordinance the appellant was convicted of having violated was adopted by the mayor and common council in the exercise of the power to regulate hacks. The power of regulation is the more general of the powers the charter confers, and, as applied to business, occupations, or employments, is the power to prescribe rules for the conduct of the business, or the manner in which the occupation or employment is to be pursued. Hackmen, cartmen, and wagoners, engaged in the carriage of goods or persons for hire, by the common law are regarded as common carriers, and the power lies in the legislature, in the absence of constitutional restraint or limitation to regulate, to prescribe the rules according to which their business may be conducted: *Munn v. Illinois*, 94 U. S. 113. The power may be, and is often, delegated to municipal corporations, to be exercised for the promotion of the public convenience. When the power has been delegated in terms of the character employed in the amended charter, the validity of ordinances, prescribing the times, places, and manner in which the employment is to be pursued, has been uniformly sustained: *Commonwealth v. Stodder*, 2 Cush. 562; 48 Am. Dec. 679; *St. Paul v. Smith*, 27 Minn. 364; 38 Am. Rep. 296; *Veneman v. Jones*, 118 Ind. 41; 10 Am. St. Rep. 100. Such ordinances are in their nature and essence police laws or regulations, and, when adopted in the exercise of an express legislative grant of power, there can be no inquiry into or discussion of their policy or reasonableness. "What the legislature says may be done cannot be set aside by the courts, because they may deem it unreasonable or against sound policy": 1 *Dillon on Municipal Corporations*, sec. 328.

The material contention of the appellant is, that if he be subjected to the operation of the ordinance, his principal, the Anniston Transfer Company, in whose service he was engaged when doing the act complained of, will be divested of a right and privilege which the railroad companies owning and constructing the depot had granted on a valuable consideration, prior to the adoption of the ordinance. The contract into which the railroad companies and the transfer company had entered purports

to be founded on a valuable consideration, and ²⁶² thereby the railroad companies do, "so far as it is lawful," grant to the transfer company the exclusive right, by the officers, agents, and employé's, to enter the premises and trains of the grantors for the purpose of soliciting patronage. It is forcibly argued by the counsel for the appellee that the real object of the contract, the object the parties contemplated and proposed to accomplish, was the grant to the transfer company of the exclusive right and privilege to enter the premises and trains of the railroad companies for the solicitation and procurement of the patronage of passengers, and that of consequence the contract is illegal, offending public policy. It is a grave and important question, embarrassed by a serious conflict of authority, whether a railroad company may grant to hackmen or to others pursuing a public employment, the exclusive right to enter its depot, or to enter and occupy the adjacent grounds, for the purpose of soliciting and obtaining patronage. The authorities have been carefully collected, reviewed, and discussed by Mr. Freeman, in the elaborate notes to the case of Kalamazoo Hack etc. Co. v. Sootsma, 22 Am. St. Rep. 693, and Montana Union Ry. Co. v. Langlois, 18 Am. St. Rep. 745. The necessities of this case do not require a discussion or decision of that question. The contract, whatever may be its objects, or whatever may be the rights it confers, or it was intended to confer, must be deemed to have been entered into in view and in subordination to the powers of the municipal authorities to exercise the power to regulate the business and employment of hackmen: Knoxville v. Bird, 12 Lea, 121; 47 Am. Rep. 326. It is observed by Judge Cooley that the clause of the constitution of the United States forbidding state legislation impairing the obligation of contracts "does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time, as the general well-being of the community may ²⁶³ require, or as the circumstances may change, or as experience may demonstrate the necessity": Cooley's Constitutional Limitations, 6th ed., 707. The charter of the city is essentially a public statute; of it all the courts of the state take judicial notice; and obe-

dience to it is due from all who are within its protection. It is not mere legal presumption resting upon considerations of public policy, that the law silently incorporates itself into the contracts of parties. The incorporation, when the parties are dealing in good faith, most often comports with their actual intention, or they would have expressed all that the law implies. The parties could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate the business of hackmen; nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The juster presumption is, that if was not intended the rights and privileges the contract may confer should endure if they became in conflict with the regulations ordained by the municipal authorities. However this may be the ordinance is a valid exercise of the power with which the municipal authorities were clothed—a power intended for the protection of the public, and the promotion of good order, and its exercise deemed necessary for the public benefit. If thereby pre-existing private rights are restrained or limited, the restraint or limitation is *damnum absque injuria*: 1 Dillon on Municipal Corporations, sec. 141; *Vanderbilt v. Adams*, 7 Cow. 349. The individual shares in the public benefit which it is intended to promote, and this is the compensation deemed by the law adequate.

The act, the appellant admitted, was a violation of the ordinance necessitating the judgment of conviction; and it must be affirmed.

MUNICIPAL CORPORATIONS—ORDINANCES—REGULATION OF HACKS.—Under charter authority “to regulate” hacks, omnibuses, and other vehicles, an ordinance enacting that they shall take their places at a railway station or depot in the position assigned by the police is reasonable and valid: *St. Paul v. Smith*, 27 Minn. 364; 38 Am. Rep. 296; *Veneman v. Jones*, 118 Ind. 41; 10 Am. St. Rep. 100. Some cases hold that courts do not inquire into the reasonableness of city ordinances when power exists to pass them: *Skaggs v. Martinsville*, 140 Ind. 476; 49 Am. St. Rep. 209; but the better opinion is that the courts are the final judges of the reasonableness of city ordinances: *Champer v. Greencastle*, 138 Ind. 339; 46 Am. St. Rep. 390; *Tarkio v. Cook*, 120 Mo. 1; 41 Am. St. Rep. 678.

MUNICIPAL CORPORATIONS—POLICE POWER—CONTRACTS.—Police power may be delegated to cities: *St. Paul v. Colter*, 12 Minn. 41; 90 Am. Dec. 278, and note; but they cannot impair the right by contract: *Jacksonville v. Ledwith*, 28 Fla. 163; 23 Am. St. Rep. 558.

FESTORAZZI v. ST. JOSEPH'S CATHOLIC CHURCH.

[104 ALABAMA, 327.]

LEGACIES TO CHURCH, WHEN INVALID—SOUL OF DECEASED PERSON AS USEE.—A bequest by a testator, to a church, of a stated amount of money, to be used "in solemn masses for the repose of my soul," is invalid. It cannot be enforced as a direct bequest to the church for its own general uses, as the form of the bequest repels such an idea; or as a charitable use, because it does not confer a public benefit open to an indefinite number of persons; or as creating a valid private trust, because there is want of a living beneficiary.

Bill in equity for the construction of a will. The bill was filed by the appellants, Festorazzi and Muscat, as executors of the estate of Joseph Peter, deceased, and sought directions as to how to distribute the estate. The children of Joseph Peter and the Roman Catholic Cathedral and the St. Joseph's Catholic Church of Mobile were made parties defendant. The controversy arose over the second and third items of the will, which were as follows: "Second. I give and bequeath to the Roman Catholic Cathedral in the city of Mobile, the sum of three thousand dollars, the same to be used in solemn masses for the repose of my soul. . . . Third. I give and bequeath to the Roman Catholic Church of Saint Joseph in the city of Mobile, the sum of two thousand dollars, also to be used in solemn masses for the repose of my soul." There was no answer by the Catholic Cathedral, and a decree pro confesso was entered against it. There was an answer and cross-bill filed by the St. Joseph's Catholic Church, setting up its claim to the legacy of two thousand dollars bequeathed to it by the will. The executors demurred to the cross-bill, on the ground that it did not appear that the complainant therein was entitled to the enforcement of the legacy under the laws of Alabama. This demurrer was overruled. It was decreed that the bequest made to the St. Joseph's Catholic Church was a legal and valid bequest, and the executors were directed to pay the same out of the money in their hands belonging to their testator's estate. The executors appealed from this decree and assigned the same as error.

Overall & Bestor, Frederick G. Bromberg, and Hannis Taylor, for the appellants.

Gaylord B. and F. B. Clark., Jr., for the appellee.

320 HEAD, J. The validity of the bequest brought to our view, in this case, must be upheld, if at all, upon one of three propositions, viz: 1. That it is a direct bequest to the church

for its general uses; 2. That it creates a charitable use; 3. That it creates a valid private trust.

1. The form of the bequest repels the idea that a gift to a church for its own general uses was intended. ³³⁰ The bequest is to the church, "to be used in solemn masses for the repose of my soul." Similar bequests have been many times before the courts, in England and this country, and in all the cases, so far as our research extends, they were treated as having the form and nature of the declaration of a use or trust, and not as direct gifts to, and for the general uses of, the church. An application of the fund to other uses than securing masses to be said for the repose of the donor's soul would contravene the intent and purpose of the testator. In England, by statute, as well as the general policy of the law, uses or trusts like this were denounced as superstitious, and held void accordingly. Under our political institutions which maintain and enforce absolute separation of church and state, and the utmost freedom of religious thought and action, there is no place for the English doctrine of superstitious uses, and if such dispositions could be otherwise supported, under recognized rules of law, they would not be assailed here as giving effect to the religious superstitions of the donor. But the authorities, whether English or American, are potent to show that these bequests partake of the nature of trusts, and cannot be treated as gifts to the churches themselves.

2. Charitable uses, whether arising out of the English statute of charitable uses, in force in a qualified sense in Alabama, or sustained upon the general principles of equity (*Williams v. Pearson*, 38 Ala. 307), do not include dispositions of the kind in question. To constitute a charitable use, it must confer a public benefit open to an indefinite number of persons: 3 Am. & Eng. Ency. of Law, 123, 126, 127, 130; 2 Perry on Trusts, 3rd ed., secs. 693, 697, 710. In an extended note to the case of *Dashiell v. Attorney General*, 9 Am. Dec. 577, will be found a full discussion of the whole subject, collating the authorities. We need only to refer to what is there said. The bequest in the present case is, according to the religious belief of the testator, for the benefit alone of his own soul, and cannot be upheld, as a public charity, without offending every principle of law by which such charities are supported.

3. It is not valid as a private trust, for the want of a living beneficiary. A trust in form, with none to enjoy or enforce the use, is no trust. Argument is unnecessary ³³¹ to show that there is no imaginable being possessing power to enforce the use

declared in this bequest. The executor cannot do it, for he succeeds only to the property rights of the testator. His powers and functions do not, and cannot, extend to the well-being of the soul of his testator. As said by appellants' counsel, "If the church should receive this bequest and apply it to paying its debts, repairing its building, supporting its priests, and paying the expenses of their ceremonies, the purpose of the bequest would be clearly violated. But what living person is authorized to call the trustee to an account for the misuse of the fund?"

The authorities upon the several propositions discussed will be found in the briefs of counsel, which will be reported.

Upon no principle are we able to sustain this bequest. The decree of the chancellor must be reversed and the cause remanded.

Reversed and remanded.

Brickell, C. J., dissenting.

LEGACY—MASSES FOR SOUL.—A BEQUEST TO A CHURCH to be expended in masses for the testator's soul is for a religious use, and is invalid: *Rhymer's Appeal*, 93 Pa. St. 142; 39 Am. Rep. 736. Such a use is superstitious: See monographic note to *Dashiell v. Attorney General*, 9 Am. Dec. 579, on charitable uses.

YEEND v. WEEKS.

[104 ALABAMA, 331.]

FRAUDULENT CONVEYANCES—CONSIDERATION MERELY "GOOD."—If one makes a conveyance of his property on a consideration which is merely good, as contradistinguished from one which is valuable, it is without effect, inoperative and voidable against any debt the grantor may owe at the time of its execution; and this without reference to the good intentions of the parties, and the solvency or insolvency of the grantor, at the time of the execution of the conveyance. Such a conveyance, when not tainted with actual fraud, is void only as to antecedent debts; but if made with an intent to hinder, delay, and defraud creditors, which is actual fraud, it is void as to subsequent, as well as to existing creditors.

FRAUDULENT CONVEYANCES—WHO MAY ATTACK—HOW FAR VALID.—It is only those persons whose rights are interfered with, those who are injured by conveyances alleged to be fraudulent, that have the right to interfere to set them aside. Strangers have no interest, and therefore no right to question their validity; and, between the parties and their privies, they are valid.

FRAUDULENT CONVEYANCES—ASSAILANT OF, MUST PROVE EXISTENCE OF DEBT TO HIM.—If one aggrieved by a conveyance calls its validity in question, and moves to set it aside, the parties claiming under it may dispute his claim by demanding that he shall prove himself to be a creditor of the grantor, with a

valid, subsisting debt against him. The fact of primary importance in such a proceeding, whether it be to set aside the conveyance, as constructively fraudulent and therefore voidable as against past due debts, or actually fraudulent, and voidable as to future, as well as to past, obligations, is the existence of a debt, for the payment of which, except for the conveyance, the property transferred could be made liable. The grantee in the conveyance must have an opportunity to dispute the debt, and may plead any defense, not merely personal, which the grantor or debtor could have made against it.

FRAUDULENT CONVEYANCES—JUDGMENT AS EVIDENCE OF DEBT.—A judgment rendered by a court of competent jurisdiction, in the regular course of judicial proceedings, without fraud or collusion, is conclusive evidence of the amount and existence of a debt, at the time of its rendition, though it is not evidence of an indebtedness existing at any time anterior to its rendition. Therefore, in a proceeding by the plaintiff against the defendant and his grantee, to set aside an alleged fraudulent conveyance, such judgment, whether rendered prior or subsequent to the conveyance, is competent evidence of the debt, and the plaintiff is entitled to ask that the conveyance be set aside as he may be affected or injured thereby.

FRAUDULENT CONVEYANCES—WHEN JUDGMENT IS SUFFICIENT EVIDENCE OF DEBT—BURDEN OF PROOF.—If a creditor files a bill to set aside a conveyance made by his debtor, on the ground of actual fraud, a judgment recovered by the complainant against the debtor, after the execution of the alleged fraudulent conveyance, is, of itself, competent and sufficient evidence of the existence of the debt, and establishes the creditor's right to attack the conveyance; but the burden of proving the actual fraud is upon the complainant.

FRAUDULENT CONVEYANCES—WHEN JUDGMENT IS INSUFFICIENT EVIDENCE OF DEBT—BURDEN OF PROOF.—If a creditor files a bill to set aside a conveyance made by his debtor, on the ground that it was merely voluntary, and, therefore, only constructively fraudulent, the judgment, having been rendered subsequent to the execution of the conveyance, is not, of itself, sufficient evidence as to the existence of the debt; but there must be independent, distinct evidence of facts showing that the cause of action authorizing the rendition of the judgment is older than the conveyance. If this is proved, the conveyance must yield to the judgment; and the burden is on the grantee to prove that he paid an adequate and valuable consideration.

FRAUDULENT CONVEYANCES—OBLIGATION OF ADMINISTRATOR'S BOND—ONE CONTINGENTLY LIABLE IS A CREDITOR—STATUTE OF FRAUDS—PROTECTION OF CONTINGENT LIABILITY.—An administration bond is a continuing obligation of security from the day of its execution to the termination of the administrator's authority to act; and though it antedates a voluntary conveyance, yet the ascertainment of its breach, by proper judicial proceedings, begun and concluded after the execution of such conveyance, will, as between the judgment creditor and the grantor in the conveyance, relate back to the date of the bond, and be held to be a debt existing at that time. A person contingently liable is a creditor, within the meaning of the statute of frauds, and that statute protects a contingent liability against fraudulent and voluntary conveyances, as fully as a debt which is certain and absolute.

FRAUDULENT CONVEYANCES—SURETY ON ADMINISTRATOR'S BOND AS A CREDITOR—SUBROGATION.—The liability of the surety on an administrator's bond, or other contingent obligation, makes him a creditor, within the provisions of the statute of

frauds, from the date of the contract, and, though he has no cause of action until he has paid the debt, he is entitled to protection against fraudulent conveyances executed by the principal debtor in the meantime. Therefore, the payment of a judgment recovered on the administrator's bond, made by a surety on such bond, subrogates him to the rights of the judgment creditor, with the right to have set aside a fraudulent and voluntary conveyance made by his cosurety before the judgment but after the execution of the bond.

FRAUDULENT CONVEYANCES BY SURETY ON ADMINISTRATOR'S BOND.—If it appears, upon a creditor's bill filed to set aside a conveyance alleged to be fraudulent and void as to creditors, that the grantor in the conveyance, who was a cosurety with the complainant on an administrator's bond, owned a farm, and was engaged with his brother in raising sheep; that two years before a suit against him as surety on such bond was commenced, he executed a bill of sale for his share of the sheep to his wife, without dissolving partnership, and without any apparent change of possession or management of the property; that a few days before this sale, he conveyed his land to a person who, within a short time, reconveyed it to the grantor's wife; that the bill of sale and the deed for the lands to the grantor's wife were not recorded until after suit was commenced against the grantor; that no explanation of such failure was made; and where neither the grantor nor his wife testifies as to the good faith of the conveyance of the lands, but both do testify that the consideration for the sale of the sheep was a debt which the husband had owed the wife for about twenty years, and it is not shown that the wife had any money at the time of the conveyance to her, such transfers of property must be held to have been made with the intent to hinder, delay, and defraud the husband's cosurety on the bond, and they are, therefore, void.

APPEAL—SETTING ASIDE SUBMISSION—NONREVIEWABLE ORDER.—It is within the discretion of the court, after a cause has been submitted for final decree on the pleadings and proof, either to grant or to deny an application to set aside the order of submission, for the purpose of allowing new evidence to be introduced, whether upon a sufficient showing or not, but, in any event, the court's ruling thereon is not revisable on appeal.

Bill in equity filed on May 16, 1893, by Thomas A. Yeend, as administrator of the estate of George Brown, deceased, against Dorval W. Weeks, Rosalie Weeks, Felix Andry, and Joseph D. Weeks, and which sought to have set aside, as voluntary and fraudulent, certain conveyances executed by D. W. Weeks to each of the other respondents; to have contribution from D. W. Weeks of his share of the amount paid by the complainant's intestate on the administration bond of one John W. Hall; and to have the property so fraudulently conveyed declared to be liable for the payment of such contribution. It appeared from the allegations of the original bill that, in July, 1884, Hall was appointed administrator of the estate of Stephen Dowty, deceased. The sureties on his administration bond were George Brown and D. W. Weeks. In March, 1890, William Dowty, a minor, and the only heir at law of Stephen Dowty, deceased, filed a bill in equity, by his next friend against Hall, as administrator, and against his sureties, charging that Hall had improp-

erly administered the assets that came to his hands, as administrator, and had committed numerous devastavits. On January 30, 1892, the complainant, Dowty, obtained a decree against the said defendants for four thousand dollars and costs. Afterward, George Brown died, and the appellant, in the case at bar, Thomas A. Yeend, became his administrator. In the present bill, D. W. Weeks was sued as cosurety on Hall's bond, the rendition of the decree in Dowty v. Hall, Weeks, and Brown, above mentioned, was alleged, and Yeend also alleged the payment, by his intestate, of said decree for four thousand dollars, and costs. This decree and payment were the basis of the right of contribution sought by the complainant's bill. It was also alleged in appellant's bill, that on November 30, 1892, he, as Brown's administrator, recovered a judgment in the Baldwin county circuit court against D. W. Weeks, as cosurety on Hall's bond, for the sum of two thousand one hundred and thirty-three dollars and thirty-four cents. The bill, in the present case, then charged that D. W. Weeks made fraudulent transfers and conveyances of his personal and real property, described therein, for the purpose of escaping liability as a surety on Hall's note, and that Felix Andry, and one Rosalie Weeks, wife of D. W. Weeks, participated in this fraudulent scheme, for the purpose of aiding D. W. Weeks to carry out his design. To accomplish this end, it was alleged that Felix Andry took a conveyance from Weeks and wife, on August 16, 1887, conveying certain lands; that on September 24, 1887, Andry conveyed said lands by deed to Rosalie Weeks; that while these conveyances recited cash considerations, there was, in fact, no consideration paid, and the purchase money named was simulated; that on August 20, 1887, D. W. Weeks made a bill of sale to his wife conveying certain cattle and sheep for an expressed consideration, but that this was also simulated, and that the conveyance was, in fact, gratuitous and made for the purpose of putting his property beyond the reach of the law; and that D. W. Weeks also made a fraudulent conveyance of certain land owned by him to his son Joseph D. Weeks, who took the conveyance with a knowledge of the fraudulent purpose of his father. The allegations of fraud and collusion made in the bill were denied by the answer of defendants, who alleged good faith, honesty, and fairness in the several transactions. The defendants Andry and Rosalie Weeks denied a knowledge of the fact that D. W. Weeks was a surety on Hall's bond. No witness was examined by the complainant, but he offered in evidence the record and proceed-

ings in the case of Dowty v. Hall, Weeks, and Brown, including the final decree therein; also a certified transcript of the record and proceedings in the case of Yeend v. Weeks, above mentioned. The respondents objected to the admissibility of said records and proceedings as evidence against the respondents, Felix Andry, Rosalie Weeks, and Joseph D. Weeks, upon the ground that, as the deed from D. W. Weeks to Andry, and the deed from Andry to Rosalie Weeks, antedated the filing of the bill in the case of Dowty v. Hall, Weeks, and Brown, and antedated the judgment in the circuit court, such records, proceedings, judgments, and decrees were, in this case as to these defendants, *res inter alios acta*, and that, therefore, they could not be bound by any fact ascertained or determined in said causes, but were entitled to have their day in court to contest the liability of Hall on the charge of waste and *devastavit*. The complainant, after the cause was submitted, moved to set aside such submission, and for leave to take further testimony to establish the existence of the indebtedness for which he sought to condemn the property described in the bill. This motion was submitted for decree upon the affidavit of the receiver in the cause, which showed that Brown had paid the judgment recovered; but in the final decree of the chancellor this motion was overruled. The chancellor, upon the final submission of the cause on the pleadings and proof, and after reviewing the evidence and declaring that all the conveyances attacked in the bill were fraudulent and void, decreed that the objections to the admissibility in evidence of the records, proceedings, judgments, and decrees, in the case above mentioned, were well taken; that the proceedings in the cause of Dowty v. Hall, Weeks, and Brown, could not be evidence against any of the parties to this suit, except D. W. Weeks; and that, as there was no proof that Brown had paid the decree, in Dowty v. Hall, Weeks, and Brown, the complainant had failed to make out his case. The bill was, therefore, dismissed, and the complainant appealed, assigning as error the action of the chancellor in overruling his motion to set aside the submission, in decreeing that he was not entitled to relief, and in dismissing the bill.

Gregory L. and H. T. Smith, for the appellant.

Pillans, Torrey & Hanaw, for the appellees.

338 HARALSON, J. 1. When one makes a conveyance 339 of his property on a consideration which is merely good, as contradistinguished from one which is valuable, it is without effect,

inoperative, and voidable against any debt the grantor may owe at the time of its execution; and this, without reference to the good intentions of the parties, and the solvency or insolvency of the grantor, at the time of the execution of the conveyance. Such a conveyance, when not tainted with actual fraud, is void only as to antecedent debts; but if made with an intent to hinder, delay, and defraud creditors, which is actual fraud, it is void as to subsequent, as well as to existing, creditors: *Dickson v. McLarney*, 97 Ala. 383; *Seals v. Robinson*, 75 Ala. 364; *Kirksey v. Snedecor*, 60 Ala. 197; *Huggins v. Perrine*, 30 Ala. 396; 68 Am. Dec. 131.

2. Only those persons whose rights are interfered with—who are injured by conveyances alleged to be fraudulent—have the right to interfere to set them aside. Strangers have no interest and therefore no right to question their validity; and, between the parties and their privies they are valid. When one aggrieved by such a conveyance calls its validity in question, and moves to set it aside, the parties claiming under the gift or conveyance may dispute his claim by demanding that he shall prove himself to be a creditor of the grantor or donor, with a valid, subsisting debt against him. The fact of primary importance in such a proceeding—whether it be to set aside the conveyance as constructively fraudulent and therefore voidable as against past due debts, or actually fraudulent and voidable as to future as well as to past obligations—is the existence of a debt, for the payment of which, except for the conveyance, the property transferred could be made liable. The grantee in the conveyance must have an opportunity to dispute the debt, and may plead any defense, not merely personal, which the grantor or debtor could have made against it: *Troy v. Smith*, 33 Ala. 469; *Halfman v. Ellison*, 51 Ala. 544; *Pickett v. Pipkin*, 64 Ala. 520; *Lawson v. Alabama Warehouse*, 73 Ala. 292, and authorities *supra*.

3. The decisions of this court also establish the principle that “no alienee, grantee, or assignee is bound or affected by a judgment or decree rendered in a suit against the alienor, grantor, or assignor subsequent to the alienation, grant, or assignment; for the plain reason that otherwise his rights of property could be divested ³⁴⁰ without his consent, and the fraud or laches of the grantor could work a forfeiture of estates he had created by the most solemn conveyances”: *Coles v. Allen*, 64 Ala. 106; *Donley v. McKiernan*, 62 Ala. 34; *Floyd v. Ritter*, 56 Ala. 359. But this principle does not in anywise conflict with that other,

that where a judgment is rendered by a court of competent jurisdiction in the regular course of judicial proceeding, without fraud or collusion it is conclusive evidence of the amount and existence of a debt at the time of its rendition, and that in a proceeding by the plaintiff against the defendant and his grantee to set aside an alleged fraudulent conveyance, such judgment, whether rendered prior or subsequent to the conveyance, is competent evidence of the debt, and that the plaintiff therein stands in a relation to be affected or injured by the conveyance. As was said in *Lawson v. Alabama Warehouse Co.*, 73 Ala. 293: "It is not evidence of an indebtedness existing at any time anterior to its rendition; and if the conveyance is impeached as merely voluntary, as wanting in a valuable consideration, if the time of rendition is subsequent to the conveyance, there must be other evidence than the judgment affords to show the existence of the debt when the conveyance was made. But if, as in the present case, the gift or conveyance is assailed as tainted with actual fraud, as having been made to hinder, delay, or defraud existing creditors, it is void, not only as to such creditors, but as to subsequent creditors; and the judgment, of itself, establishes the right of the creditor to impeach the gift or conveyance."

4. If, then, there is no more proof than the judgment itself—in the absence of fraud or collusion, as we have seen—it is evidence of the existence of a debt at the time of its rendition, and only at that time. This is sufficient to entitle the judgment creditor to impeach the fraudulent conveyance as tainted with actual fraud. In such case, the burden of proving the actual fraud would be upon the complainant. If the complainant, however, would use the judgment to the prejudice of a grantee in a deed alleged to be only voluntary and constructively fraudulent, there must be independent, distinct evidence of facts showing the cause of action which authorized the rendition of the judgment, and that it is older than the conveyance: *Coles v. Allen*, 64 Ala. 106. If the right ³⁴¹ out of which the judgment springs is older than the voluntary conveyance, the latter must yield to it: *Anderson v. Anderson*, 64 Ala. 405; and, in such case, on a bill filed by the judgment creditor to set it aside, the burden is on the grantee to prove that he paid an adequate and valuable consideration: *Chipman v. Glennon*, 98 Ala. 263; *Page v. Francis*, 97 Ala. 379; *Moore v. Penn*, 95 Ala. 200; *Hamilton v. Blackwell*, 60 Ala. 545. And, again, if the transferee be a near relation, fuller and more satisfactory proof is required than when strangers are the contracting parties: *Thorington v. City Council of Montgomery*, 88 Ala. 552.

5. It must be stated, in this connection, that an administration bond is a continuing obligation of security from the day of its execution to the termination of the administrator's authority to act; and though it antedates a voluntary conveyance, yet the ascertainment of its breach, by proper judicial proceeding, begun and concluded after the execution of such conveyance, will, as between the judgment creditor and the grantor in the conveyance, relate back to the date of the bond, and be held to be a debt existing at that time. Such a bond is unlike a promissory note or other claim made upon a present consideration, after the execution of a voluntary conveyance. A contingent claim is as fully protected as a claim that is certain and absolute: *Bibb v. Freeman*, 59 Ala. 615; *Anderson v. Anderson*, 64 Ala. 405; *Fearn v. Ward*, 65 Ala. 33; *Corr v. Shackelford*, 68 Ala. 241; *Kelly v. McGrath*, 70 Ala. 80; 45 Am. Rep. 82; *Keel v. Larkin*, 72 Ala. 500.

6. Another principle equally well settled is, that the liability of the surety on an administrator's bond, or other contingent obligation, makes him a creditor within the provisions of the statute of frauds, from the date of the contract, and though, generally, he has no cause of action until he has paid the debt, he is entitled to protection against fraudulent conveyances executed by the principal debtor in the meantime. As was stated in *Keel v. Larkin*, 72 Ala. 500, "The claim of the surety is considered as having existed—so far as to constitute him a creditor—at the time he incurred the contingent liability, being *debitum in presenti, solvendum in futuro*; his subsequent payment of the debt extending back by relation to that date, although no demand, or ³⁴² right of action technically accrues until a subsequent date. The surety is thus, in a certain sense, subrogated to the rights of the creditor, whose claim he has been compelled to pay." This principle extends to sureties, as between themselves, where one has paid the joint obligation of all. The right of contribution between them is founded on natural justice, is secured by statute, and may be enforced by summary proceedings: Code, secs. 3149, 3151; *Bragg v. Patterson*, 85 Ala. 233; 1 *Brandt on Suretyship and Guaranty*, sec. 254.

7. Let us make application of these principles to this case. The record in the case of *Dowty v. Hall, Weeks, and Brown* was relevant to show, as it did, that a decree was rendered therein against said Weeks and Brown as sureties for four thousand dollars. This decree was conclusive evidence of a debt existing at that time to Dowty, but it was not evidence of an indebted-

edness to any other person than Dowty, nor of the existence of said debt, prior to its rendition.

The decree, by itself, was no more evidence as between Weeks and Brown, the sureties, to show that the defendant, Weeks, owed Brown anything, at the date of its rendition, than it was to show that Brown owed Weeks. Its only evidential force, apart from other evidence, was, that Weeks and Brown owed the plaintiff in the judgment or decree. But there was an agreement of counsel in writing on the trial—to quote its language—“that the allegations contained in the first and second paragraphs of the original bill of complaint are true, and shall be taken as admitted on the final hearing of the cause, by the defendants, and that the bond set forth in the second paragraph of the complaint was executed on the eleventh day of July, 1884.” These admissions cover the following facts: That complainant is the duly qualified administrator of George Brown, deceased; that Stephen Dowty died prior to the 11th of July, 1884, and that John W. Hall, was his duly appointed administrator; that he gave bond as such administrator, with Dorval W. Weeks and George Brown as sureties on said bond, and that the copy of the bond set out in the bill is a correct copy of the original, which was duly executed. Said bond was introduced in evidence in place of the original. The introduction of this bond, in connection with the decree, was sufficient to show that the decree was authorized ³⁴³ and was rendered on this bond, showing a debt to the plaintiff in the decree existing, not only at its date, but, as for the rights of the complainant in this case, at the date of the approval of said bond, on the eleventh day of July, 1884. This debt was owing, therefore, for the purposes of this bill, by said sureties to William Dowty, the only son and heir of Stephen Dowty, at the last-named date. And, as between the sureties on said bond, their obligation to contribute to each other began, also, at that date. So, if it be shown that complainant's intestate, Brown, paid the whole of said decree, after it was rendered against him and his cosurety, Weeks, that fact made Weeks a debtor to Brown for one-half of the sum so paid, at the date of the bond, on which they were joint sureties, with interest from the time he paid the same.

8. For the purpose of showing that his intestate paid and satisfied this decree, the complainant offered in evidence a duly certified transcript of a judgment and the proceedings thereon, had in the circuit court of Baldwin county, the place of residence of said Weeks. This was a summary proceeding under

the code, section 3151, authorizing a surety, who has paid the debt of his principal, to recover of his cosurety his aliquot proportion of the debt. The complaint in the case set out the appointment of Hall—on the 11th of July, 1884—by the probate court of Baldwin county, as administrator on the estate of Stephen Dowty, his due and regular qualification as such; that he gave bond, which is set out, with said Weeks and Brown as his sureties; the filing of said bill by William Dowty—the only heir at law and distributee of said Stephen Dowty—in the chancery court of Mobile county, on the 30th of March, 1889, against said Hall as administrator, and said George Brown and Dorval W. Weeks as sureties on said bond, wherein complainant charged that certain devastavits and waste had been committed by said Hall in his administration of the estate of said Stephen Dowty; that in said chancery court, such proceedings were had as that on the 30th of January, 1892, said court rendered a decree in said cause against the said Hall as administrator, and against the said Brown and Weeks, sureties on his administration bond, in the sum of four thousand dollars; that thereafter execution issued on said decree out of said court against ³⁴⁴ the said Hall and said Brown, which was levied on said Brown's property, and to prevent the sale of his property so levied on, the said Brown paid four thousand dollars on said decree, with interest from the date of its rendition, with costs, to Joseph Hodgson, who was receiver in the cause; and claiming the sum of two thousand dollars, with interest thereon from January 30, 1892, he moved the court for judgment against said Dorval W. Weeks, as contribution from him as his cosurety. Of this proceeding, said Weeks had due and legal notice. On the trial of that motion—on the 30th of November, 1892—a judgment was duly rendered against said Weeks in favor of complainant for the sum of two thousand one hundred and thirty-three dollars and thirty-four cents.

9. The transcript of these proceedings against said Weeks as to him, was proof of all that the complaint contains, and evidenced a debt against him in favor of Brown, at the date of its rendition, which related back and existed, for the purposes of this suit, to the date of said administration bond (3 Brickell's Digest, sec. 75, p. 580), which debt the said Brown had paid in full. We thus have the case of a creditor with a valid subsisting debt, anterior to the execution of said fraudulent conveyances by said Weeks, the debtor. The bill is filed to set aside these conveyances on the two grounds: That they were construc-

tively fraudulent—executed voluntarily and without consideration, and actually fraudulent—executed to hinder, delay and defraud the complainant's intestate, and to place the property of said Weeks beyond the reach of complainant's intestate for contribution to said suretyship liability.

The burden of proving that these conveyances were not voluntary, but were made in good faith for an adequate consideration, as we have seen, was on the defendants. If actually and not constructively fraudulent, the burden was on the complainant. The complainant introduced no evidence except said administration bond, the record in the Dowty case, to prove the decree therein, and the transcript of the record of his case from the Baldwin circuit court; and these, with the effect as we have stated. The defendants, Weeks and wife, examined and introduced the deposition of two witnesses, besides their own.

10. In looking for the bona fides of these transactions between this husband and his wife, the pertinent fact ³⁴⁵ strikes us that Weeks had been quietly living in Baldwin county for a long number of years, owning several hundred acres of land, engaged since 1872, with his brother, George, in the sheep and wool business. They owned, together, about one thousand sheep—D. W. three-fourths, and George one-fourth of them. In March, 1889, the bill of Dowty against Hall and Brown and himself as sureties, was filed in Mobile chancery court, which resulted in said decree against them of four thousand dollars, in January, 1892. He knew, of course, of the dangers that threatened him in that suretyship. In August, 1887, without any dissolution of the partnership between him and his brother George, without any reasons assigned or shown for dissolving it, but continuing to reside at the same place, and without engaging in any other business, he sold and transferred to his wife his interest in the flock of sheep, for the recited consideration of sixteen hundred dollars, which was for money of hers, as he and Mrs. Weeks swore, which he had received and used about the year 1866. This bill of sale was executed and recorded with the formalities of a conveyance of land, and which, executed in August, 1887, was not recorded until August, 1889, several months after the bill by Dowty had been filed against him. If the bill in this case had not been filed, this bill of sale, we are not slow to believe, would never have been brought to light. The wife, after its execution, as is shown, continued the business of sheep and wool culture with George Weeks, with no apparent change of possession or management of the property.

But the land as well as the sheep must be covered, and, accordingly, we find Weeks and wife, on the 16th of August, 1887, four days prior to the sheep transaction, conveying to Felix Andry, for the recited consideration of one thousand dollars, the five hundred and sixty acres of land which he owned. This deed was not acknowledged by the wife, separate and apart from her husband, and, if the lands conveyed constituted their homestead, it was ineffectual to pass the same to the extent allowed by law. A deed thus executed is void as to the homestead. This deed was recorded August 19, 1887. Felix Andry reconveyed these lands to Rosalie, the wife of said Weeks, on the 20th of September, 1887, for the recited consideration of one thousand and fifty dollars, but the deed was not filed for record until the 10th of August, 1889. If Mrs. Weeks had the money with which ³⁴⁶ to make this purchase, that fact was not shown. In November, 1890, Weeks and wife conveyed to their son, Joseph D. Weeks, forty acres of the same land they had conveyed to Andry, and which he had reconveyed to said Rosalie, for the nominal consideration of two dollars, and this conveyance did not find record until April, 1891.

If Andry had paid any consideration for the conveyance from Weeks and wife to him, and if Rosalie, in turn, had paid him any consideration for his conveyance to her, and if the transaction was a real and not a simulated one, he was very competent to prove these facts, and a failure to examine him is suggestive that the proof could not be made by him, if he should swear truthfully. And more striking and suggestive still is the fact that Weeks and wife were both examined in their behalf, and neither of them were questioned or deposed as to any fact touching the consideration and bona fides of these conveyances of land. They denied in their answers the allegations of fraud, and averred that said conveyances were made in good faith for the considerations expressed in them, and yet offered no proof to show the truth of the allegation, themselves being examined as witnesses.

11. The chancellor reviewing the testimony reached the conclusion that all of the conveyances of the personal and real property were part and parcel of one scheme to hinder, delay, and defraud the complainant's intestate—were voluntary and void as to him. We approve his finding on the fact.

He dismissed the bill, however, on the ground, as stated, that it did not aver that Hall, the administrator of Stephen Dowty, was in default as such, or that he owed anything by virtue of his

administration; that the proceedings in said cause cannot be evidence against any of the parties to this cause, except said Weeks; that the other defendants are entitled to have their day in court to controvert the issue (that of a devastavit by Hall) on which their liability depends, and the bill, by its averments, did not afford them that opportunity.

From what has been said, it will sufficiently appear in what the learned chancellor mistook the real issue in the cause, and wherein he erred. The real issue was, whether the complainant's intestate was a creditor of said Weeks, ³⁴⁷ either before or after the execution of said conveyances; and whether the same were constructively or actually fraudulent. These issues, as tendered by the complainant, the grantee had ample opportunities to contest.

The question of exemptions was not passed on, and, if properly presented, is one which is not likely to be of difficult solution.

12. The application to the chancellor, pending the submission to set it aside, did not state that the evidence proposed to be taken could be made and by whom, nor any reason why it was not done before the submission of the cause, or any fact showing diligence, nor was it verified. It was within the discretion of the court to either grant or deny the application, but for the reasons stated, it was properly disallowed: *Magruder v. Campbell*, 40 Ala. 611; *Ex parte Ashurst*, 100 Ala. 573.

Reversed and remanded.

FRAUDULENT CONVEYANCES—SURETY AS CREDITOR—CONTRIBUTION.—A voluntary conveyance is presumed to be fraudulent and void as against existing creditors, though not as against subsequent creditors: *Severs v. Dodson*, 53 N. J. Eq. 633; 51 Am. St. Rep. 641; *Riley v. Carter*, 76 Md. 581; 35 Am. St. Rep. 443; *Stumbaugh v. Anderson*, 46 Kan. 541; 26 Am. St. Rep. 121. But if a conveyance is made with a fraudulent intent, which is participated in by the grantee, it may be avoided by subsequent creditors as well as by previous creditors, although it is founded on a good and valuable consideration: See monographic note to *State v. Mason*, 34 Am. St. Rep. 399, on fraudulent conveyances. All deeds, conveyances, contracts, and transactions entered into in fraud of creditors are, however, valid between the parties: See cases collected in the monographic note to *Whitworth v. Thomas*, 3 Am. St. Rep. 728, on recriminatory fraud; *Gilbert v. Stockman*, 81 Wis. 602; 29 Am. St. Rep. 922. Creditors only of grantor can attack a transfer of property to a third person on the ground of fraud: *McClenney v. McClenney*, 3 Tex. 192; 49 Am. Dec. 738; but to constitute one a creditor, it is not necessary that money be due to him from the debtor at the time of the transfer. It is sufficient that the debtor has entered into some obligation or done some act which may result in his liability to the creditor. When the liability is ascertained, it relates back to the inception of the original agreement or obligation,

and entitles the creditor to proceed as though there had been a debt due and payable to him at that time: See monographic note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 743, on voluntary conveyances. The term "creditors," as employed in the statutes and decisions concerning fraudulent and voluntary conveyances, is not used in any narrow or technical signification, but includes all persons whose interests might be defrauded by the transfer. Wherever there exists a right or obligation for the invasion or disregard of which a judgment may be entered, a transfer made with the view of rendering such judgment ineffectual is doubtless fraudulent, and therefore void as against the interest sought to be defrauded: Note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 743. Such a transfer cannot be supported by showing that, when it was made, the claim of the judgment creditor was contingent, and it could not then have been known that any cause of action would ever result from the contract. Therefore, if a bond be given, a fraudulent transfer made subsequently, but before breach of its condition, may be avoided as well as if executed after such breach. The same rule prevails where the liability of the fraudulent grantor, at the date of the grant, was contingent; as, where he was a surety or indorser, and it was not known that he would ever be called upon to pay the debt: Note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 744; *Hutchison v. Kelly*, 1 Rob. (Va.) 123; 39 Am. Dec. 250. A surety is a "creditor" of his principal, who may impeach a voluntary conveyance made by the latter, where he is bound as surety at the date of the conveyance, though he did not pay until afterward: *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460. Compare *Williams v. Tipton*, 5 Humph. 66; 42 Am. Dec. 420. A surety will be protected, even by injunction, against his principal's fraudulent disposition of property: *Bowen v. Hoskins*, 45 Miss. 183; 7 Am. Rep. 728. A surety who pays the debt of his principal is entitled to be subrogated to the rights of the creditor as against his principal and a cosurety: *Peebles v. Gay*, 115 N. C. 38; 44 Am. St. Rep. 429; *Nettleton v. Ramsey County etc. Loan Co.*, 54 Minn. 395; 40 Am. St. Rep. 342; and he may enforce contribution from his cosurety without first obtaining a judgment at law against him: See monographic note to *Gross v. Davis*, 10 Am. St. Rep. 640, 645, on the right of one surety to enforce contribution from another, and the remedies for its enforcement.

FRAUDULENT CONVEYANCES—JUDGMENT AS EVIDENCE OF DEBT.—If a creditor seeks the aid of a court of equity for the satisfaction of a judgment out of the property of his debtor, the title to which has been in the debtor, but has been fraudulently transferred, it is sufficient for the creditor to show a judgment at law and execution to entitle him to resort to equity to vacate such fraudulent conveyance: *Logan v. Logan*, 22 Fla. 561; 1 Am. St. Rep. 212. But if the judgment creditor brings an action to set aside, as fraudulent as to creditors, a conveyance of real estate made by the debtor prior to the judgment, he must show that the debt for which the judgment was rendered existed at the time of the conveyance. The judgment, as against the grantee, does not prove such existence: *Bloom v. Moy*, 43 Minn. 397; 19 Am. St. Rep. 243. A creditor's bill to reach property which the judgment debtor has conveyed without consideration, for the purpose of defrauding his creditors, cannot be sustained, when such conveyance antedates the judgment on which the plaintiff relies, and no execution has ever issued thereon: *Gilbert v. Stockman*, 81 Wis. 602; 29 Am. St. Rep. 922. Compare *Henderson v. Henderson*, 133 Pa. St. 399; 19 Am. St. Rep. 650.

FRAUDULENT CONVEYANCES—BURDEN OF PROOF.—One claiming to be a bona fide purchaser from a fraudulent grantor has the burden of proof to establish his claim: *Connecticut etc. Ins. Co. v. Smith*, 117 Mo. 261; 38 Am. St. Rep. 656, and note; *Mobile Sav.*

Bank v. McDonnell, 89 Ala. 434; 18 Am. St. Rep. 137. But a subsequent creditor who attacks and seeks to avoid a voluntary conveyance made by his debtor must assume the burden of proving an actual fraudulent intent on the part of the grantor to defraud some creditor: Hagerman v. Buchanan, 45 N. J. Eq. 292; 14 Am. St. Rep. 732.

RANDOLPH v. EAST BIRMINGHAM LAND COMPANY.

[104 ALABAMA, 355.]

POWERS OR TRUSTS must, in all cases, be construed according to the intention of the parties, to be gathered from the whole instrument.

TRUSTS—WHAT WORDS WILL CREATE.—A gift in a deed, expressed to be for the "use and benefit" of another, is sufficient to fasten a trust upon the conscience of the trust donee.

POWERS COUPLED WITH TRUST.—Mere powers are discretionary with the donee, and courts cannot exercise them, but it is different with powers coupled with a trust. In this class of cases, the power is so given that it is considered a trust for the benefit of other parties, and becomes imperative.

TRUSTS—FAILURE OF.—COURTS WILL NOT ALLOW a clear trust to fail for want of a trustee; nor will they allow a trust to fail by reason of any act or omission of the trustee.

TRUSTS—CONSTRUCTION OF, AS TO POWERS.—A court of equity will never favor a construction that confers upon a trustee absolute and uncontrollable powers.

TRUSTS—DISCRETIONARY POWERS.—COURTS WILL NOT INTERFERE with the exercise of discretionary powers by trustees, where they are acting in good faith, without fraud or collusion, and without selfish, corrupt, or improper motives; but they will interfere where the exercise of discretion by trustees is infected with fraud or misbehavior, or is mischievously and ruinously exercised, or where they decline to undertake the duty of exercising discretion.

TRUSTS—INVESTMENTS.—If there are no directions in an instrument of trust, or rules of court, or statutory provisions in relation to investments, they must be governed by sound discretion and good faith. In the absence of statutory direction, or specific authority, trustees are not permitted to invest trust funds in the stock or shares of any private corporation, although the stock is considered good by discreet business men who evince their confidence by investing their own funds therein; and no court can sanction such investments where they are against the policy of the state and expressly forbidden by its laws.

TRUSTS—DEED TO FATHER IN TRUST FOR HIS SON.—If a father purchases land for the "use and benefit" of his minor son, and joins in the execution of a conveyance of the property, made to himself as trustee for his son, which conveyance gives the father power to manage and control the trust estate until the son is twenty-one years old, and, in the meantime, to use and appropriate the rents, profits, and income therefrom; to lease, mortgage, or sell the same; and to reinvest the proceeds in such a manner as he may think best for his son's use and benefit, the father becomes a trustee for the son, assuming the same responsibilities and obligations that a third person would, if the land were conveyed to him by a deed creating the same trust. The powers so conferred are not purely

discretionary, but create a trust, coupled with an interest, requiring the trustee to perform active duties, and a court of equity will interfere to prevent a wrongful exercise of such duties.

TRUSTS—INVALID SALE OF LAND—INVESTMENT.—A trustee having authority to lease, mortgage, or sell land held in trust, and to reinvest the proceeds, but who is not authorized by the trust deed to invest the trust funds in stock or shares of private corporations, cannot sell the land so held in trust to a land company and take in payment therefor stock of such company, especially where such investments, by trustees, are forbidden by the laws of the state. Such a sale is a violation of good faith on the part of the trustee, and is void.

TRUSTS—INVALID SALE OF LAND—TITLE—BONA FIDE PURCHASERS WITHOUT NOTICE.—If a trustee sells land to a private corporation in violation of his trust, and such land is afterward sold at a judicial sale to persons who had knowledge of the conditions of the trust and of the illegal sale to their vendor, such parties are not bona fide purchasers for value without notice, and, as against the cestui que trust, acquire no right to the land.

Bill in equity to set aside a deed to lands, and to enforce a trust therein. The bill was filed by Ryland Randolph, Jr., by his next friend, against the East Birmingham Land Company, Ryland Randolph, Sr., James E. Webb, H. C. Tompkins, and D. H. Sumner. The trust land, mentioned in the opinion, was, after being held about twelve years, sold and conveyed by Ryland Randolph, Sr., to the East Birmingham Land Company. The land was paid for in stock of the company, to the amount of eighty thousand dollars. This was the sole consideration for the execution of the deed. A few years after such purchase by the company, it made a general assignment of its property, including the trust land mentioned, to D. H. Sumner, for the purpose of securing the payment of its past indebtedness. Sumner had notice of the trust. Sumner, as trustee and assignee, sold the lands, under the power contained in the deed of assignment, to the defendants Webb and Tompkins. The company and Ryland Randolph, Sr., were both insolvent. The bill prayed that the deed made by Ryland Randolph, Sr., to the company, the company's deed of assignment to Sumner, and Sumner's deed to Webb and Tompkins, so far as they purported to convey the lands conveyed in trust for Ryland Randolph, Jr., be set aside and annulled; and that the trust be enforced against the land in the hands of the defendants Webb and Tompkins. The chancellor sustained a demurrer to the bill which alleged the above facts, and those referred to in the opinion, and the plaintiff appealed.

White & Howze and Carmichael & Thatch, for the appellant.

James E. Webb, for the appellees.

³⁶³ HARALSON, J. 1. Ryland Randolph, Sr., purchased the land in question from J. W. Briggs, for which he paid him seventeen hundred and sixty dollars. The purchase was made by him for the use and benefit of his son, Ryland Randolph, Jr. The deed recites that he was desirous, in making the purchase, to invest that amount of money in this land for the use and benefit of his said son, and make a donation of it to him and his use. By his own directions, the conveyance was made to him, as trustee for his son. He ingrafted upon the trust the provision that he should control, manage, and direct the property, until the termination of the trust—which was provided to be when his son should arrive at the age of twenty-one years, if he should live so long—and, until that time, use and appropriate the rent, profits, and income of the same, as he might see proper, for the use and benefit of the cestui que trust, and to lease, mortgage, or sell the same, and reinvest the proceeds in such manner as he might think best for his said son's use and benefit. He joined said Briggs in the execution of the conveyance.

The transaction, in its legal effect, is the same as if said Randolph, Sr., had taken the conveyance directly to himself, and had then executed a deed to a third person, in whose honesty and judgment he had confidence, ingrafting upon the trust the same power and discretion he reserved in this deed to himself. He occupies in this deed the same relations, responsibilities, and obligations as a trustee to his said son, as a trustee, in the person of a third person, in the case we have supposed, would have sustained to the son.

2. What obligations, then, did the trustee in this deed sustain to the cestui que trust? The deed itself describes him as a trustee. It gave him the power to manage and control the trust estate until the son arrived at the age of twenty-one years, and, meantime, to lease, mortgage, or sell the same, and reinvest the proceeds; but whatever he did was repeatedly stipulated to be for the use and benefit of his son. It was not imperative on him to lease, mortgage, or sell. He had the discretion to ³⁶⁴ do either. He was not a mere naked or dry trustee, but one with active duties to perform, such as are referred to in section 1832 of the code: *You v. Flinn*, 34 Ala. 409. The power reserved by the donor in this instance, who was also the donee in trust to sell, was not a mere power, purely discretionary with him; but it was a trust, coupled with an interest, obligatory on the conscience of the donee: *Hill on Trustees*, *67; 1 *Perry on Trusts*, sec. 248; 18 *Am. & Eng. Ency. of Law*, 882, 887, 888.

3. In all cases, as has been held, powers or trusts must be construed according to the intention of the parties, to be gathered from the whole instrument: 1 Perry on Trusts, sec. 248; *Kerr v. Verner*, 66 Pa. St. 326; *Guion v. Pickett*, 42 Miss. 77. And when a gift in a will or deed is expressed to be for the "use and benefit" of another, or to be at the disposal of the donee, "for himself and children," or "toward his support and family," or "to enable the donee to provide for and maintain" his children, or where the gift is expressed to be made "to the end," or "to the intent," that the donee should apply it to certain purposes, the terms thus employed have been held sufficient to fasten a trust upon the conscience of the trust donee: *Hill on Trustees*, *66, *67.

"Mere powers," says Mr. Perry, "are purely discretionary with the donee; he may or may not execute them, at his sole will and pleasure, and no court can compel or control his discretion, or exercise it in his stead or place, if, for any reason, he leaves the power unexecuted. If the donee executes the powers, but executes them in a defective manner, courts may aid the execution, and supply the defects, but they cannot exercise mere naked powers conferred upon a donee. It is different with powers coupled with a trust. In this class of cases, the power is so given that it is considered a trust for the benefit of other parties . . . and becomes imperative. . . . Courts will not allow a clear trust to fail for want of a trustee; nor will they allow a trust to fail by reason of any act or omission of the trustee." And, as was held in *McDonald v. McDonald*, 92 Ala. 542, "a court of equity will never favor a construction that confers upon a trustee absolute and uncontrollable powers": 1 Perry on Trusts, sec. 248; 2 Perry on Trusts, sec. 507, and authorities cited.

4. But while the court will not generally decide upon ³⁰⁵ the propriety or impropriety of a refusal of trustees to act, in cases where their powers are entirely discretionary, its failure to exercise its directing and restraining authority proceeds upon the principle that the trustees are acting in good faith, without fraud or collusion, and without selfish, corrupt, or improper motives. Lewin, in his work on Trusts, as a summation of the authorities on the subject, states the principle to be, that "there is sufficient ground for the interference of the court, wherever the exercise of the discretion by trustees is infected with fraud or misbehavior, or they decline to undertake the duty of exercising the discretion or, generally, where the discretion is mischievously or ruinously exercised, as if a trustee be authorized to

lay out money upon government, or real or personal security, and the trust fund is outstanding upon any hazardous security. But, when the course pursued by the trustees is within the letter of the power, the onus is on the person challenging their conduct to show that their discretion has been mischievously, or ruinously, or fraudulently exercised": 2 Lewin on Trusts, *616, and authorities cited; 2 Perry on Trusts, secs. 508-511; Gossen v. Ladd, 77 Ala. 224.

5. The question just here arises as applicable to the facts of this case: Was the sale of the land, the subject of the trust, by the trustee to the East Birmingham Land Company, and taking in payment of its purchase price the stock of said company, such a violation of good faith on the part of the trustee as will authorize the court to interfere to set it aside?

Without statutory direction, or specific authority in the instrument creating the trust, or an order of court allowing it, it may be stated as a general rule that trustees are not permitted to invest trust funds in the stock or shares of any private corporation, and the rule is not varied by the fact that the stock is considered good by discreet business men who evince their confidence by investing their own funds therein: 11 Am. & Eng. Ency. of Law, 813. If there are no directions in the instrument nor rules of court, nor statutory provisions in relation to investments, they must be governed by sound discretion and good faith: Perry on Trusts, sec. 452, and authorities in note 1.

The rule, perhaps, cannot be better stated than as we ³⁶⁶ find it laid down by the author last cited: "In states where there are no statutes or rules of court regulating investments, trustees are bound to act in good faith and with sound discretion in investing trust money and, if they so act, they are not responsible for any loss that may happen; but to invest in mere personal securities is not a sound discretion anywhere. Nor is it sound discretion for trustees to subscribe trust funds to new enterprises, as for the stock of a new manufacturing, insurance, or railroad corporation, when the undertaking must, in the nature of things, be experimental; and it will not excuse the trustee that he subscribes his own money to such enterprises, as it is permitted to him to speculate with his own money, if he sees fit": Perry on Trusts, sec. 459. "And whatever may be the apparent advantages of such a course, and however well-intentioned the conduct of the trustee, there is no question, but that the court will visit upon him any loss resulting from such a step": Hill on Trustees, *379.

The policy of the law of the state forbids such investments, for it is provided in the constitution itself, that "No act of the general assembly shall authorize the investment of any trust fund by executors, administrators, guardians, and other trustees in the bonds or stock of any private corporation": Const., art. 4, sec. 35.

The trustee in this case embarked the whole trust estate in the stock of a recently formed land company, organized, as is alleged, as a purely speculative venture, the risks in which were extremely hazardous, and it is averred that the certificates of stock were issued to, and the trustee took them, in his own name. He thereby imperiled it in a way that sound discretion and good faith cannot sanction. The failure and winding up of the enterprise, in the entire loss, as is alleged to all the stockholders of their capital stock, furnishes evidence of the recklessness of the hazardous risk this trustee assumed.

6. It is averred in the bill that at the time of the purchase of said lands by the East Birmingham Land Company, the company and its officers knew that said lands were held by the said Ryland Rudolph, Sr., in trust for appellant, under the deed of trust which is exhibited to the bill. It is further averred that the defendants, Webb and Tompkins who became the purchasers ³⁶⁷ of the land at the sale by the assignee of the company, and who are now in possession of it, bought the same at said sale well knowing that the assignee could not convey to them a fee simple title thereto; and, cognizant of the facts set forth in the bill, they took and now hold the property subject to the trusts in favor of complainant in the deed to said trustee. If these allegations are true, they are not bona fide purchasers for value without notice, and cannot claim protection as such. The land company participated and aided the trustee in the violation of his trust, and acquired no rights as against the cestui que trust; the trustee, Sumner, in the deed of general assignment by the company, acquired no greater rights than the company had, and Webb and Tompkins, the purchasers at the assignee's sale, with notice of all the facts, acquired no greater rights than had been conferred by the deed of assignment on the assignee: Code, sec. 1843; Dawson v. Ramser, 58 Ala. 573; Shorter v. Frazer, 64 Ala. 74; Stickney v. Adler, 91 Ala. 198; Sampson v. Jackson, 103 Ala. 550; Leake v. Watson, 58 Conn. 382; 18 Am. St. Rep. 270.

The demurrer to the bill should have been overruled.

Reversed and remanded.

TRUSTS AND POWERS.—A trust will not be allowed to fail for want of a trustee: Brandon v. Carter, 119 Mo. 572; 41 Am. St. Rep.

673, and note. Powers are to be construed in the light of the purpose which the agent or depositary is appointed to accomplish: *Mayor etc. v. Reynolds*, 20 Md. 1; 83 Am. Dec. 535. Courts will not interfere with the exercise of a personal or discretionary power: *Gambell v. Trippe*, 75 Md. 252; 32 Am. St. Rep. 388, and note. Hence, where trustees have a discretion to do or not to do a particular thing, courts of equity will not command or prohibit the exercise of the power, if the conduct of the trustees is in good faith, and not influenced by improper motives; but courts will interfere to prevent an abusive, fraudulent, collusive, illusive, or other improper exercise of a discretionary power: *Read v. Patterson*, 44 N. J. Eq. 211; 6 Am. St. Rep. 877, and note. When a trust is intended, it will be equally effectual whether the donor transfers the title to a trustee, or declares that he himself holds the property for the purposes of the trust: *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641, and note. If a trust is expressed in the instrument creating it any act done by the trustees in contravention of the trust is void: *Kirsch v. Tozier*, 143 N. Y. 390; 42 Am. St. Rep. 729. A conveyance by the trustee in violation of the trust is void: *Briggs v. Davis*, 20 N. Y. 15; 75 Am. Dec. 363; monographic note to *Gale v. Mensing*, 64 Am. Dec. 199-202, on the effect of a conveyance by a trustee. A purchaser of trust property with notice of the trust takes it charged with and subject to the trust: *Notes to Gale v. Mensing*, 64 Am. Dec. 201; *Bunting v. Ricks*, 32 Am. Dec. 705. All kinds of voluntary settlements are good against the grantor and those claiming under him: See monographic note to *Williamson v. Yager*, 34 Am. St. Rep. 217, on voluntary trusts arising from the declaration of the trustor. If the statute permits a trustee to invest trust funds in the stock of a private corporation, he may, of course, do so, without being liable for loss. If the statute prohibits it, such an investment is a violation of good faith on his part. If the statute is silent as to investments, there is much difference of opinion as to whether an investment of such funds in the stock of a private corporation is a good one, as much depends upon the financial condition of the corporation whose stock is taken: See *Morris v. Wallace*, 3 Pa. St. 319; 45 Am. Dec. 642; and monographic notes to *Slauter v. Favorite*, 57 Am. Rep. 113; and *Nyce's Estate*, 40 Am. Dec. 515, showing what investments trustees may make without being liable for loss.

WIMBERLY v. WINDHAM.

[104 ALABAMA, 409.]

AGENCY—DISCHARGE OF LIEN—EXECUTION OF NOTE.

Under a power of attorney authorizing the agent to carry on a general mercantile business, in a certain state, and to do all necessary acts in conducting it, as fully as the principal might do, the agent is authorized, in buying cotton within the scope of his authority, to satisfy a third person's claim to, or lien upon, the cotton bought, by giving a promissory note in the name of the principal.

NEGOTIABLE INSTRUMENTS—WHO IS MAKER AND NOT A SURETY.—A buyer of cotton who signs a note with the seller for the purpose of satisfying a third person's claim to, or lien upon, the cotton bought, is a maker of the note, and not a surety thereon, as he is directly interested in, and benefited by, such settlement.

APPEAL—CONTINUANCE—NONREVIEWABLE ORDER.—The granting or refusal of an application for a continuance is discretionary with the trial court, and not revisable on appeal.

Action on a promissory note, in which Windham, the appellee, was plaintiff, and H. T. Wimberly and W. J. Nicholson, the appellants, were the defendants. The note had been made by the defendants to George W. Scott & Co., and assigned to the plaintiff. When the case was called for trial, the defendants moved for a continuance, on account of the absence of Nicholson, who was claimed to be a material witness for the other defendant. It was also urged that Nicholson was detained at home on account of the sickness of his wife, but no proof was offered or made of this fact. It appeared that Nicholson had not been subpoenaed as a witness for the defendant Wimberly. The motion was denied, and the defendant excepted. The defendants objected to the introduction of evidence showing that H. T. Wimberly's signature to the note was signed by M. W. Wimberly, on the ground that it was illegal, and because M. W. Wimberly was not shown to be authorized to sign the name of H. T. Wimberly to the note. They also objected to the introduction, by plaintiff, of testimony to the effect that M. W. Wimberly, as agent of H. T. Wimberly, had received cotton raised by Nicholson, upon which George W. Scott & Co., claimed a lien. These objections being overruled, the defendants excepted. They also excepted to the charge of the court, which charge was given in accordance with the principles stated in the opinion; and further excepted to the court's refusal to charge, as asked by them, that "under the written power of attorney of H. T. Wimberly, M. W. Wimberly was without authority to execute the note, the foundation of this suit." The plaintiff obtained judgment, and the defendants appealed, assigning the rulings upon the evidence, and the charges given and refused, as error.

J. C. Richardson, for the appellants.

L. M. Lane, for the appellee.

411 COLEMAN, J. The evidence shows that H. T. Wimberly was engaged in a general merchandise business, and did an advancing business to his customers. W. J. Nicholson became indebted to him, and on this indebtedness delivered a certain number of bales of cotton to M. W. Wimberly, who "managed, collected, and conducted" the business for his brother, H. T. Wimberly. W. J. Nicholson was also indebted to George W. Scott & Co., for guano, and for this indebtedness executed to them an instrument in writing, containing certain stipulations in regard to his cotton to be raised. Scott & Co., through their agent, set up a claim to, or lien upon, the cotton delivered to

M. W. Wimberly for H. T. Wimberly by Nicholson. There was evidence tending to show that this contention was settled by Scott & Co's acceptance of an obligation payable to them signed by W. J. Nicholson and H. T. Wimberly, and which is the foundation of the present action. The defendant, H. T. Wimberly, filed a sworn plea of non est factum. H. T. Wimberly defended also upon the ground that his name was signed as a ⁴¹² mere surety to the obligation. It was admitted M. W. Wimberly signed the name of H. T. Wimberly. The following power of attorney executed by H. T. Wimberly to M. W. Wimberly, was introduced in evidence:

"Greenville, Ala., Feb. 5th, 1886.

"Know all men that I, the undersigned of Loachapoka, Ala., do hereby make, constitute, and appoint M. W. Wimberly of Greenville, Ala., my true and lawful attorney, for me, and in my name and stead to carry on a general mercantile business in the city of Greenville, Ala., to do and perform all the necessary acts in the execution and promotion of the aforesaid business and in as full and ample a manner as I might do, if I were personally present."

The power of attorney authorized the agent to make the settlement that was made with Scott & Co. The business was within the scope of his authority. The case is distinguishable from the principles declared in *Scarborough v. Reynolds*, 12 Ala. 252; *Brantly v. So. Life Ins. Co.*, 53 Ala. 554.

Whether his name was signed as principal or surety, he was equally bound by the obligation, but the facts show he was directly interested in, and benefited by, the settlement made by Scott & Co., in regard to the cotton, and this settlement was the consideration of the contract sued upon. His relation was not that of a mere surety: *Mobile etc. R. R. Co. v. Nicholas*, 98 Ala. 92.

The granting or refusal of an application for a continuance is discretionary with the trial court, and not revisable on appeal.

There is no error in the record.

Affirmed.

AGENCY—POWER OF ATTORNEY.—A general agent is presumed to have the power to do all that is usual and necessary to accomplish the object for which the agency is created: *Austrian v. Springer*, 94 Mich. 343; 34 Am. St. Rep. 350. One who buys by an agent buys by himself: *Davison v. Holden*, 55 Conn. 103; 3 Am. St. Rep. 40. In construing a power of attorney, the intention of the parties, and not the letter, must control: *Note to Munger v. Baldridge*, 13 Am. St. Rep. 280. The principal authority, in a power of

attorney, includes all mediate powers which are necessary to carry it into effect: *Lamy v. Burr*, 36 Mo. 85; 88 Am. Dec. 135. A principal will be bound by any contract of his agent in regard to business concerning which he holds him out as his general agent: *Williams v. Getty*, 31 Pa. St. 461; 72 Am. Dec. 757. As a general authority to do an act includes the power to do everything requisite to its performance, an agent, employed by parol to settle a controversy, may do so, by giving a note in his principal's name, because the giving of the note is an incident which the general authority includes: *Piercy v. Hedrick*, 2 W. Va. 458; 98 Am. Dec. 774.

APPEAL—CONTINUANCE.—An appellate court will not interfere with an order granting or refusing a continuance, unless there is palpable error, without the correction of which manifest injustice will be wrought. Such orders are discretionary: *Sealy v. State*, 1 Ga. 213; 44 Am. Dec. 641; *McDaniel v. State*, 8 Smedes & M. 401; 47 Am. Dec. 93; *State v. Hildreth*, 9 Ired. 429; 51 Am. Dec. 364.

MAGNETIC ORE CO. v. MARKBURY LUMBER CO.

[104 ALABAMA, 465.]

DEEDS—CONVEYANCE OF GROWING TREES.—Growing trees are such a part of the realty that the title to, or interest in, the same can be conveyed or transferred, as a general rule, only by a written instrument.

DEEDS—CONVEYANCE OF STANDING TIMBER.—If "saw timber," growing on certain lands, is sold and conveyed by deed regularly executed, without condition or limitation, no mention being made as to when the timber is to be cut and removed, the title to it, independently of the land, vests absolutely in the grantee, and is not lost or forfeited in favor of the vendor, or of a subsequent purchaser of the land whose deed expressly reserved such timber, by the fact that the timber was not cut and removed within a reasonable time after it was conveyed.

Bill in equity to determine claims to real estate, and to cancel a deed to timber thereon, filed on December 4, 1893, by the appellant, the Magnetic Ore Company, against the appellee corporation, the Marbury Lumber Company. The complainant appealed from a decree sustaining a demurrer to the bill.

Houghton & Collier, for the appellant.

J. M. Falkner, for the appellee.

466 COLEMAN, J. We presume the present bill was filed under the provisions of an act of the legislature entitled, "An act to compel the determination of claims to real ⁴⁶⁷ estate in certain cases, and to quiet the title to the same": Acts 1892-93, p. 42. The bill shows that in July, 1881, the Louisville and Nashville Railroad Company, by deed of conveyance regularly executed, sold, and conveyed absolutely the "saw timber" growing on certain lands. No mention is made in the conveyance as to

when, if ever, the "saw timber" was to be cut and removed, but the saw timber is sold and conveyed wholly without condition or limitation. This, the bill avers, is the claim and interest of the defendant. The bill avers, and exhibits show, that the Louisville and Nashville Railroad Company, by deed of conveyance made in October, 1886, sold and conveyed the lands to H. F. De Bardeleben, with the following provision or reservation: "But it is understood and agreed that the timber with right of way to reach same has been sold," etc. In February, 1888, De Bardeleben conveyed to complainant. This is complainant's title.

The prayer of the bill is, that it be decreed that respondent has no interest in the lands, and that the deed of conveyance by the Louisville & Nashville Railroad Company of the "saw timber" to it be canceled. The respondent demurred to the bill, assigning several grounds of demurrer, the last of which was, "that the bill was without equity." Both parties claimed their respective rights and interest from the Louisville and Nashville Railroad Company; the respondent by deed of prior date, notice of which, under the averments of the bill is chargeable to complainant. We regard it as settled law in this state that growing trees are such a part of the realty that the title to, or interest in, the same can be conveyed or transferred only by written instrument. The rule is not universal under all circumstances: See leading cases in 4 American Law Reports of Real Property, 515, with notes by Sharswood and Budd. The two deeds from the Louisville & Nashville Railroad Company, the first to the respondent, and the latter to complainant, convey different and distinct interest of the same realty. The bill does not show that the respondent has, at any time, nor does now claim to own, any interest, except that purchased from and conveyed by the owner thereof. As we understand the averments of the bill, the complainant does not claim that, by its deed in October, 1888, it acquired any legal right or title to the "saw timber." As we understand the bill, the prayer for relief is based upon the proposition that as the deed of conveyance for the "saw timber" ⁴⁰⁸ did not specify any time within which the timber was to be cut and removed, the law supplied a provision, to the effect that it was to be cut and removed within "a reasonable time," and the respondent having failed to do this within a reasonable time, the right to the saw timber was forfeited, and became the property of complainant. We will consider this proposition further on. If it be true, as held in some decisions, that a deed of conveyance of trees or timber operates

ipso facto as a severance of them from the realty, and that the trees are thereby converted into personalty, the bill is without equity, as regards the "saw timber," as, under such a rule, there can be no claim by respondent under this conveyance to any part of the realty. Under this view, the case made by the bill is not within the statute, under which it is filed. It is simply a contention over personal property, which may be fully settled in a court of law. On the other hand, if the trees until cut remain realty, the case made by the bill is, that the respondent is claiming only what it purchased in which complainant has no interest, unless the respondent has forfeited its real estate by a failure to remove it, within a reasonable time, and by the forfeiture the right and title of those who bought and paid for it became vested in the complainant who never purchased it and has no deed of conveyance for it. There ought to be some cogent reasons compelling such a conclusion, or decisions to that effect which have established a rule of property, before we should adopt it as law. The case of *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119, cited by counsel for appellant in support of the doctrine, is an authority to the contrary. In that case, it appears that one Very, in the year 1863, sold the "timber standing" to one Kingsley, stipulating that if Very fail to deliver the timber at a designated place by a certain time, the grantee, his heirs and assigns, might enter the premises and take the timber. The grantor failed to deliver. No time was stipulated within which the grantee or his heirs were to enter and take the timber. In 1868, the timber was conveyed to defendants. In 1870, Very conveyed the land to the plaintiff. In 1871, the defendants cut and carried away some of the timber. The plaintiffs brought an action of trespass *quare clausum* and *de bonis*. The court decided that ⁴⁶⁹ when trees are sold, and no time is fixed for the removal of the timber, the purchaser has a reasonable time within which to enter and cut and remove the same, and if he fail to act within a reasonable time, he thereby forfeited the right to enter the premises, and was liable in an action *quare clausum*, but it was expressly decided that the defendant was not liable *de bonis*. The opinion is somewhat lengthy, and the respective rights and remedies of the parties, fully discussed. There is not a line in the opinion in which it is intimated that the purchaser of the timber forfeited his ownership of the trees, or that the grantor or his vendee of the land succeeded to the ownership of the timber upon the failure of the purchaser to enter and remove within a reasonable time. The court held that in such a sale there

was no "foundation for an exception to the general rules of law to make that a conditional conveyance of trees which would be an absolute conveyance of other property." Says the court: "The deed is absolute, the title passed to the grantee, and the defendants are not liable for the value of their own property removed after the expiration of a reasonable time."

The case of *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776, cited also by plaintiff's counsel, goes no further than *Hoit v. Stratton*, 54 N. H. 109; 20 Am. Rep. 119. It lays down the proposition that when there is a conveyance of land and a reservation of growing trees, and no time is fixed for their removal, a reasonable time only is allowed in which the entry can be made. Bingham, the defendant, having paid the purchase price, was in possession of the land under a valid parol purchase of the timber, but without a deed of conveyance. He had only an equitable title with permission to enter. Heflin purchased the lands, but in his deed of conveyance there was a reservation of the timber sold to Bingham. Heflin sued in ejectment. Bingham disclaimed possession except as to the interest reserved in the deed to Heflin and as to this pleaded "not guilty." One of the vital questions was, whether Bingham had delayed an unreasonable time under his license to enter and cut and remove the timber. If so, the court held that he was a trespasser and plaintiff was entitled to recover. If not, then plaintiff was not entitled to recover on this ground. Had the plaintiff recovered in the ejectment suit, on the ⁴⁷⁰ ground that defendant had delayed an unreasonable time, that would not necessarily have finally determined that the plaintiff became the owner of the growing timber which had been reserved in the deed to Heflin. Heflin never contracted to purchase, and never purchased, the trees. This part of the realty was never conveyed to him. He had no more right to the trees under his purchase and deed than any other person not a party to the transaction. The right to enter upon the land for the purpose of removing trees may have been lost by an unreasonable delay on the part of the purchaser of the trees, but it would not follow that the purchaser thereby became divested of his property in the trees, or that the vendor became reinvested with the ownership. As was held in the case of *Hoit v. Stratton*, 54 N. H. 109, 20 Am. Rep. 119, the sale of the timber was not conditional but absolute. The title passed to the purchaser, and we see no reason for giving to words used in a deed of conveyance of trees a different meaning than that given when used in a deed of conveyance of minerals

or any other portion of the realty, there being nothing in the instrument to control or vary their usual legal signification.

According to the bill, there is no misunderstanding or dispute of the facts in the case. There is no claim of ownership or title set up in the bill by the complainant acquired by adverse holding. Complainant's whole case, as we construe the bill and the brief of counsel, is rested upon the proposition that as defendant failed to cut and remove the timber within a reasonable time he thereby forfeited whatever of property interest he purchased and acquired by the deed of conveyance from the owner, and the "saw timber," by reason of the forfeiture, became vested in the complainant, although it was expressly reserved from the sale to De Bardeleben and excepted by De Bardeleben in the deed to complainant. We do not assent to the proposition.

The court did not err in sustaining the demurrer to the bill. Affirmed.

DEEDS—CONVEYANCE OF TIMBER—STATUTE OF FRAUDS. A contract for the sale of growing or standing trees is one concerning an interest in land, and is, therefore, within the statute of frauds, though there is a conflict of authority on the question; Note to Fish v. Capwell, 49 Am. St. Rep. 811. Standing timber is an interest in lands that may be acquired by deed, and the fact that the deed contains a provision that such timber must be removed within a definite period does not prevent the title thereto from vesting in the grantee: Mee v. Benedict, 98 Mich. 260; 39 Am. St. Rep. 543.

BECK & PAULI LITHOGRAPHING CO. v. HOUPPERT.

[104 ALABAMA, 503.]

FRAUD IN PROCURING CONTRACT—EFFECT OF.—If a party is induced by fraud and misrepresentation to sign a written instrument, which he did not know he was signing, and which he did not intend to sign, such instrument is void, although he did not read it, or have it read.

FRAUD IN PROCURING CONTRACT—SUFFICIENCY OF PLEA.—In an action to recover the price of goods sold under a written contract, a plea that the contract was procured by fraud is sufficient, and not demurrable, where it avers that the plaintiff's agent drew up the contract sued on, read it over to the defendant in the terms agreed upon, and, believing that the instrument was written as read, the defendant executed it, and where the plea then sets out the difference between the instrument the defendant signed and the one he meant to sign.

FRAUD IN PROCURING CONTRACT—BURDEN OF PROOF. The burden of proof is on the party who undertakes to impeach a written instrument for fraud to establish the fraud by clear and satisfactory evidence.

SALES—EVIDENCE IRRELEVANT AND INADMISSIBLE.—In an action on a contract to recover the purchase price of goods

sold, evidence as to the extent of defendant's business, and as to the quantity of goods annually consumed by him of the character purchased, or which would be suitable for his business, is irrelevant and inadmissible upon the issue involved.

Action to recover the purchase price of goods alleged to have been sold by the plaintiff lithographing company to the defendants under a written contract contained in a proposition to furnish stationery at certain prices, and which was accepted by the defendants. The plaintiff demurred to the two special pleas mentioned in the opinion on the following grounds: 1. That they showed that defendants were negligent in not reading over said contract before they executed the same; 2. That it was not alleged that the defendants, at the time of the execution of said contract, were illiterate and unable to read the same. These demurrers were overruled. The court rendered judgment for the defendants, and the plaintiff appealed.

Mountjoy & Tomlinson and Tarrant & Kronshage, for the appellant.

R. H. Pearson, for the appellees.

506 COLEMAN, J. The complaint contains several counts, some of which, are in the common form, and others upon a breach of a special agreement. The defendant pleaded a general issue and several special pleas.

The only assignments of error which arise upon the pleadings are to the ruling of the court, overruling plaintiff's demurrer to two pleas filed on the 9th of October, 1893. These two pleas were intended to answer the counts of the complaint based upon an alleged breach of a written agreement, and aver as a defense that the execution of the written agreement was procured by fraud. It is well settled that a person who signs an instrument without reading it, when he can read, cannot, in the absence of fraud, deceit, or misrepresentation, avoid the effect of his signature, because not informed of its contents; and the same rule would apply to one who cannot read, if he neglects to have it read, or to inquire as to its contents. In such case, ignorance of the contents is attributable to the party's own negligence: *Goetter v. Pickett*, 61 Ala. 387; *Pacific Guano Co. v. Anglin*, 82 Ala. 492; *Watts v. Burnett*, 56 Ala. 340; *Cannon v. Lindsay*, 85 Ala. 202; *Jones v. Cincinnati etc. R. R. Co.*, 89 Ala. 376; *Sheldon v. Carter*, 90 Ala. 380.

In these cases, it was held that the ignorance of the party was attributable to his negligence in not reading the instrument, or in not making proper inquiry of its contents, and

where there is an absence of fraud, deceit, or misrepresentation. But the rule is otherwise where its execution is obtained by a misrepresentation of its contents, the party signing a paper he did not know he was signing, and did not really intend to sign. It is immaterial, in the latter aspect of the case, that the party signing had an opportunity to read the paper, for he may have been prevented from doing so by the very fact that he trusted to the truth of the representation made by the other party with whom he was dealing: *Burroughs* ⁵⁰⁷ v. *Pacific Guano Co.*, 81 Ala. 255; *Johnson v. Cook*, 73 Ala. 537; *Foster v. Johnson*, 70 Ala. 249; *Davis v. Snider*, 70 Ala. 315; *Kinney v. Ensminger*, 87 Ala. 340.

The facts as averred in these pleas, show that the parties came to an agreement that plaintiff's agent drew up the writings, and then read them over to the defendants, in the terms agreed upon, and believing that the instrument was written as read over, they executed it. The pleas then show the difference in the instrument signed and the one he intended to sign. If these averments are true, the instrument was procured by fraud and misrepresentation, and is void. The demurrer was properly overruled.

The court permitted the defendants to testify as to the extent of their business, and as to how much stationery and materials of the kind, the subject of the litigation, were annually consumed by them. This was error. It was no part of the vendor's duty, under the facts of this case, to ascertain and determine, whether the character or quantity of the goods and articles offered for sale by them would be useful or beneficial to the trade and business of the purchaser. Nothing that he said was relied upon as an inducement to make the purchases, and there is no evidence that the vendor had any information on the subject. The question was directly settled in the case of *Shrimpton v. Brice*, 102 Ala. 655.

The case was tried by the court without the intervention of a jury, and, under the statute, this court has jurisdiction to render final judgment. The evidence is in such condition that we think the ends of justice would be better served by a reversal and remandment of the cause. Where the trial court has the opportunity to hear the witnesses and observe their manner of testifying, it has an advantage in weighing evidence which is not furnished to this court by the record. We will, therefore, forbear making any comment or criticism of the evidence, least what we say might have undue weight on another trial. It should

be borne in mind that the burden is on the party who undertakes to impeach a written instrument for fraud to establish the fraud by clear and satisfactory evidence.

Reversed and remanded.

FRAUD IN PROCURING CONTRACT vitiates it: *Finlayson v. Finlayson*, 17 Or. 347; 11 Am. St. Rep. 836. Where a deed or other instrument has been misread to the party executing it, or where some other imposition or circumvention has been practiced upon him, whereby he has been led to sign and seal an instrument which he never intended to sign, or where another instrument has been substituted for the one which he intended to execute, even a court of common law may treat the instrument as if it had never had any legal existence: See monographic note to *McArthur v. Johnson*, 93 Am. Dec. 596, on fraud which will avoid a deed at law. The burden is on a party attacking a contract as fraudulent to prove the fraud by positive or circumstantial evidence: *Giddings v. Steele*, 28 Tex. 733; 91 Am. Dec. 336. For special rules as to fraud in procuring the delivery of negotiable instruments, see *Willard v. Nelson*, 35 Neb. 651; 37 Am. St. Rep. 455, and monographic note thereto.

ALABAMA STATE LAND COMPANY v. THOMPSON.

[104 ALABAMA, 570.]

ALTERATION OF INSTRUMENTS—REMOVAL OF SUSPICION.—If any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection, or is made so by extrinsic evidence, the party producing it, and claiming under it, is bound to remove the suspicion by accounting for the alteration.

ALTERATION OF INSTRUMENTS—ALTERED DEED AS EVIDENCE OF TITLE.—A deed to land, confessedly valid when executed passes title, which is not divested by the grantee's subsequent unauthorized alteration of the deed in a material part, and the deed, though altered, may still be given in evidence to prove the conveyance and the existence of title in the grantee.

ALTERATION OF INSTRUMENTS—EVIDENCE—ADMISSIBILITY OF ALTERED DEED.—If a party claims title to land under a deed which shows an erasure of the reservation of the minerals in the land, it cannot be received as evidence of his title to the minerals, in the absence of a sufficient explanation of the erasure. Without such explanation, the deed must be deemed to have been taken as if it contained the erased words reserving title in the mineral deposits in the grantor; but the deed is admissible in evidence to show title in the grantee to the land described in it, excepting only the minerals in the land.

Ejectment brought by the appellant land company against the appellees, Thompson and others. The case was tried without a jury. There was a judgment for the defendants, and the plaintiff appealed.

Smith & Lowe, for the appellant.

Dortch & Martin, for the appellees.

571 McCLELLAN, J. This is an action of ejectment. The demise relied upon is laid in John Swan and John A. Billups, trustees, etc. The defendants in respect of a part of the land sued for—the northwest quarter of the southeast quarter, and the southwest quarter of the southwest quarter of section 23, township 11, range 6, lying in Etowah county, Alabama—claimed title through a deed from said Swan and Billups to Shaw, bearing date, March 13, 1878, and title in Swan and Billups having been shown by plaintiff, they offered this deed in evidence. Its introduction was objected to by the plaintiff on the ground “that it shows on its face that it has been mutilated, and upon the further ground that the clause, ‘minerals reserved’, in the deed has been erased by a pen.” This objection was overruled, the deed was admitted, plaintiff was cast as to this land, and reserving exceptions to this ruling and also to the judgment, which was without jury, now appeals to this court.

The original deed from Swan and Billups to Shaw accompanies this record for our inspection. It is a printed form prepared especially for conveyances by Swan and Billups, as trustees of the Alabama and Chattanooga railroad lands. In the body of this deed are four erasures of printed matter. It was in the contemplation of the draughtsman of this form that the lands would be sold for cash in part and on credit for the balance, and that purchasers would execute their notes for the deferred payments. Hence, in the form there is a reference to notes executed by the purchaser. But Shaw paid cash in full, as is shown by the recitals, and that part of the deed referring to the notes is erased. Again, the form contemplates a sale to two or more persons, and in it there is a reference to the purchasers, “or either of them.” Shaw was the sole purchaser in this instance, and, therefore, the words, “or either of them,” are erased. The other two erasures are of the words “minerals **572** reserved,” where they occur at two places in the form. The context of the deed fully explains the first two erasures, but not so in respect of the last two. And we feel safe in concluding affirmatively that the former were made at the time the printed form was filled out and before the execution of the deed. A presumption to like effect in respect to the latter would be indulged if it were not for certain suspicious facts apparent on the face of the deed, and the conclusions to which these facts force

as to the time of those erasures and by whom made. These facts and conclusions are: 1. That the erasures appear not to have been made with the same pen in the two classes of instances, the mark being much heavier upon the words "minerals reserved," certainly in one place, than in either of the other instances; 2. That the erasures are not made in the same way; in erasing the reference to notes and the words "or either of them," a single line only is drawn through them, but in one instance two or three, and in the other certainly three, lines are drawn through the words "minerals reserved"; 3. That the last erasure of the words "minerals reserved" appears to have been made after the blank deed had been filled out, inasmuch as the erasing lines pass over the top of the letter "S" in Shaw's name in the succeeding line; 4. That in the absence of explanation, we must conclude that these erasures were made after the others, and, therefore, after execution, and while the paper was in the possession of the defendants or Shaw, through whom they claim; and 5. The erasures being of benefit to the defendants, we must further conclude they were made by them or Shaw, and for a fraudulent purpose. Upon the face of the deed, therefore, suspicion attaches to the erasures of the words "minerals reserved," and so far from this suspicion being removed by evidence aliunde going to show that these erasures were made at or before execution, the only evidence adduced bearing on the question was that in behalf of the plaintiff to the effect that Shaw had made a written application for the sale of this land to him, and in it had embodied a reservation of the mineral interests, or, in other words, had proposed to buy and pay for all interests in the land except the minerals. This evidence goes strongly to support plaintiff's theory that the minerals were intended to be and were in fact, reserved in the sale and conveyance by Swan 573 and Billups to Shaw; and upon it, in connection with the circumstances of suspicion apparent on the face of the deed in respect of the erasures of the words of reservation, we have no hesitation in reaching the conclusion that the lower court erred at least in respect of rendering judgment for the defendants for the land including the minerals, or rather in not entering judgment for the plaintiff for the mineral rights and interests in the realty.

Whether the Shaw deed should have been received at all in evidence is another question. That it should not have been received as evidence of defendants' title to the minerals in the absence of sufficient explanation on his part of the erasures of

the words "minerals reserved," is, of course, clear, because, prima facie, the alterations in question being, upon the considerations to which we have adverted, of a suspicious character, evidenced by the face of the instrument, the deed, until the suspicions were removed by satisfactory explanation, was to be taken, if admissible at all, as if it contained the erased words which reserved title to the mineral deposits to the grantors. But whether the paper was evidence of Shaw's title to the land exclusive of the minerals is a more difficult question. It is a familiar law that the effect of an unauthorized alteration of an instrument in a material part, by one not a stranger to it, after its execution, ordinarily is the destruction of the paper, in such sort that no rights under it can be asserted, and no rights between the parties can be proved by it: Sharpe v. Orme, 61 Ala. 263; Hill v. Nelms, 86 Ala. 446; Barclift v. Treece, 77 Ala. 528; Anderson v. Bellenger, 87 Ala. 334; 13 Am. St. Rep. 46; Montgomery v. Crossthwait, 90 Ala. 553; 24 Am. St. Rep. 832; Saint v. Wheeler etc. Mfg. Co., 95 Ala. 362; 36 Am. St. Rep. 210; Hollis v. Harris, 96 Ala. 288. A paper so altered is no longer the paper which was signed by the party sought to be charged, and he cannot be held to the obligation originally evidenced by it. This is true in respect of all executory instruments; their destruction in this way is the destruction of the rights they were intended to secure and evidence. There is, however, a well-recognized distinction in this connection between this class of instruments and those which merely evidence a completed and fully executed transaction, and even between those parts of the same instrument which are, as to some matters, executory, and as to others, executed, in the sense of being ⁵⁷⁴ a mere memorial of an accomplished and existing fact. The distinction, so far as it has been fully recognized and established, goes only to this extent: Where the right is executory, and the instrument securing and evidencing it is thus altered, not only is the paper as evidence of the right destroyed, but the right itself is also destroyed; while, on the other hand, where the instrument merely evidences an executed transaction, and is a memorial of it, the rights which vested by virtue of that transaction in the person who spoliates the instrument are not thereby destroyed or divested, whatever may be the effect of the spoliation upon the memorial itself. There is some question whether the distinction goes further than this. Some courts hold that not only is the right which has passed by such an executed instrument unaffected by the kind of destruction of the paper—

as it would be unaffected by the physical obliteration of the paper—but also that the paper itself, eliminating the unauthorized alterations of it, continues to be a memorial of the right or title, and may be adduced in evidence to prove the passing and vesting of such right or title. The recognized distinction is fully illustrated in the case of an altered conveyance of realty containing covenants. The alteration does not divest the title which has passed by the instrument into the grantee, any more than the actual destruction of the paper would, but it destroys all the grantee's rights under the covenants, and also, of course, the paper as evidence of the covenants. And the mooted distinction turns upon the inquiry whether, in such case, the altered deed may still be adduced in evidence of the title which passed by it in its original form. The following cases hold directly or in principle that while a party does not divest himself of title to land by an unauthorized alteration in a material part of the deed by which it was conveyed to him, yet he cannot adduce such deed in evidence to prove such conveyance and the existence of title in himself, but must prove the conveyance by other evidence: *Babb v. Clemson*, 10 Serg. & R. 419; 13 Am. Dec. 684; *Withers v. Atkinson*, 1 Watts, 236; *Chesley v. Frost*, 1 N. H. 145; *Newell v. Mayberry*, 3 Leigh, 250; 23 Am. Dec. 261; *Bliss v. McIntyre*, 18 Vt. 466; 46 Am. Dec. 165; *Batchelder v. White*, 80 Va. 103. To the contrary in *Doe v. Hirst*, 3 Stark, 60, an altered deed, though said by the court, to be void, was admitted to show title in the party who had altered ⁵⁷⁵ it, because the alteration did not divest the title which had originally passed by the instrument. And the cases of *Jackson v. Gould*, 7 Wend. 364, and *Lewis v. Payn*, 8 Cow. 71; 18 Am. Dec. 427, tend to support the same view. In *Elphinstone's Interpretation of Deeds*, page 19, is this text: "There is a distinction between those deeds, or clauses of a deed, which have a continuing effect, or are executory, such as a covenant to pay a sum of money, and those which produce their full effect at the instant of execution, such as a conveyance of land. No case can be found in which a deed or clause of the latter nature has been prevented from having full effect because the deed was altered after execution; so that an altered deed may be given in evidence to prove any effect produced by it at the instant of execution, or of any right which existed aliunde of which it is evidence. . . . A deed which has been materially altered by a defendant may be given in evidence by him": Citing *Pattison v. Luckley*, L. R. 10 Ex. 330. And in *Insurance Co. v. Fitzgerald*, 16 Q. B.

440, Lord Campbell, C. J., said: "There is no ground for saying that, if a deed be altered in a material part it is rendered void from the beginning. It ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed or to prove any collateral fact." And to the same effect are the following cases: *Davidson v. Cooper*, 11 Mees. & W. 778; *Ward v. Lumley*, 5 Hurl. & N. 87; *Hutchins v. Scott*, 2 Mees. & W. 815, 816. This view, we conceive, is the more reasonable, and the sounder in principle. The contrary doctrine is based on the idea that a deed so altered is void *ab initio* and for all purposes. This cannot be true, for such deed is confessedly valid when executed, else title could not have passed by it. And all authorities agree that title does pass and is not divested by the subsequent alteration. All authorities agree, also, that, notwithstanding the unauthorized erasures or interlineation, it is open to the grantee named in the paper to show, by any competent evidence, the fact of the passing of title into him. In other words, he may and must show that a deed conveying the land to him was executed by the grantor named in the altered paper; he must prove the execution ⁵⁷⁶ and contents of a deed, and this, of course, by the best evidence the case admits of. He cannot resort to parol evidence of the contents of a paper which has not been lost or physically destroyed, but, on the contrary, is then in his possession and in court, the paper itself, regardless of a signature to it, would be the best evidence of its own contents. Nor can he resort to parol evidence to show execution of a paper which is in court, purports to be signed by the grantor, and which bears the solemn official certification required by the statutes, that the person whose name appears to be signed to it, admitted and acknowledged that he executed the instrument; the certificate of acknowledgment would itself be the very best and only competent evidence of the fact of the execution. It is upon him to prove a deed as that deed existed the moment after its execution was completed by delivery to him. He has that deed as it then existed, duly acknowledged, in his possession. Nobody questions it. All that is shown is, that certain words which were in the deed at that time have been marked across without authority. The words themselves are still visible and legible in the paper. His adversary says to him, The paper you have and offer, including the words you have attempted to erase, is my deed. He offers this

paper, including those words. Could there possibly be any better, or indeed any other competent, evidence of the contents of such a deed than the deed itself, or of its execution, than the statutory acknowledgment appended to it? We think not; and accordingly hold that the trial court did not err in receiving this deed in evidence to show title in the defendant to the land described in it, excepting only the minerals in said land.

To the other part of the land involved here, the defendant claimed title by adverse possession under color and claim of title for more than ten years before suit brought. We have carefully considered the evidence of such possession adduced on the trial, and upon it we concur with the trial court in finding the defense made out, and affirm the judgment in favor of plaintiff and in favor of defendant in so far as it relates to lands not mentioned in the Shaw deed.

As to the lands in suit mentioned in the Shaw deed, the judgment will be reversed and judgment will be ⁵⁷⁷ here rendered in favor of the plaintiff for all the minerals in the same.

One-half of the costs of appeal in this court and the court below will be paid by each of the respective parties.

Affirmed in part, reversed and rendered in part.

ALTERATION OF INSTRUMENTS—EVIDENCE.—Every alteration on the face of a written instrument detracts from its credit and makes it suspicious, and this suspicion the party claiming under it is bound to remove: Note to Warder etc. Co. v. Willyard, 24 Am. St. Rep. 253. The burden of explaining material alterations is upon the holder of an instrument so altered: Note to Warder etc. Co. v. Willyard, 24 Am. St. Rep. 253. Plaintiff who produces in evidence a deed as a muniment of his title, which appears upon its face to have been altered in a particular material to his interests and to the prejudice of the defendant, must establish by satisfactory evidence that the alteration was made at the time the instrument was executed, or it will be given effect to as read before the alteration was made: Galland v. Jackman, 26 Cal. 79; 85 Am. Dec. 172. An alteration is sometimes presumptively fraudulent: Warder etc. Co. v. Willyard, 46 Minn. 531; 24 Am. St. Rep. 250; other cases hold that in the absence of evidence to the contrary an alteration in a deed will be presumed to have been made contemporaneously with its execution: Note to Willard v. Ostrander, 37 Am. St. Rep. 304; and in some there is held to be a presumption of fact that an alteration was made after the execution: See monographic note to Woodworth v. Bank of America, 10 Am. Dec. 273, on alteration of instruments. But where there is any ground of suspicion, it will be generally a question for the jury to determine whether the alteration was made before or after the execution: Note to Woodworth v. Bank of America, 10 Am. Dec. 273.

HALL v. ALABAMA TERMINAL AND IMPROVEMENT Co.

[104 ALABAMA, 577.]

CREDITOR'S SUIT—ONE SUIT AS A BAR TO ANOTHER.—

A pending creditor's bill, filed by the complainant for himself, and all other creditors who may join therein, is no bar to another bill, filed afterward, but before a decree has been rendered in the cause, by another creditor of the same debtor, who did not make himself a party to the first bill; and a plea setting up the pendency of the first bill as a bar to the second is bad.

Bill in equity filed by the appellants Hall and others, against the improvement company and others. The object sought was to subject certain subscriptions, made by the defendants, to the capital stock of the Alabama Terminal and Improvement Company, to the payment of a judgment in favor of the complainants, on which judgment execution had been duly issued and returned by the sheriff "no property found." The right to maintain the suit was resisted by a plea in bar, setting up that at the time of the institution of the suit, there was pending in another court of competent jurisdiction, a suit against the same parties, which was instituted by a simple contract creditor filing a general creditor's bill predicated on the same facts alleged in the present suit and seeking substantially the same relief. The chancellor held that the plea was sufficient, and the complainants appealed.

W. A. Gunter, for the appellants.

J. M. White and W. S. Thorington, for the appellees.

579 COLEMAN, J. This appeal is prosecuted from the decree of the chancery court sustaining the sufficiency of a plea filed by appellees to the bill of appellant. There is but one question argued by the counsel for the appellee, and but one principle involved in this appeal, and that is, whether a pending creditor's bill, filed by the complainant for himself and all other creditors who may see proper to come in and make themselves parties, before a decree has been rendered in the cause, can be pleaded in bar to another bill filed by a creditor of the same debtor, and who has not made himself a party to the other proceeding. No case has been cited by counsel for appellee, in support of the contention, and we presume none can be found. In 2 Daniell's Chancery Practice, sections 1615, 1616, it is stated that, "there is no instance, however, in which a creditor at law has ever been stopped, unless there was a decree, giving him an absolute and unconditional right to come in and prove his debt

at once." In 1 Story's Equity Jurisprudence, section 549, the rule is thus stated: "As soon as the decree to account is made in such a suit, . . . *and not before*, the executor is entitled to an injunction," etc. Italics are ours: See also 4 Am. & Eng. Ency. of Law, 580.

We deem it unnecessary to accumulate authorities.

The court erred in holding that the plea was sufficient.

Reversed and remanded.

Brickell, C. J., not sitting.

CREDITOR'S SUIT.—All creditors may be joined in a creditor's suit; but one creditor may sue without bringing the other creditors before the court. To avoid inconvenience, however, from joining a great number of individuals as plaintiffs in the one case, and to avoid a multiplicity of suits in the other, courts of equity will allow one creditor to file a bill for himself and other creditors: Daniell's Chancery Pleading & Practice, 5th ed., 235; monographic note to Massey v. Gorton, 90 Am. Dec. 288-301, on creditors' bills and proceedings in equity in aid of executions.

MAYER v. THOMPSON-HUTCHISON BUILDING COMPANY.

THOMPSON-HUTCHISON BUILDING COMPANY v. MAYER.

[104 ALABAMA, 611.]

NEGLIGENCE—WHO ARE JOINTLY LIABLE.—One who superintends the construction of a building as agent of the contractor corporation, although he may be, in fact, an officer of the corporation, is jointly liable with the contractor, in an action on the case for an injury to a third person, resulting from culpable negligence in the construction of the walls of the building.

NEGLIGENCE—WHEN ERROR TO DIRECT A VERDICT.—It is error for the court, in any case of negligence, to direct a verdict where there is a conflict in the evidence as to material facts.

NEGLIGENCE—BUILDING—QUESTION FOR JURY—DIRECTION OF VERDICT.—In an action against one who superintended the construction of a building, for an injury caused by a brick falling from the top of one of the walls, alleged to have been the result of the negligent construction of the wall, the admitted fact that the brick fell, is, in the absence of some affirmative proof that the brick was made to fall by some external force, a circumstance or fact which the jury have the right to consider in determining the weight and credibility of the defendant's testimony that it could not have fallen without some external force. It is error, in such a case of conflicting evidence as to a material fact, to direct a verdict for the defendant, as this invades the province of the jury.

NEGLIGENCE—USE OF PROPERTY UNDER ONE'S CONTROL.—One is under a common-law obligation to so use that which he controls as not to injure another.

NEGLIGENCE—AGENT'S LIABILITY TO THIRD PERSONS. The mere relation of agency does not exempt a person from liability for any injury to third persons resulting from his neglect of duty through nonfeasance, for which he would otherwise be liable; and an agent cannot excuse himself on the plea that his principal is liable.

NEGLIGENCE—BUILDING—DUTY TO ERECT SAFEGUARDS—LIABILITY.—It is the duty of a contractor, in erecting the walls of a brick school building, adjacent to a schoolhouse and lot, occupied and used by teachers and pupils, to put on the outside thereof safeguards to prevent injury to persons having a right to be in close proximity to the walls. If this duty is neglected, and a person is injured by a brick falling from one of the walls before it is completed, the contractor cannot escape liability for his negligence upon the ground that it is not customary to erect safeguards on the outside of the walls, as they can be built with safety from the inside.

NEGLIGENCE—BUILDING—SAFEGUARDS, WHEN NOT EXCUSED.—A contractor, in erecting a building, is not excused from performing his duty to put safeguards on the outside of the walls during their construction by the fact that he cannot do so without occupying adjacent property, which he is forbidden to do by its owner; and his failure to construct them is culpable negligence, rendering him liable for injuries resulting from their absence.

NUISANCE—WHAT WILL NOT EXCUSE.—Pecuniary interest will not excuse a nuisance which endangers public safety.

NEGLIGENCE—BUILDING—FALLING BRICK—LIABILITY. If a brick falls from a wall, which is being built, by reason of a defect in its construction, and injures a person, the contractor is liable for negligence in constructing the wall; and if an employé allows, or causes, the brick to fall during the course of his employment, and there are no safeguards, the contractor is liable for resulting injuries, because he did not erect safeguards; but, after the wall is properly constructed and completed, the contractor is not liable for an injury caused by a brick falling therefrom in consequence of an intentional or negligent act of an employé, while not acting within the scope of his employment, although no safeguards had been erected, as the proximate cause of the injury, in such a case, is the act of such person, and not the failure to construct safeguards.

NEGLIGENCE—BUILDING—NONLIABILITY OF SURETIES ON CONTRACTOR'S BOND—EVIDENCE.—The sureties on a contractor's bond, given to the owner of a building, guaranteeing the faithful performance of the work provided for in the contract, are not liable in an action against the contractor for personal injuries resulting from the negligent construction of the building; and the bond, having no office to perform on the trial, is not admissible in evidence.

NEGLIGENCE—BUILDING—EVIDENCE—RECORD OF CONTRACTOR CORPORATION.—In an action against a contractor for personal injuries resulting from the negligent construction of a building, the record of the incorporation of the contractor, and the contract entered into for the construction of the building, are admissible in evidence.

NEGLIGENCE—BUILDING—EVIDENCE—PAYMENT OF MEN.—In an action against a contractor for personal injuries resulting from the negligent construction of a building, the court does not err in refusing to allow a witness to state whether the workmen on the building were paid by the number of brick they laid, or by the day, as this fact is most too remote to be considered in determining whether the building was properly constructed.

Action by Albert Mayer, suing by his next friend, to recover damages for personal injuries alleged to have been inflicted by reason of the negligence of the defendants, the Thompson-Hutchison Building Company, T. C. Thompson, W. H. Thompson, J. Harry Hutchison, and Henry Hutchison, in erecting a certain building. The defendants pleaded the general issue. The building company was a corporation. The other defendants were the only stockholders of the corporation, and were the directors of it. T. C. Thompson was its president, J. H. Hutchison, its vice-president and general manager, and W. H. Thompson, its secretary and treasurer. The only work that T. C. Thompson and W. H. Thompson did in and about the building was as the employes and officers of the building company. The mayor and aldermen of the city of Birmingham, through the school board of one of the public schools of that city, had contracted with the Thompson-Hutchison Building Company to erect a brick schoolhouse on property owned by the city, on which was then a frame structure occupied and used as a schoolhouse. The plaintiff, a boy twelve years old, was a pupil at that school. The wooden structure was moved from its site, and work was commenced on the new building which stood in its place. The two buildings were left about seven feet apart. The city built a high board fence between the old wooden structure and the new building, which fence was about five feet from the entrance to the old building, and about two feet from the nearest wall of the new building. The entrance to the wooden schoolhouse was at the side nearest the new structure, and while the pupils were standing in line, preparatory to entering the schoolhouse, some one from the top of the new structure exclaimed, "Look out!" as several bricks fell from the top of the new wall, which was sixty feet above the ground. One of the bricks struck the plaintiff on the head, and fractured his skull. This injury was permanent, and the boy suffered greatly from the effects of the wound. There was no scaffolding, safeguard, or protection of any kind between the old building and the new wall to prevent bricks from falling from the wall. Just what caused the bricks to fall was not shown, but the defendants' testimony tended strongly to show that they could not have fallen without being pushed out, or without the application of some external force. The plaintiff's evidence, which was not controverted, showed that a scaffold or staging could have been put up between the two buildings by projecting beams out of the window openings and putting planks thereon; that brick buildings were frequently

built from outside scaffolds constructed in this way; and that had such a scaffold been put up between the two buildings, it would have protected the pupils of the school from falling bricks while they passed in out of the old schoolhouse. But one of defendants' witnesses, an architect, testified that it was impracticable to have erected a scaffold on the outside of the wall, as the defendants had no control over the ground on the outside of the fence next to the old building; that it could not have been erected on the inside of the fence next to the new building; and that it was not customary, in the erection of brick buildings, to erect scaffolds on the outside of the wall. It was shown that the building company was a corporation, and the record of its incorporation, as well as the contract between it and the school board, was introduced in evidence. The plaintiff also put in evidence the bond made by the building company, guaranteeing that it would faithfully perform the work provided for in the contract. The plaintiff obtained a judgment against the building company for eight thousand dollars damages, but there was a judgment in favor of the other defendants. Cross-appeals were taken, the plaintiff and defendants each assigning errors.

Hewitt, Walker & Porter, for the Thompson-Hutchison Building Company, and others.

Ward & John, for Mayer.

619 COLEMAN, J. The Thompson-Hutchison Building Co., a corporation, contracted to erect a brick building in the city of Birmingham. Thompson, a corporator, and president of the corporation, as its agent and officer, controlled and directed the workmen in its construction. A brick, either without the application of force, or by force, fell from the top of the wall, which, in falling, struck the plaintiff below on the head, and greatly injured him. Thompson was not present, when the injury occurred, and was not otherwise liable than as an agent or officer of the company in charge. The first count of the complaint charges, that the defendants "did erect and build a certain building . . . in so careless, negligent, ⁶²⁰ and improper a manner, that by reason thereof certain brick fell from said building," etc. In the second count it is charged that the defendants "did erect and build a certain four story brick building, . . . to the height of sixty feet, without any scaffold, barrier, and safeguard to protect persons, . . . from brick falling from said building when it was their duty to do so," etc. The corporation and Thompson and the other corporators were jointly sued. The jury,

under the instruction of the court, returned a verdict against the corporation and in favor of Thompson. This statement of the case we deem sufficient to bring up the material question involved.

The first we will consider is, conceding that the facts tend to show negligence and a liability on the part of the contractor corporation, as averred in the complaint, is one who acts merely as an agent of the corporation (though he may be also in fact an officer of the corporation), in superintending and controlling the erection of the building for the contractor, jointly liable with the contractor in an action on the case for such negligence? If the proof had shown that the injury resulted from culpable negligence in the construction of the wall, the agent in control, by whose orders it was thus constructed, would be guilty of misfeasance, and jointly liable with the contractor. We think all the authorities are to this effect. The court instructed the jury to find the issue in favor of the defendant, Thompson. We will first consider the correctness of this charge as applied to the first count. All the witnesses who had knowledge of the facts testified that the wall was constructed in a workmanlike manner, and these witnesses and others, who gave expert testimony, swore that the bricks could not have fallen from any defect or imperfection in the wall or cornice. Nevertheless, the bricks did fall. A person was seen standing at the top of the wall near the place from which they fell, and was heard to say "Look out." The evidence does not show who this person was, and it seems he was not discovered, or, if so, he was not examined. Precisely what caused the bricks to fall is not positively shown. The defendants contend that the person seen near the place, from where they fell, must have pushed them off the top of the wall. This may be true, ⁶²¹ and it may be that the weight of the evidence tends to this conclusion, but, in the absence of some affirmative evidence that the bricks were pushed over, is not the admitted fact that the bricks fell, a circumstance or fact which the jury had the right to consider, in determining the weight and credibility of the defendants' testimony that they could not have fallen without some external force? The general affirmative charge should not be given in any case where there is conflict in the evidence as to material facts. We are of opinion the charge given was an invasion of the province of the jury. If the bricks were pushed over by some person, and did not fall in consequence of a defect in the wall, the defendants were not liable under the first count of the complaint. This conclusion is

based upon the assumption, which we think clearly established in the present record, that the brickwork on the wall had been completed, and that no person in the employ of the contractor, or under the control of Thompson, had any business at the time near the place of the wall from which the bricks fell. We think it clearly shown that if an employé or laborer pushed the bricks over, after the completion of the wall, whether done intentionally or negligently, it was an act not within the scope of his employment, nor was it done in the performance of any duty: *Wood on Master and Servant*, 535.

The second count charges the defendants with neglect in their failure or omission to erect scaffolds or guards, so as to prevent brick from falling to the ground. On this proposition, the defendant, Thompson, invokes the doctrine that an agent or servant is not liable for a mere omission or nonfeasance. The rule is stated as contended for in *Story on Agency*, section 308, and in *Story on Contracts*, section 171; and there are numerous decisions which fully sustain the text. There are courts of high authority which hold differently. Our attention has not been called to any decision of the question in this state, and, in declaring the law which shall govern, we have carefully considered both lines of decisions.

The principle upon which the rule is founded, as declared by *Story*, is, that there is no privity between the servant or agent and third persons, but the privity exists only between him and the master or principal. This relation ⁶²² of privity is that from which arises the maxim *respondet superior*. The liability of the principal or master to third persons does not depend upon any privity between him and such third persons. It is the privity between the master and servant that creates the liability of the master for injuries sustained by third persons on account of the misfeasance and nonfeasance of the servant or agent. It is difficult to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or nonfeasance, or to give a sound reason why a person who, while acting as principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty, because he was acting as servant or agent. The tort is none the less a tort to the third person, whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the

injury. We think the better rule declared in *Baird v. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504, in which it is held that "an agent of the owner of property, who has the complete control and management of the premises, and who is bound to keep them in repair, is liable to third persons for injuries resulting to the latter, while using the premises in an ordinary and appropriate manner, through the neglect of such agent. And the agent cannot excuse himself on the plea that his principal is liable. It is not his contract that exposes him to liability to third persons, but his common-law obligation to so use that which he controls as not to injure another": See notes to this case in 22 Am. St. Rep. 504. In *Ellis v. McNaughton*, 76 Mich. 237, 15 Am. St. Rep. 308, we find this language: "Misfeasance may involve the omission to do something which ought to be done; as when an agent, engaged in the performance of his undertaking, omits to do something which it is his duty to do under the circumstances; as that when he does not exercise that degree of care which due regard for the rights of others requires." In *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503, it is said: "It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The ⁶²³ corporation acts through and by them, and they act for the corporation, and when their acts or neglects result in injury to third persons, they are equally responsible with their principal." The rule is broadly stated in 14 *American & English Encyclopedia of Law*, 814. We might cite other decisions if deemed necessary. We hold, that the mere relation of agency does not exempt a person from liability for any injury to third persons resulting from his neglect of duty, for which he would otherwise be liable.

It is contended by the defendants: 1. That they were under no duty to erect scaffolding or safeguards to prevent brick from falling; and 2. That under the circumstances they had no right to do so. The first of these propositions is asserted under the evidence to the effect that it is not customary to erect scaffolding on the outside of the wall, and that the wall may be built from the inside with safety. The facts will appear in the statement of the facts of the case. Our conclusion is, that, for the purposes of this case, the defendants were as much bound to erect scaffolding or safeguards as if the wall had been along the sidewalk of a public street of the city of Birmingham. If, in the course of the erection of a brick wall along the sidewalk of a public street, the mason, being at work on the inside, should accidentally, or

from want of skill, let slip from his hand a brick, or inadvertently cause one to topple down, and it should fall on the head of some person passing along the public sidewalk, where he had the right to be, there being no safeguard or precaution to avert such a possible result, the principal or person would be liable. In such a case, the duty is so apparent, and the probable or possible danger so obvious, that no amount of testimony as to the usage or custom or comparative safety, would excuse such culpable negligence.

It is next contended by the defendants that it was impossible to erect a scaffold or safeguards without occupying the space between the wall and the construction and the building next to it, or by using the windows of the adjacent building, and that they were positively prohibited from using either by the owners. We do not think this any excuse. The defendants were under no compulsion to erect the building. They should have provided for such contingencies in their contract. No man can ⁶²⁴ with impunity use his own property or exercise any supposed rights or privilege in such way as to endanger the lives of innocent persons, in the exercise of a public right and privilege. Pecuniary interest will not excuse a nuisance which endangers public safety. It is unnecessary to cite authorities on this proposition.

The defendants, however, are not liable for any neglect of duty, unless such neglect was the proximate cause of the injury. So, in this case, if the defendant had completed the brick wall, had ceased to work on it, and some person, even though an employé, of his own accord, not acting under orders, nor within the scope of his duties, nor in furtherance of his employment intentionally or recklessly or heedlessly pushed the brick from the wall, which fell and caused the injury, the act of such person, and not the neglect to provide safeguards, would be the proximate cause of the injury, and he alone would be responsible.

There is no count counting on a willful or intentional wrong, nor do we think the evidence in the record authorizes such an allegation.

The main question of inquiry may be stated as follows: Did the brick fall because of a defect in the construction of the wall or cornice? If so, the defendants are liable under the first count; otherwise they are not liable under this count. Was it from a want of skill, or of due care, or from heedlessness or recklessness on the part of some employé at the time engaged within the scope of his duties or employment, that caused the brick to

fall, and not from a defect in the wall? If so, the defendants were liable under the second count of the complaint. On the other hand, were the bricks pushed off the wall by some employé, after the brickwork of the wall had been completed in a proper and workmanlike manner, whose duties did not call him there, and who, at the time, was not acting under proper orders, or within the scope of his duties, nor in furtherance of his masters contract? If so, whatever may have been his motive or the inducement, the defendants are not liable. The duty to construct scaffolding in such a case is to afford security and protection during the erection of the wall. If the wall has been fully completed without injury, the failure to construct scaffolding cannot be regarded ⁶²⁵ as negligence proximately causing injury, if the injury was caused by the fall of a brick, intentionally or heedlessly pushed off the wall after its completion.

The sureties as such on the bond of the contractor are not liable in this action, and the bond had no office to perform on the trial. We do not see that there was error in the admission of the record of the incorporation of the contractor, nor in the admission of the contract entered into for the construction of the building.

We do not think the court erred in refusing to allow the witness to answer the question as to whether Davis, the brick mason, was paid by the day or by the thousand of bricks put in the wall. It is possible that a person who is paid by the number of bricks he may place, instead of by the day, may be less careful in placing brick, but this fact is most too remote to be considered as tending to show that the wall was not properly constructed.

Nearly all the assignments of error in both appeals, are based upon charges given and refused. We deem it unnecessary to mention them in detail, as the principles of law governing the case have been plainly stated. There was error in the instructions given on behalf of the plaintiff, and error in those given for the defendants.

Reversed and remanded on both appeals.

NEGLIGENCE — BUILDINGS — SAFEGUARDS — FALLING BRICKS.—All persons who are required by an ordinance to construct a covered way next to a building which is being erected adjacent to a sidewalk in a city, are guilty of negligence if they fail to do so, and are liable to one traveling on the sidewalk, in the exercise of ordinary care, who is injured by reason of such negligence, as by the falling of a brick from the top of a partially completed building. There may be a liability for such an injury on account of the omission to construct barriers, although there was no negligence in suffering the brick to fall: *Smith v. Milwaukee etc. Exchange*, 91 Wis. 360; 51 Am. St. Rep. 912, and note. There is a

common-law obligation to so use that which one controls as not to injure another: *Baird v. Shipman*, 132 Ill. 16; 22 Am. St. Rep. 504. An agent or servant is responsible to third persons for injuries occasioned by his misfeasance, but not for those occasioned by his non-feasance: *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225; 48 Am. St. Rep. 911. An agent's liability for negligence is discussed in the monographic notes to *Baird v. Shipman*, 22 Am. St. Rep. 512, 514, on the personal liability of an agent to third persons; and *Greenberg v. Whitcomb Lumber Co.*, 48 Am. St. Rep. 913-928, on the personal liability of officers of corporations to third persons. Parties co-operating in the commission of an act tending toward a common end are jointly and severally liable for negligence concurred in by them, which results in injury to another: *Andrews v. Boedecker*, 126 Ill. 605; 9 Am. St. Rep. 649; monographic note to *Carterville v. Cook*, 16 Am. St. Rep. 250-257, on the negligence of two or more persons resulting in injury to a third; *Consolidated Ice-Machine Co. v. Keifer*, 134 Ill. 481; 23 Am. St. Rep. 688, and note. In case of conflicting evidence, on a question of negligence, the jury have a right to decide the character of the negligence: *Louisville etc. R. R. Co. v. Collins*, 2 Duvall, 114; 87 Am. Dec. 486.

MOLTON v. STATE.

[105 ALABAMA, 18.]

TO CONSTITUTE LARCENY there must be a felonious taking and carrying away of personal property. There must be such a taking that the accused acquires dominion over the property, followed by such an asportation or carrying away, as to supersede the possession of the owner; for an appreciable period of time.

LARCENY—TAKING OF POSSESSION NECESSARY.—Although an accused may, with intent to steal, have killed an animal, and may have been near enough to take possession and carry it away, yet the offense of larceny was not complete until the possession of the owner was severed by the taking of actual possession by the accused.

Indictment, trial, and conviction for the larceny of a hog, which the accused killed, but never took into his possession. The accused appealed.

J. G. Winter, for the appellant.

W. C. Fitts, attorney general, for the state.

19 BRICKELL, C. J. The indictment is founded on the statute (Crim. Code, sec. 3789), which declares the larceny of a hog, and of other domestic animals therein enumerated, a felony, without regard to the value of the animal. On the trial the court instructed the jury in these words: "If a man shoots the hog of another with the intent to steal it, and kills the hog, and takes possession of it, he is guilty of larceny; or if he gets near enough to the hog to exercise dominion and control over it, after the killing, with the intent to steal it, he is guilty of larceny."

thereof." An exception was reserved to the instruction as a whole, and a separate exception to the last clause or member commencing with the word "or." As a whole the instruction is not erroneous. The first clause or member hypothesizes every fact essential to constitute larceny. The intent to steal, and the consummation of the intent by the taking possession, which of itself includes an asportation, are the essential elements of the offense of larceny, however it may be defined or described. The last clause or member, however, seems to us erroneous. To constitute larceny there must be a severance of the possession of the owner and an actual possession by the wrongdoer. The severance of the possession of the owner, and the actual possession of the wrongdoer, may be but for a moment; the length of ²⁰ time they continue is not important; but as appreciable facts, they must exist: Roscoe's Criminal Evidence, 7th ed., 622; Frazier v. State, 85 Ala. 17; 7 Am. St. Rep. 21; Thompson v. State, 94 Ala. 535; 33 Am. St. Rep. 145; Wolf v. State, 41 Ala. 412; State v. Seagler, 1 Rich. 30; 42 Am. Dec. 404; State v. Alexander, 74 N. C. 232. That the wrongdoer may be in such position or condition as enables him to exercise the power of taking and carrying away the thing alleged to be stolen, is not sufficient. Until he avails himself of the position or condition, and exercises the power by the taking of possession, which, as we have said, involves an asportation, the offense is not complete, however evil may have been his intent.

In State v. Seagler, 1 Rich. 30, 42 Am. Dec. 404, an indictment for the larceny of a hog, the facts were, in all material respects, similar to the facts of the present case, and it was held, the offense was not complete unless the accused, after killing the hog, had taken possession of it. The court said, though the intent to steal was manifest, to constitute the offense, there must be a carrying away, a removal of goods from where they were, "and the felon must, at least for an instant, be in the entire possession of the goods." In State v. Alexander, 74 N. C. 232, the court said: "To complete the crime of larceny, it is not sufficient that the defendant had the control of the article, that is, had the power to remove it, but there must be an asportation of the thing alleged to have been stolen. It is true, a very slight asportation will be deemed sufficient, yet there must be some removal to complete the offense. The case here shows that there was no removal of the hog, but that it remained in situ, as it had been shot down." In Frazier v. State, 85 Ala. 17, 7 Am. St. Rep. 21, said Clopton, J: "It is said generally that to con-

stitute the offense, there must be a wrongful taking possession of the goods of another, with the intent to deprive the owner of his property, either permanently or temporarily. The accused must have acquired dominion, so as to enable him to take actual custody or control, followed by asportation, which severs the property from the possession of the owner to some appreciable extent." In *Thompson v. State*, 94 Ala. 535, 33 Am. St. Rep. 145, said Walker, J: "To constitute larceny, there must be a felonious taking and carrying away of personal property. There must be such a caption that the accused acquires dominion over the property, followed ²¹ by such an asportation or carrying away, as to supersede the possession of the owner for an appreciable period of time. Though the owner's possession is disturbed, yet the offense is not complete, if the accused fails to acquire such dominion over the property as to enable him to take actual custody or control." The accused may, with the intent to steal, have killed the hog, and may have been near enough to take possession and carry it away, yet, the offense of larceny was not complete, until the possession of the owner was severed by the taking of actual possession by the accused. If the expressions in the opinions in the cases of *Edmonds v. State*, 70 Ala. 8, 45 Am. Rep. 67, *Croom v. State*, 71 Ala. 14, to which we are referred, assert a contrary doctrine, we cannot adhere to them.

The last clause of the instruction is erroneous, and the judgment must be reversed and the cause remanded.

LARCENY—ASPORTATION.—The offense of larceny is not complete if the accused fails to acquire such dominion over the property as to enable him to take actual custody or control: *Thompson v. State*, 94 Ala. 535; 33 Am. St. Rep. 145, and note; *Frazier v. State*, 85 Ala. 17; 7 Am. St. Rep. 21. To constitute larceny, there must be some removal of the goods and the felon must at least for an instant be in entire possession of them: *State v. Seagler*, 1 Rich. 30; 42 Am. Dec. 404; *Harrison v. People*, 50 N. Y. 518; 10 Am. Rep. 517. See, also, the extended notes to *State v. Holmes*, 57 Am. Dec. 272, and *Wilson v. State*, 51 Am. Rep. 313.

SCOTT v. STATE.

[105 ALABAMA, 57.]

EVIDENCE OF GOOD CHARACTER is always admissible in a criminal case, and should be considered in connection with all the other evidence, but never independent of it, to generate a doubt of the guilt of the accused.

Indictment for murder. Conviction of murder in the second degree. Defendant appealed.

J. G. Finley and J. G. Winter, for the appellant.

W. C. Fitts, attorney general, for the state.

59 HARALSON, J. The charge on which we are requested to review this case asserts the proposition that proof of good character "may be sufficient to generate a reasonable doubt of guilt, although no such doubt would have existed but for such good character." It is clearly subject to the vice that it gives undue prominence to the proof of character: *Goldsmith v. State*, 105 Ala. 8; *Grant v. State*, 97 Ala. 35.

We would not impair the value of the proof of good character, in the trial of a defendant charged with crime. Let it be made, always for its full value, to be considered in connection with all the other evidence in the cause, but never independent of it, to generate a doubt of defendant's guilt.

Nor would we deny that there are cases where proof of good character may and ought to generate a doubt, when, without such proof, the jury would be satisfied of the defendant's guilt beyond a reasonable doubt.

The charge in hand, similar to the one in *Johnson v. State*, 94 Ala. 39, is subject to the further condemnation that it was calculated to convey to the jury the impression that they might consider the proof of good character by itself, independent of the other evidence, and that when so considered it might generate a doubt: *Springfield v. State*, 96 Ala. 81; 38 Am. St. Rep. 85; *Pate v. State*, 94 Ala. 18; *Barnett v. State*, 83 Ala. 45; *Williams v. State*, 52 Ala. 413.

There was no error in refusing to give said charge.

Affirmed.

CRIMINAL LAW—GOOD CHARACTER AS A DEFENSE.—Proof of the good character of the accused is admissible in all criminal cases, not only where doubt exists on the other proof, but also to generate a doubt. An instruction, however, should not be granted which leaves the jury to infer that the good character alone of one accused of murder might, if proved to their satisfaction, raise a reasonable doubt that the killing was done with criminal intent: *Spring-*

field v. State, 96 Ala. 81; 38 Am. St. Rep. 85, and note. Evidence of the general character of the defendant is admissible in his favor in all criminal cases in which intent is necessary to constitute the offense with which he is charged: Lincecum v. State, 29 Tex. App. 328; 25 Am. St. Rep. 727, and note. No precise or definite rule has been laid down by which to determine the weight to be given evidence of good character in prosecutions for homicide; but it would be going a long way too far to lay it down as a fixed rule that proof of good character is sufficient to raise a reasonable doubt in the minds of the jury, when, excluding such proof, the evidence is sufficient to satisfy them of the guilt of the accused: Wesley v. State, 37 Miss. 327; 75 Am. Dec. 62, and note. This subject will be found further discussed in the notes to O'Bryan v. O'Bryan, 53 Am. Dec. 134, and Wachstetter v. State, 50 Am. Rep. 98.

CHESTNUT v. TYSON.

[105 ALABAMA, 149.]

LANDLORD AND TENANT—LEASES—COVENANT FOR QUIET ENJOYMENT.—A guardian cannot bind his ward nor the ward's estate by a covenant for quiet enjoyment contained in a lease of the ward's land; but a guardian executing a lease containing such covenant binds himself individually and becomes personally liable for its breach.

LANDLORD AND TENANT—LEASES—COVENANTS FOR QUIET ENJOYMENT do not warrant against the wrongful eviction of the covenantee by a third person, nor afford any remedy for damages consequent upon such wrongful eviction; and if the gravamen of an action is an eviction by strangers to such covenant, the plaintiff must allege and prove that such third person had lawful title superior to that held by the covenantor at the time of the conveyance by him to the plaintiff, and the latter must also specify who are the holders of such paramount title.

CONVEYANCES—COVENANTS FOR QUIET ENJOYMENT.—In actions on covenants for quiet enjoyment the breach must be set forth particularly, and it is not sufficient to negative the words of the undertaking or to merely aver that the defendant has failed to comply with the undertaking.

LANDLORD AND TENANT—LEASES—COVENANTS FOR QUIET ENJOYMENT—BREACH OF A NOTICE.—If a tenant is evicted under a judgment obtained by a stranger having a paramount title, and brings an action against the landlord to recover for a breach of a covenant for quiet enjoyment contained in his lease, it is not necessary to the maintenance of the action that the tenant aver and prove that he notified the landlord of the pendency of the action under which he was evicted.

LANDLORD AND TENANT—LEASES—BREACH OF COVENANT FOR QUIET ENJOYMENT—EVICTION—NOTICE OF SUIT.—If a tenant evicted under a judgment obtained by a stranger having title paramount to the landlord, brings an action against the landlord upon a breach of covenant for quiet enjoyment contained in the lease, and seeks to recover special damages for expenses incurred in defending the action under which he was evicted, he must allege and prove, in order to maintain his action, that he gave the landlord certain and explicit notice, either oral or in writing, of such action resulting in his eviction, and that he expressly requested him to attend and defend such action.

LANDLORD AND TENANT—LEASES—BREACH OF COVENANT FOR QUIET ENJOYMENT—PLEADING.—An allegation by a tenant in an action against his landlord to recover for a breach of covenant for quiet enjoyment contained in his lease, that he was evicted from the leased premises under judgment and writ of restitution issued in an action by strangers claiming their right of possession and title under and through such landlord, and that said judgment was obtained and plaintiff evicted under title paramount to that of the landlord, is insufficient as an averment of breach of covenant, or of title paramount in the strangers at the time of the execution of the lease.

PRACTICE—ERRONEOUS RULING ON DEMURRER.—If, by a ruling on demurrer, the plaintiff is compelled to proceed to trial on an amended complaint, he has the right to insist upon appeal that such ruling was erroneous and to have the judgment reversed on account of it, unless it affirmatively appears that he was not prejudiced by the action of the trial court.

LANDLORD AND TENANT—LEASE—COVENANT FOR QUIET ENJOYMENT—BREACH OF AND RIGHT TO RECOVER FOR.—If, in an action by a tenant to recover for the breach of a covenant for quiet enjoyment contained in the lease, the gist of the action is the deprivation of the possession and use of the leased premises for a part of the term embraced in the covenant, the fact alone that the tenant was deprived of such possession under a judgment of eviction in an action of unlawful detainer, does not deprive him of the right to maintain his action, provided the other elements essential to the maintenance of the action are sufficiently alleged and proved.

Gamble & Powell, for the appellant.

J. M. Chilton and Lomax & Ligon, for the appellee.

157 McCLELLAN, J. This action is prosecuted by Chestnut against M. M. Tyson on a covenant for quiet enjoyment contained in a lease of a plantation by said Tyson to said Chestnut. The lease is in the following words: "This indenture made this the 9th day of November, 1889, between M. M. Tyson, guardian of S. L. Tyson, of the first part, and J. C. Chestnut of the second part, witnesseth: that said M. M. Tyson does hereby lease and release unto the said J. C. Chestnut for a term of four (4) years from (beginning January 1st, 1890, ending January 1st, 1894) the plantation in Lowndes county, Alabama, known as the Ewing Place, being a portion of the old Simonton Place, near Calhoun, Ala., and containing **158** about 840 acres of land, for a total rental of fifty-eight (58) bales of cotton, divided into the following annual payments, to wit, 14 B. C. Oct. 1st, 1890; 14 B. C. Oct. 1st, 1891; 15 B. C. Oct. 1st, 1892; 15 B. C. Oct. 1st, 1893, as evidenced further by the four (4) notes of said Chestnut to said Tyson covering the amounts and payments as above; said cottons are to class strict low middlings, to weigh an average of five hundred pounds per bale, and to be delivered at Calhoun station in merchantable shape, at the proper time, free

from drayage. The said M. M. Tyson guarantees to said Chestnut the peaceful and legal possession of the place above mentioned for the time specified, and agrees to build four (4) new tenement houses on the place at once. Said Chestnut agrees that he will not clear any lands except such as are hereafter agreed upon, and agrees further, at the expiration of the period, to return the plantation to said M. M. Tyson, or her legal representative, in as good condition as at present, natural wear and tear excepted." This instrument is signed by said Tyson and Chestnut, and properly witnessed.

1. The original complaint set out the lease in full, and claimed four thousand dollars damages from M. M. Tyson individually for an alleged breach of the covenant for quiet enjoyment, and also fifty dollars damages for costs paid and trouble, loss of time, etc., in an action of unlawful detainer by which the plaintiff was evicted. One of a number of grounds of demurrer assigned to this complaint raised the point that M. M. Tyson was only liable, if at all, in the capacity of guardian of S. L. Tyson; and this, with all other assignments of demurrer, was sustained by the circuit court; and the plaintiff thereupon amended the complaint so as to claim against Mrs. Tyson as such guardian. This objection to the original complaint was not well taken. Assuming that the complaint showed that the lease and covenant were executed by the defendant, as guardian of S. L. Tyson, which is by no means clear, it does not follow that she is liable on the covenant only or at all in her fiduciary capacity. To the contrary, quite the reverse is true. The covenant is a general one for quiet enjoyment. By it the covenantor warranted peaceful possession in the lessee for the term of the lease, not only against any act that had been committed by her, but also against her own future ¹⁵⁹ acts, and against the lawful acts of all other persons soever. This she was without competency to do as guardian, or so as to bind the estate of her ward. She had power as guardian to enter into only such covenant as is usual between fiduciary grantors, such as executors, administrators, trustees, and guardians, and their grantees; and the usual covenant in such cases, the only covenant which such grantees may demand, is that the grantors themselves have neither done nor knowingly suffered any act whereby or in consequence whereof the title or estate conveyed may be encumbered, impeached, charged, destroyed, or affected: Rawle on Covenants, sec. 33.

2. But when fiduciary grantors go beyond this, and enter into general covenants, such as is the covenant for quiet enjoyment in

this lease, while they fail to bind the cestui que trust and the trust estate, they do bind themselves personally; and such covenants stand upon the same footing as if the subject matter of the grant or lease had been held by them in individual right and title: Rawle on Covenants, secs. 34-36; 9 Am. & Eng. Ency. of Law, 112, note 3; Bloom v. Wolfe, 50 Iowa, 286; Sumner v. Williams, 8 Mass. 163; 5 Am. Dec. 83; Craddock v. Stewart, 6 Ala. 77; Stoudenmeier v. Williamson, 29 Ala. 558; Sanford v. Howard, 29 Ala. 684; 68 Am. Dec. 101; St. Joseph's Academy v. Augustini, 55 Ala. 493. And this doctrine applies fully to general covenants of guardians on sales and leases of the land of their wards: Foster v. Young, 35 Iowa, 27; Whiting v. Dewey, 15 Pick. 428; Heard v. Hall, 16 Pick. 457. The circuit court, therefore, erred in sustaining this assignment of demurrer to the complaint. Whether the presumption of injury arising from this erroneous ruling is rebutted by any part of the record before us, as is in effect insisted by counsel for appellee, will be considered further on.

3. General covenants of warranty and for quiet enjoyment, however broad their terms, have certain well-defined limitations within which the pleader, counting on a breach, must bring his case, or else he shows no cause of action. One of these limitations is, that a covenant for quiet enjoyment gives no assurance against the wrongful eviction of the covenantee by a third person, nor affords any remedy for damages consequent upon such wrongful eviction. If, as in this case, the ¹⁶⁰ gravamen of the action is an eviction by strangers to the covenant, it must be averred and proved that such third persons had lawful title superior to that held by the covenantor at the time of the conveyance by him to the plaintiff: Rawle on Covenants, sec. 127; Hayes v. Bickerstaff, Vaughan, 118; Beebe v. Swartwout, 3 Gilm. 180. The original complaint contains no such averment. After setting out the lease, it continues: "And the plaintiff says that, although he has complied with all the provisions of said contract on his part, the defendant has failed to comply with the following provisions thereof, viz: 1. 'The said M. M. Tyson guarantees to said Chestnut the peaceful and legal possession of the place above mentioned for the time specified'; 2. And plaintiff further alleges that the defendant has failed to comply with the provisions of said contract in this, that," etc., setting out the covenant and averring that plaintiff went into possession of the leased premises and so remained until January 23, 1891, "when he was forced to surrender the same under a judgment and writ

of restitution rendered and issued in a suit of unlawful detainer," prosecuted by certain named third persons against this plaintiff, "and that the defendant was notified of said suit, but failed to defend the same, and plaintiff was forced to surrender said place, and by the act of the defendant was deprived of the peaceful and legal possession of said lands," etc. There is a notable absence here of all averment that this eviction was upon paramount title, or upon any title, whether paramount to the title of the defendant or not. For aught that is averred, the eviction, though upon judgment in unlawful detainer, may have been wrongful; and this is in a way shown affirmatively by the inference which the complaint affords that the covenantor could have defeated that action had she appeared and defended it. Again, for aught that is here stated, the eviction of the plaintiff by the judgment in that action might well have been upon a title or right of possession on which he himself had granted out of his term, in which case, of course, though not wrongful, the eviction would not be within the covenant. This, which is the second assignment of breach of the covenant, is therefore, wholly insufficient; it states no cause of action.

4. The first assignment of breach is the mere negation ¹⁶¹ of the words of the covenant, that "the defendant has failed to comply" with its terms. This is not enough. In actions on covenants of warranty and quiet enjoyment, though otherwise in respect of covenants of seizure and right to convey, the breach must be set forth particularly, and it will not suffice to negative the words of the undertaking or to aver merely that the defendant has failed to comply with the terms of the undertaking: *Rawle on Covenants*, sec. 155; *Blanchard v. Hoxie*, 34 Me. 378; *Mills v. Rice*, 3 Neb. 76; *Morgan v. Henderson*, 2 Wash. Ter. 367; *Banks v. Whitehead*, 7 Ala. 83; *Copeland v. McAdory*, 100 Ala. 553.

5. The complaint claims also a further sum of fifty dollars special damages for the breach of said covenant, in that, on January 5, 1891, S. J. Chestnut and other named persons brought an action of unlawful detainer against the plaintiff for the leased premises, that the defendant "was notified to come and defend said suit, but failed to do so," and that afterward a judgment was rendered in said suit against the plaintiff, and, under a writ of restitution issued upon said judgment, the premises were taken from the possession of the plaintiff; and that plaintiff was forced to pay a judgment of twenty-five dollars and costs, ad-

judged against him in said suit, and that he sustained damages in other sum of twenty-five dollars on account of loss of time attending court in respect of said suit, etc. This averment of a breach of the covenant is open to the same objection pointed out above to the first and second assignments of breach. It is not averred that the plaintiff was evicted by lawful title in the plaintiffs in the unlawful detainer action existing at the time the lease was executed by Mrs. Tyson.

6. This count or assignment of breach is further assailed for insufficiency by the demurrers, on the ground that it does not aver the notice given the defendant was in writing. On the general question of notice it is proper, in view of some of the assignments of demurrer, to observe here that, to the recovery of ordinary damages for the breach of a covenant of warranty or for quiet enjoyment, it is not essential that the plaintiff should allege or prove that he notified the defendant of the pendency of the suit in which there was judgment of eviction on title paramount, for if he was evicted by a paramount title, ¹⁶² and can so prove in an action on the covenant, it is wholly immaterial whether the defendant was notified of, and invited to defend, that action, or indeed whether any such action was ever prosecuted. But where there is an action for the land involving the title of the covenantor, and the covenantee notifies him of its pendency, and invites him to its defense, then the judgment in that action, whether the covenantor accepts the invitation and makes defense or not, will be conclusive upon him as to the superiority of the title therein asserted over his title; and the plaintiff need only to adduce such judgment, with proof that the title involved was not derived from himself, to establish that the title to which he yielded was paramount to the title of the defendant. But, as in the absence of notice to come and defend the judgment will not conclude the defendant, and the plaintiff will be put to evidence aliunde of the paramount character of the title under which he was evicted, the effect and only advantage of such notice "is simply to enable the covenantee to recover on less testimony, since he is then not obliged to show under what title the recovery was had, except that it was not a title derived from himself since the purchase." And the giving of the notice having thus only an effect upon the character of evidence by which the cause of action is to be proved, and neither its presence nor absence having any influence upon the cause of action itself, it is never necessary to aver notice at all when the effort is to re-

cover damages only for the deprivation of the subject matter of the covenant: Rawle on Covenants, sec. 124; Sugden on Vendors, 612; *Bever v. North*, 107 Ind. 544.

But there is diversity of opinion as to whether notice to defend must be alleged and proved as an essential part of the cause of action when it is sought to recover special damages for expenses incurred, pains and trouble and loss of time suffered in defending the action wherein the covenantee was evicted of the premises to which the covenant pertains. Perhaps the greater number of adjudged cases hold that such damages are recoverable though the notice was not given: See *Morris v. Rowan*, 17 N. J. L. 306. The considerations which underlie the opposite view, however, are to our minds more satisfactory, and we shall adopt that conclusion. These considerations are well stated by the Maryland court of 1863 appeals as follows: "There is some conflict in the cases as to the right to recover counsel fees paid in defending the ejectment. [And other legitimate expenses in that behalf stand upon the same footing.] It is the duty of the covenantor and those bound by the covenant, upon receiving notice, to defend the covenantee's title, and upon their refusal or neglect to do so it is clear that the latter would have the right to employ counsel for that purpose, and to recover, in an action on the covenant, such reasonable fees as they had been compelled to pay. But as the appellees did not give such notice, but voluntarily undertook to defend the title, they have no right to recover the counsel fees which they have paid. Had notice been given to the appellants they might have thought proper to defend the suit and employ their own counsel, or they might have come to the conclusion that the title of the plaintiff in the ejectment could not be successfully resisted, and they might, therefore, have determined not to incur a useless expense in making a defense, and preferred to perform their covenant by paying to the appellees the amount of damages to which they might be entitled": *Crisfield v. Storr*, 36 Md. 129, 151; 11 Am. Rep. 480. Of course, this rule would not apply to such of the costs of the ejectment suit as would be adjudged against the defendant therein, though no defense were made, as upon default for instance; and these, we apprehend, might be recovered on the covenant, notwithstanding notice to the covenantor had not been given, since it is only the expenses of defending the suit which he would have upon notice the election of incurring or not.

8. The special damages claimed in the second count or third assignment of breach of the original complaint would not, there-

fore, be recoverable, even if the claim were otherwise sufficiently stated, unless notice of the suit whereby the plaintiff was evicted was given the defendant and he was requested to defend it. Speaking to the assignments of demurrer which bring in question the sufficiency of the averment of notice, without reference to the insufficiency of this part of the complaint in other respects, it becomes necessary to determine whether such notice should be in writing. Here again there is sharp conflict in the authorities, with perhaps a preponderance of the adjudged cases supporting the negative of ¹⁶⁴ the proposition: Rawle on Covenants, sec. 119. The question is *res integra* in Alabama. It would doubtless be the better practice in all cases for such notices to be written, but this is, it seems to us, a matter of convenience and not of principle. All that is requisite in such cases is, that the covenantee shall, in unequivocal, certain, and explicit terms advise the covenantor of the pendency of the action and request him to defend the same. That this may be as well done by word of mouth as by writing there can be no doubt. The only advantage which the written notice has over a verbal one is in respect of subsequent proof that a notice has been given and its contents; and if the verbal notice and its terms are proved with certainty, as, of course, it may well be in a given case, this advantage disappears. The plaintiff takes the greater risk of being able to prove the verbal notice, but if he does prove to the satisfaction of the jury that a verbal notice was given, and that it was in the terms which the trial court instructs them are requisite, there is no reason, we conceive, that such notice, so proved, should not be as efficacious as one in writing. The count of the complaint or assignment of breach under consideration is not, in our opinion, open to the objection taken by the demurrers in respect of its failure to allege that the notice given was in writing.

9. But the notice, as we have seen, whether oral or written, must be certain and explicit, and it must also be given by the covenantee to the covenantor, and it must contain an express request or requirement that the latter defend the title he has warranted. Mere knowledge on the part of the covenantor of the pendency of the suit will not suffice. Notice by a third person other than an agent of the covenantee will not do. And even notice by the covenantee, unaccompanied by an invitation to the covenantor to attend the trial, it seems, will not meet the requirements of law. It follows that the notice alleged here is insufficient because it does not appear to have been given by

the covenantee. The averment is, that "the defendant was notified," etc. This averment is insufficient: *Paul v. Witman*, 3 Watts & S. 407, 410; *Miner v. Clark*, 15 Wend. 424; *Somers v. Schmidt*, 24 Wis. 421; 1 Am. Rep. 191; *Collins v. Baker*, 6 Mo. App. 588.

10. So much with reference to the original complaint and the demurrers thereto. After all these demurrers ¹⁶⁵ had been sustained by the court, the plaintiff amended his complaint by changing the action against M. M. Tyson individually into an action against her as guardian of S. L. Tyson, and by adding a new count. This count sets out the lease as in the original complaint, and contains several distinct attempts to assign a breach of the covenant for quiet enjoyment. The first of such assignments is the same as the first assignment in the original complaint, and is wholly bad, for the reasons already given. The second assignment not only fails to aver that the plaintiff was evicted by title paramount to the title he acquired from the defendant, but affirmatively shows that the title conveyed to him by the defendant was superior to the title of his evictors, in that it is alleged that the eviction resulted solely from the failure of the defendant to come and defend that action. The third assignment of breach is open to the same construction, and is also bad for omission of averment that the eviction was by title paramount. There is in this assignment an averment that the plaintiffs in the action whereby this plaintiff was evicted "claimed their right of possession to said lands under and through the defendant." This is insufficient, and would be, even had the averment been that those plaintiffs claimed title under and through the defendant, for such averment would be filled by proof of a subletting by the covenantee to the plaintiffs in the action of unlawful detainer; a title rested upon such sublease would be a title under and through the defendant by mesne conveyances. And an eviction upon such title, of course, would not be a breach of the covenant: *Norman v. Foster*, 1 Mod. 101.

11. The fifth assignment of the breach, after stating the covenant, continues thus: "Plaintiff remained on said place under said contract of lease until, to wit, the twenty-third day of January, 1891, when he was prevented from further occupying the premises by the acts of certain persons taking possession of said land, claiming the right to do so under the defendant, and by the conduct and acts of said parties claiming under the defendant the peaceful and legal possession of plaintiff under said lease was destroyed." In addition to the defects in assignment

3, pointed out above, this one is further at fault in that eviction, actual or constructive, upon a mere claim of adverse right or title, is not a breach of the covenant. ¹⁶⁶ The evictors must not only claim paramount title but they must prove it. "Habens titulum," said Chief Justice Hale, "would have done your business": *Norman v. Foster*, 1 Mod. 101.

12. The fourth assignment of breach of the covenant in the amended complaint is in the following words: "In and by the terms of said contract, the defendant guaranteed to the plaintiff the peaceful and legal possession of said premises and lands, therein described from, to wit, January 1, 1890, to January 1, 1894, that plaintiff remained on said place under said contract until, to wit, the twenty-third day of January, 1891, when he was evicted from the same under a title which was paramount to the title of the defendant." And another assignment, numbered 5½, avers that the plaintiff was forced to surrender possession of the demised premises on a day certain pending the term under a judgment and writ of restitution rendered and issued in a suit of unlawful detainer prosecuted against him by S. J. Chestnut and three other named plaintiffs, and "that said judgment was obtained, and this plaintiff was evicted from said premises, under a title which was paramount to the title of the defendant." In passing upon the sufficiency of these assignments, some observations upon the requirements of good pleading, under our somewhat relaxed system, in respect of the particularity with which the paramount title must be stated, will be necessary. In general, it may be said that it is unnecessary to go further in averment than to substantially set forth the paramount title by an eviction under which the covenant sued on is broken. And while, of course, a complaint could not be bad for extreme particularity in this respect, a resort to it might be very embarrassing to the plaintiff when he is put to his proofs, and, being unnecessary, it is imprudent to aver such title with minute precision: *Rawle on Covenants*, sec. 86. The paramount title could not, however, be said to be substantially set forth unless there is an averment identifying the holders of it; it must, at least, appear who had and asserted the superior title; and for the absence of such averment assignment No. 4 is clearly bad, but that number 5½ is not objectionable on this ground. Moreover, it must, as we have seen, be averred that the title relied on as working a breach of the covenant, through eviction under it, was ¹⁶⁷ a lawful title. And further, inasmuch as no eviction under a title emanating from the covenantee would be a breach of the cove-

nant, and as no title emanating from the covenantor after the conveyance to the covenantee could be a lawful title to the estate or interest which had passed into the latter, it must be alleged in terms or substance that the lawful title under which eviction was had existed at the time of the conveyance to the plaintiff. "But having averred that the interruption was made under lawful title, existing before and at the time of the conveyance to the covenantee, it is not necessary that that title should be set forth particularly": Rawle on Covenants, sec. 155; Naglee v. Ingersoll, 7 Pa. St. 205; Frost v. Earnest, 4 Whart. 86; Crisfield v. Storr, 36 Md. 148; 11 Am. Rep. 480; Proctor v. Newton, 2 Liv. 37; Buckley v. Williams, 3 Liv. 325; Banks v. Whitehead, 7 Ala. 83.

13. The last of the assignments now under consideration substantially alleges that the title to which the plaintiff was forced to yield was in S. J., N. F., E. B., and J. B. Chestnut; and it is otherwise sufficient if it shows that this title existed at the time the lease was executed by Mrs. Tyson. The averment in that regard is, that said title "was paramount to the title of the defendant." Is this the equivalent of the averments that the title of S. J. Chestnut et al. was a lawful title, and that it existed before and at the date of the lease? As a title could not be paramount in relation to another claim of title which, but for such alleged paramount title, would itself be good, unless it were a lawful title as against such claim, we take it that the averment here sufficiently shows that the title of S. J. Chestnut and others named was a lawful title. But not so, we think, so far as regards the existence of such lawful title before and when the lease was made. The question here is, not who owned the fee in the land, but who had title to the term which M. M. Tyson demised to the plaintiff, and this at the time of the demise. If the defendant owned this term when she executed this lease, her title for all the purposes of this case was paramount, and by the lease this title passed into the plaintiff. If she also had title in fee or for a larger term of years, the lease may well be said to be paramount, in respect of this term, to her title. And if the lease were assigned and the lessee evicted by his assignees, it could, in such ¹⁰⁸ case, be said, as it is said in this assignment of breach, that the title of the evictors was superior to the title of the lessor to the term. These considerations, it is thought, demonstrate the inadequacy of the averment under consideration. It does not exclude the conclusion that the title under which the plaintiff was evicted emanated from himself.

14. There are a number of other assignments or attempted assignments of breach of the covenant in this lease, but each of them is subject to one or another, or more than one, of the grounds of demurrer which we have sustained to the assignments specially considered. A great many assignments of demurrer are without merit; but those which were properly sustained below left the plaintiff without a cause of action before the court, and hence there should be an affirmance but for the ruling of the circuit court upon the original complaint whereby the plaintiff was forced to proceed, if at all, against M. M. Tyson as guardian of S. L. Tyson. The compulsory amendment by which this change was wrought did not deprive the plaintiff of the right to insist on appeal that that ruling was erroneous, and to have the judgment reversed on account of it, unless it affirmatively appears that he was not prejudiced by that action: *Williams v. Ivey*, 37 Ala. 242; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; 56 Am. Rep. 31.

15. We find nothing in this record to rebut the presumption of injury which arose upon the erroneous ruling of the court whereby the plaintiff was forced to proceed, if at all, against the defendant as guardian. So proceeding, it was upon him to aver an eviction by a lawful title, existing at the time of and before the lease, paramount to her title as such guardian, that is paramount to the title of her ward, represented by her. This he has not averred, and as the necessity to so aver was pointed out to him by the court's rulings or other assignments of demurrer, it must be that the omission is due to his inability to make and substantiate such averment. It may well be, however, that the averment of ouster by a paramount title, etc., could have been made against M. M. Tyson in her individual capacity, and such averment might, for aught we can know, have been open to support by proof of eviction under the title of the ward of the defendant. For all that appears, ¹⁶⁹ therefore, this ruling on demurrer might well have made it impossible for the plaintiff to state a cause of action at all, though but for it, that is, had he been allowed his right to proceed against M. M. Tyson individually, we cannot say but that he had, and could have alleged, a case authorizing recovery.

16. The gist of plaintiff's action is the deprivation of the possession and use of the leased premises for a part of the term embraced in the covenant for quiet enjoyment. The paramount title which he must show is such title or right as will draw to it the possession in question; it is really the right of possession

and not title in a strict sense that is involved. If the plaintiff was ousted under a lawful possessory right, whether deriving its efficacy from title to the freehold or in fee or not, existing, potentially even, at and before the time of the lease, paramount to the title or right of possession for the term then in M. M. Tyson, it is of no manner of consequence that this superior right was of a nature to be asserted and in fact was asserted in the possessory action of unlawful detainer. If the right to the possession was in truth paramount to the right of possession which the plaintiff took from M. M. Tyson, he might safely yield to it without suit of any kind, and recover his damages on the covenant for quiet enjoyment. Hence our opinion that all which is said by the demurrers and in briefs of counsel about the eviction being by judgment in unlawful detainer, where ordinarily title is not involved, etc., is of no importance.

The judgment of the circuit court is reversed. The cause will be remanded.

Covenant for Quiet Enjoyment.

Leases — Covenant Implied.—Although a lease does not contain an express covenant for the quiet possession and enjoyment of the demised premises during the term, the law always implies it, and it is the condition on which the rent is payable: *Abrams v. Watson*, 59 Ala. 524; *Mack v. Patchin*, 42 N. Y. 167; 1 Am. Rep. 506; *Knapp v. Marlboro*, 29 Vt. 282; *Avery v. Dougherty*, 102 Ind. 443; 52 Am. Rep. 680; *Berrington v. Casey*, 78 Ill. 317; *Duncklee v. Webber*, 151 Mass. 408; *Baughner v. Wilkins*, 16 Md. 35; 77 Am. Dec. 279. The law always implies in leases a covenant against paramount title, and against such acts of the landlord as destroy the beneficial enjoyment of the premises. This implied covenant, however, extends only to the acts of the lessor, or of those claiming under him. It does not extend to the acts of strangers without lawful title: *Abrams v. Watson*, 59 Ala. 524; *Wade v. Halligan*, 16 Ill. 507; *Berrington v. Casey*, 78 Ill. 317. The words "grant" and "demise" in a lease always create an implied covenant for quiet enjoyment: *Scott v. Rutherford*, 92 U. S. 107; *Barney v. Keith*, 4 Wend. 502; and a covenant in a lease, that the lessee shall "hold and occupy" the demised premises during the term, amounts to a general covenant for quiet enjoyment during the term: *Ellis v. Welch*, 6 Mass. 246; 4 Am. Dec. 122; *Midgett v. Brooks*, 12 Ired. 145; 55 Am. Dec. 405.

While the law implies an undertaking on the part of the lessor that the lessee shall have the undisturbed possession of the premises during the term for which they are demised, and the lessor is as fully bound as if there was an express covenant to that effect, such undertaking only imports that the lessor has such title as enables him to make a valid and unencumbered lease, and that the possession and enjoyment of the premises will not be interrupted or interfered with by the lessor himself or anyone rightfully claiming under him. It has never been regarded as a covenant that the lessee shall enjoy

against all pretending to claim any right, and implies no warranty against strangers or wrongdoers: *Sigmund v. Howard Bank*, 29 Md. 324; *Moore v. Weber*, 71 Pa. St. 429; 10 Am. Rep. 708. Only one authority contrary to the above doctrine is found holding that a covenant for quiet enjoyment is not implied in a lease of lands for life from the mere use of words of lease: *Black v. Gilmore*, 9 Leigh, 446; 33 Am. Dec. 253. Every lease contains an implied covenant for quiet enjoyment, and when the lessor suffers the demised premises to be recovered from his tenant, in ejectment by an outstanding title, his right to recover rent is gone: *Ross v. Dysart*, 33 Pa. St. 452. It is not necessary for the tenant to be actually removed from the premises under the judgment in ejectment to give him a good defense against the lessor: *Ross v. Dysart*, 33 Pa. St. 452. Though actual eviction under legal process is not necessary, yet in order to be a defense the lessee must show an entry, or a disturbance of the possession by, or a surrender to, the lawful owner: *Whitbeck v. Cook*, 15 Johns. 483; 8 Am. Dec. 272; *Fowler v. Poling*, 6 Barb. 165.

Effect and Scope of Covenant.—A covenant for quiet enjoyment relates to the lessor's title and right to grant the premises, and to the possession thereof during the term, and not to their possession and enjoyment in fact by the lessee, as against those having no right to disturb him. It is a covenant that the lessee shall not be rightfully disturbed in his possession and enjoyment during the term, not that he shall not be disturbed at all: *Underwood v. Birchard*, 47 Vt. 305. Under such a covenant, the lessor is responsible only for his own acts and those of others claiming by title paramount to the lease, and not for the acts of a mere trespasser, although the effect of these acts may be to deprive the lessee of the benefit of the lease: *Playter v. Cunningham*, 21 Cal. 229. Although every lease contains such implied covenant, it extends only to possession, and its breach arises only by eviction by means of paramount title: *Schuykill etc. R. R. Co. v. Schmoele*, 57 Pa. St. 271.

This covenant implies that the lessor has title to the property leased, and power and right to convey it, and is immediately broken if the lessor has made a prior lease of part of the demised premises, which is still outstanding when the subsequent lease is executed: *McAlester v. Landers*, 70 Cal. 79. If a lease contains an express covenant for quiet enjoyment without molestation or disturbance from the lessor, his successor or assigns, no other or further covenant in respect to enjoyment will be applied; and if the lessor has, at the time of giving the lease, no title to the land leased, and enters into no covenant, express, or implied, for quiet enjoyment, except as against his own acts, his subsequently acquired title does not inure to the benefit of the lessee by virtue of the lease, but the latter holds as against the lessor by virtue of his personal covenant, which operates by way of estoppel only to prevent his interference with the lessee's possession, and in no way binds him to protect the lessee against the foreclosure of previous liens upon the property: *Burr v. Stenton*, 43 N. Y. 462.

The covenant for quiet enjoyment implied from the use of the word "demise" in a lease, may be modified or restrained by express covenants inconsistent therewith, and a covenant to aid the lessee

In keeping possession of the premises is incompatible with such implied covenant: *O'Connor v. Memphis*, 7 Lea, 219. The covenant for quiet possession merges all previous representations as to the possession, and limits the liability growing out of them: *Andrus v. St. Louis Smelting Co.*, 130 U. S. 643-47. A covenant for quiet enjoyment, in a lease for years, being a covenant in futuro, runs with the land and will pass with it to any person, as assignee in law, who becomes legally possessed of the term: *Shelton v. Codman*, 3 Cush. 318.

Breach of Covenant.—To sustain an action for breach of a covenant for quiet enjoyment in a lease, it is necessary to prove that the tenant was evicted by a person who had a lawful and paramount title existing at or before the time of the defendant's covenant, as the covenant for quiet enjoyment applies only to the acts of those claiming title, and to rights existing at the time it was entered into: *Knapp v. Marlboro*, 34 Vt. 235. This covenant in a lease is not broken without an eviction of the lessee, either actual or constructive, but, to constitute an eviction, the lessee need not be actually dispossessed: *McAlester v. Landers*, 70 Cal. 79; *Hayes v. Ferguson*, 15 La. 1; 54 Am. Rep. 398. As the covenant for quiet enjoyment goes to the possession, and not to the title, to constitute a breach thereof, there must be some actual disturbance of the possession equivalent to a lawful eviction under paramount title: *Moore v. Frankenfield*, 25 Minn. 540. And, to sustain an action for a breach of such a covenant, the lessee must show that he has been evicted by title both lawful and paramount to that held by his lessor: *Kelly v. Dutch Church*, 2 Hill, 105. If the tenant yields the possession of the demised premises, in pursuance or in consequence of a judgment for the recovery of the possession, to the person adjudged to be the rightful owner of the paramount title, it is an eviction, and he is discharged from the payment of rent: *Home Life Ins. Co. v. Sherman*, 46 N. Y. 376. An eviction is actual or constructive. There cannot be a constructive eviction without a surrender of the possession: *Boreel v. Lawton*, 90 N. Y. 293; 43 Am. Rep. 170. A declaration on the covenant broken must allege an eviction, otherwise the action cannot be maintained: *Ware v. Lithgow*, 71 Me. 62. In an action for a breach of the covenant for quiet enjoyment, the burden rests upon the plaintiff to show such breach, and the consequent damages, and the breach can only be shown by proof of an eviction, or its equivalent. There must be a union of acts of disturbance under lawful title, to constitute a breach of this covenant: *Barry v. Guild*, 126 Ill. 439. This covenant does not stipulate against the unlawful acts of a third person in disturbing the possession, and a breach thereof is badly pleaded if it does not show an interruption by title paramount: *Rantin v. Robertson*, 2 Strob. 366. Hence, an action for breach of the covenant does not lie for the tearing down and removal of the demised buildings by third persons having no privity with, and not acting under, the direction of the lessors: *Connor v. Berheimer*, 6 Daly, 295. A covenant for quiet enjoyment is not a guaranty to the tenant from the wrongful acts of a stranger, and cannot be broken by such acts: *Moore v. Weber*, 71 Pa. St. 429; 10 Am. Rep. 708; *Schuykill etc. R. R. Co. v. Schmoele*, 57 Pa. St. 271. This covenant exacts of the lessor only that he shall have such title at the time as enables him

to give a free, unincumbered lease for the term demised. Hence, he is not liable for the acts of strangers to the title, but the covenant is broken if the lessee cannot enter because another is already in possession under title paramount: *Gardner v. Keteltas*, 3 Hill, 330; 38 Am. Dec. 637. The covenant is not broken if the possession is withheld by a wrongdoer, as where he holds under a prior lease under an unfounded claim that it has not terminated: *Gardner v. Keteltas*, 3 Hill, 330; 38 Am. Dec. 637. The landlord, under such a covenant, is liable only for such evictions of the tenant as are caused by the act of the lessor directly or indirectly: *Surgent v. Arighi*, 11 Smedes & M. 87; 49 Am. Dec. 46. The covenant is not broken by a mere demand for possession made by one having title: *Cowan v. Silliman*, 4 Dev. 46. A recovery in trespass brought by a prior lessee against a subsequent lessee of the same land is a sufficient eviction to constitute a breach of the covenant for quiet enjoyment contained in the subsequent lease, although the action was not commenced until the expiration of the prior lease: *McAlester v. Landers*, 70 Cal. 79. If a lessee, to prevent being actually expelled from the demised premises, yields the possession thereof, and attorns, in good faith to one who has a title paramount to the lessor's, and also a right to immediate possession, this is equivalent to an actual eviction, constitutes a breach of the covenant for quiet enjoyment, and is a good defense to an action brought by the lessor against the lessee for rent: *Morse v. Goddard*, 13 Met. 177; 46 Am. Dec. 728; *Smith v. Shepard*, 15 Pick. 147; 25 Am. Dec. 432. A mere fugitive trespass by the landlord does not constitute a breach of the covenant for quiet enjoyment, but an entry by the lessor, under a claim of title, constitutes a breach of such covenant: *Avery v. Dougherty*, 102 Ind. 443; 52 Am. Rep. 680; *Mayor of New York v. Mable*, 13 N. Y. 151; 64 Am. Dec. 538. Thus a mere act of trespass on the part of the landlord, not interfering with the substantial enjoyment of the demised premises, does not amount to an eviction. To constitute the latter, there must be an actual or constructive exclusion of the tenant from the beneficial enjoyment of some part of the demised premises: *Loundsbery v. Snyder*, 31 N. Y. 514. Interruption by the landlord of his tenant's occupation of the premises does not alone constitute a breach of the covenant, or suspend the rent: *Fuller v. Ruby*, 10 Gray, 285. If the tenant cannot obtain possession of the premises because another is rightfully in possession, this is a breach of the covenant and bars the remedy for rent: *Fleld v. Herrick*, 14 Ill. App. 181. If part of the leased premises is sold under execution against the lessor during the term of the lease, upon a judgment antedating the lease, the lessee is entitled to recover of the lessor, under his covenant for quiet enjoyment, so much of the rent as he has thus been obliged to pay to the purchaser under the execution: *Kane v. Mink*, 64 Iowa, 84. The erection, by authority of the lessor, of a wall upon land under the eaves of a leased building, is a breach of covenant for quiet enjoyment: *Sherman v. Williams*, 113 Mass. 481; 18 Am. Rep. 522.

Measure of Damages for Breach.—The rule has been laid down and adhered to, that on a breach of the covenant for quiet enjoyment, express or implied in a lease, where an eviction is occasioned through the fault of the lessor, the measure of damages is the value

of the unexpired term, less the rent reserved: *Mack v. Patchin*, 29 How. Pr. 20; affirmed, 42 N. Y. 167; 1 Am. Rep. 506; *Denison v. Ford*, 7 Daly, 384; *Trull v. Granger*, 8 N. Y. 115; *Fritz v. Pusey*, 31 Minn. 368. Thus a lessee for years of mortgaged premises holding under a lease containing a covenant for quiet enjoyment, upon foreclosure and sale under the mortgage, is entitled to receive out of the surplus moneys the value of the use of the premises for the remainder of the term, less the rents reserved and other payments to be made by him under the lease: *Clarkson v. Skidmore*, 46 N. Y. 297. In an action to recover damages for a refusal to give possession of the demised premises, the lessee may recover the damages arising from expenses incurred in preparing to remove to and occupy the premises, together with the difference between the real value of the rent and the sum agreed to be paid, but he cannot recover the profits which he might have made in his business had he occupied the premises: *Giles v. O'Toole*, 4 Barb. 261. Upon a breach of a covenant of quiet enjoyment in a lease, the lessee can recover nothing for improvements placed upon the premises or for rise in value of his lease: *Kelly v. Dutch Church*, 2 Hill, 105. If the lessee is evicted during his term by a holder of the paramount title, his measure of damages against his lessor, under the implied covenant for quiet enjoyment arising from the words "demise and let" is the consideration paid by him. If he has paid only the rent during the time of his possession, he is entitled to only nominal damages. He is not entitled to recover the value of improvements for the prosecution of the business, some of which were erected in pursuance of a covenant made by him to that effect in the lease, and all of which he had, by the terms of the lease, the right to take down and remove at the end of the term: *Lanigan v. Kille*, 97 Pa. St. 120; 39 Am. Rep. 797. If a lessee has erected a shop on the demised premises, under the false and fraudulent representations of the lessor that he is the owner of the premises, and the lessee, on being evicted by title paramount, is compelled to move his shop to other land, the measure of damages against the lessor is the actual necessary expense of such moving, and, as to the cost of another lot whereon to place the shop during the unexpired term of the lease, the damages must be confined to the actual necessary rent of a suitable lot for such purpose: *Wilson v. Raybould*, 56 Ill. 417. If a tenant is ousted by his landlord before the expiration of his term, and, without any re-entry, he brings an action of trespass, he can recover damages for the ouster and all necessary and natural consequences thereof, but not for the value of his unexpired term, or for the mesne profits thereof: *Smith v. Wunderlich*, 70 Ill. 426. In many jurisdictions, a rule more just is maintained, namely, that the measure of damages for a breach of the covenant for quiet enjoyment is not the amount of the rent, or of the lessee's profits, but according to the value of the lease at the time of eviction: *Dexter v. Manley*, 4 Cush. 14; *Jewett v. Brooks*, 134 Mass. 505; *Williams v. Burrell*, 1 Man. G. & S. 402. The true measure of damages for the breach of the covenant is what the lessee has lost by the breach: *Locke v. Furze*, L. R. 1 Com. P. 441. In an action for damages on account of an eviction by the landlord before the expiration of the term, the tenant may prove the value of improvements placed by him upon the demised premises before eviction, rendering them more

productive, for the purpose of showing the extent of his damage: *Ricketts v. Lostetter*, 19 Ind. 125. And a tenant who has been unlawfully evicted from a barn occupied by him as a livery and boarding stable may recover the loss of profits for the balance of the term, arising from boarding the horses of others, as well as the difference in cost of keeping his own horses and hiring them boarded, if the evidence shows that such damages were the natural and proximate consequence of such eviction by the landlord. Under the statute, such damages may be trebled: *Shaw v. Hoffman*, 25 Mich. 162. If a tenant, his family, and goods are unlawfully evicted from the demised premises by the landlord, he may recover, as an element of damage, for injury to his feelings, but not for injury to his health resulting from exposure consequent upon such eviction: *Fillebrown v. Hoar*, 124 Mass. 580. If a prior lessee, entitled to the possession, recovers in trespass against a subsequent lessee, the damages to the latter arising from the breach of his covenant for quiet enjoyment cannot be less than the judgment for damages and costs recovered against him by the prior lessee: *McAlester v. Landers*, 70 Cal. 79.

Deeds.—A covenant for quiet enjoyment inserted in a deed is governed by the same rules in relation to its extent and breach as the covenant of general warranty: *Mitchell v. Warner*, 5 Conn. 498; *Scott v. Kirkendall*, 88 Ill. 465; 30 Am. Rep. 672; *Fowler v. Poling*, 2 Barb. 300. A covenant for quiet enjoyment is usually treated as synonymous with a covenant of general warranty, since the same concurrence of circumstances is necessary to their breach—they equally possess the capacity of running with the land, and the rules as to the measure of damages are the same in both: *Bostwick v. Williams*, 36 Ill. 65; 85 Am. Dec. 385; *Scott v. Kirkendall*, 88 Ill. 465; 30 Am. Rep. 562.

Covenant for Quiet Enjoyment in Deeds Runs with the Land and is binding upon the grantor and all of his subsequent grantees of the same land: *Schwallback v. Chicago etc. Ry. Co.*, 69 Wis. 292; 2 Am. St. Rep. 740; *Heath v. Whidden*, 24 Me. 383; *Logan v. Moulder*, 1 Ark. 313; 33 Am. Dec. 338; *Markland v. Crump*, 1 Dev. & B. 94; 27 Am. Dec. 230. This covenant runs with the land and passes to a purchaser by a quitclaim deed from the grantee: *Hunt v. Amidon*, 4 Ill. 345; 40 Am. Dec. 283; *Jenks v. Quinn*, 137 N. Y. 223. This covenant also descends to heirs and is made transferable to the assignee: *Ross v. Turner*, 7 Ark. 132; 44 Am. Dec. 531; *Heath v. Whidden*, 24 Me. 383; and suit thereon may be maintained by the assignee, devisee, or heir of the grantee: *Martin v. Baker*, 5 Blackf. 232. A covenant for quiet enjoyment in a deed runs with the land, and is divisible, so that if the land is sold in parcels to different purchasers, each may maintain an action upon the covenant: *Schofield v. Homestead Co.*, 32 Iowa, 317; 7 Am. Rep. 197. A covenant for quiet enjoyment, entered into jointly by the owner of the fee and a stranger to the title, who does not assume any title in himself or right to convey, does not run with the land as against the stranger, and is not available in favor of a subsequent grantee who holds no assignment of the cause of action arising from the breach of the covenants: *Mygatt v. Coe*, 124 N. Y. 212.

Breach of the Covenant.—It has been held that a covenant for quiet enjoyment in a deed extends only to the possession and not

to the title; and is not broken unless there is an eviction of the covenantee and a disturbance of his possession: *Kortz v. Carpenter*, 5 Johns. 120; *Whitbeck v. Cook*, 15 Johns. 483; 8 Am. Dec. 272. A covenant for quiet enjoyment of the property conveyed against the claims of the covenantor or persons claiming under him necessarily refers to existing claims, not to those which the covenantor may thereafter acquire. The object of such a covenant is to defend the grantee against acts done or suffered to be done by the covenantor, whereby the title conveyed may be jeopardized; nor does such covenant operate as a personal obligation of the covenantor not to buy an outstanding claim against the property, and he is not estopped by such covenant to buy and assert such outstanding claim: *Taggart v. Risley*, 4 Or. 236. To constitute a breach of the covenant for quiet enjoyment in a deed, there must be a union of acts of disturbance of the possession and lawful paramount title: *Hoppe v. Cheek*, 21 Ark. 585; *Whitbeck v. Cook*, 15 Johns. 483; 8 Am. Dec. 272; *King v. Kerr*, 5 Ohio, 154; 22 Am. Dec. 777. And no action can be maintained for the breach of such covenant, until there has been an eviction or ouster, actual or constructive, by title paramount: *Van Slyck v. Kimball*, 8 Johns. 198; *Waldron v. McCarty*, 3 Johns. 471; *Holladay v. Menifee*, 30 Mo. App. 207; *Bostwick v. Williams*, 36 Ill. 65; 85 Am. Dec. 385; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429; 19 Am. Dec. 139; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189; *Johnson v. Nyce*, 17 Ohio, 66; 49 Am. Dec. 444; *Clark v. Lineberger*, 44 Ind. 223. Without an eviction there can be no breach of the covenant, but it is not necessary that the eviction should be by process of law consequent on a judgment, nor is an actual dispossession of the grantee required to constitute such an eviction as will amount to a breach of the covenant. The covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title: *McGary v. Hastings*, 39 Cal. 360; 2 Am. Rep. 456; *Parker v. Dunn*, 2 Jones, 203; *Hodges v. Latham*, 98 N. C. 239; 2 Am. St. Rep. 333; *Ogden v. Ball*, 40 Minn. 94. In an action for the breach of the covenant, the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or of some part thereof, or has yielded the possession thereof to the paramount title: *Real v. Hollister*, 20 Neb. 112; *Anderson v. Buchanan*, 20 Neb. 272; *Whitbeck v. Cook*, 15 Johns. 483; 8 Am. Dec. 272; *Boothby v. Hathaway*, 20 Me. 251. If, at the time of the execution of the deed, the premises are in the possession of a third person holding under paramount title, and the grantee is, in consequence, defeated in legal proceedings to obtain possession, and is thus kept out of possession, this is sufficient breach of the covenant to maintain an action upon: *Shattuck v. Lamb*, 65 N. Y. 499; 22 Am. Rep. 656. The mere existence of a mortgage encumbrance on the land at the time the purchase is made is not a breach of the covenant: *Clark v. Lineberger*, 44 Ind. 223. But it is broken by an eviction of the grantee under a foreclosure and sale on such mortgage: *McLean v. Webster*, 45 Kan. 644; *Cheney v. Straube*, 35 Neb. 522. A mere recovery in ejectment against the covenantee is not a breach of the covenant for quiet enjoyment. To constitute such breach, there must be an actual ouster by writ of

possession: *Kerr v. Shaw*, 13 Johns. 236; *Grist v. Hodges*, 3 Dev. 200; *Coble v. Welborn*, 2 Dev. 388. The grantee under a deed containing such covenant has no right to give up the land voluntarily to a stranger who claims by title paramount, nor even to pay off an alleged encumbrance, without suit, and then resort to his action upon the covenant: *Hunt v. Amidon*, 4 Hill, 345; 40 Am. Dec. 283. An entry by the covenantor himself tortiously and without title is a breach of the covenant: *Sedgwick v. Hollenback*, 7 Johns. 376. The covenant is broken if the lot conveyed and part of the buildings thereon encroach on the street, on account of which the grantee is obliged to pull down part of the buildings and repave the street, if the fact of such encroachment was not known to the grantee at the time of his purchase: *Trice v. Kayton*, 84 Va. 217; 10 Am. St. Rep. 836. Where the owner of land on a stream conveys with a covenant for quiet enjoyment, and the lower owner by virtue of a paramount right, raises his dam and floods the lands so conveyed, this is a breach of the covenant: *Scriven v. Smith*, 100 N. Y. 471; 53 Am. Rep. 224. This covenant is broken by a judgment in dower for money assessed in lieu of dower: *Welsh v. Kibler*, 5 S. C. 405. The covenant is broken by a sheriff's sale under a paramount encumbrance, although one of the assignees of the covenantee purchase the property, and there has been no other ouster: *Brown v. Dickinson*, 12 Pa. St. 372. The covenant for quiet enjoyment in a deed is not broken by a mere trespass, not amounting to an eviction, committed without claim of right on the part of the trespasser: *Horton v. Bauer*, 129 N. Y. 148; but a recovery for damages in an action of trespass against the grantee constitutes a breach of the covenant: *Williams v. Shaw*, N. C. Term Rep. 197; 7 Am. Dec. 706; provided the latter avers and proves that the party recovering in the action of trespass, before and at the date of the covenant, had lawful title and by virtue thereof entered and ousted the covenantee: *Webb v. Alexander*, 7 Wend. 281.

Measure of Damages.—It is well settled that the measure of damages for the breach of a covenant for quiet enjoyment in a deed is the consideration paid for the land, with interest, and the costs and expenses incurred in the suit by which the covenantee is evicted, and, if the latter is obliged to purchase an outstanding title in order to protect his own, he may recover the amount paid for such paramount title, not exceeding the consideration paid by him: *Cheney v. Straube*, 35 Neb. 521; *McGary v. Hastings*, 39 Cal. 360; 2 Am. Rep. 456; *Kingsbury v. Milner*, 69 Ala. 502; *Stirling v. Peet*, 14 Conn. 245; *West v. West*, 76 N. C. 45; *Price v. Deal*, 90 N. C. 290; *Swafford v. Whipple*, 3 G. Greene, 261; 54 Am. Dec. 498; *Bond v. Quattlebaum*, 1 McCord, 584; 10 Am. Dec. 702.

CAPITAL CITY INSURANCE COMPANY v. AUTREY.

[105 ALABAMA, 269.]

INSURANCE—LIENS INVALIDATING.—A provision in an insurance policy avoiding it for false representations or warranties by the insured in reference to liens and incumbrances on the insured property includes liens created by operation of law as well as those created by contract.

INSURANCE—LIENS VITIATING—MISREPRESENTATIONS. A judgment lien duly recorded against property before making application for, or the issuance of, a policy of insurance thereon, constitutes a breach of warranty on the part of the assured that there are no liens or encumbrances on the property and that his ownership is absolute, unqualified, and undivided, and is such a misrepresentation as vitiates the policy containing a condition that it shall be void if the exact interest of the insured is not truly stated therein.

INSURANCE—INTEREST OF INSURED—MISREPRESENTATIONS.—If a policy of insurance provides that it shall be void unless the exact interest of the insured is truly stated, a statement by him that he is the absolute, unqualified, and undivided owner of the property insured vitiates the policy, when there are others interested in such property to the extent that they are to perform certain services in relation thereto, and participate in the proceeds of the sale thereof.

Knox & Bewir, for the appellant.

C. C. Whitson, for the appellee.

272 COLEMAN, J. The plaintiff, Autrey, sued the defendant upon a policy of insurance to recover the value of a lot of hay, which had been destroyed by fire. There is but little conflict in the evidence on any point, and we do not deem it necessary to consider more than two or three questions.

In the contract of insurance, it was stipulated that the statements and representations made by plaintiff in his application for insurance were a part of the policy and warranted to be true; and it was further stipulated that **273** if the exact interest of the insured was not truly stated, the policy was to be void. The application contains the following questions and answers:

"Title: Is your ownership of the property to be insured absolute, unqualified, and undivided? A. Yes."

"Has any other person claimed property? A. No."

"Encumbrance: Is there any lien or mortgage on the property, if so, for what amount? A. No."

Among other pleas, the defendant pleaded that at the time of the execution of the policy, one W. E. Story, executor, etc., had a judgment with waiver of exemptions against the plaintiff, which had been duly recorded in the office of the judge of probate as provided in the statute, and which thereupon became

a lien upon the property. In a separate plea, as a defense, the defendant averred that one Jeff Autrey and B. P. Autrey were interested and had a just claim and interest in and to the property. These pleas were drawn out formally, setting up all necessary facts to present them as a defense.

The court sustained a demurrer to the plea, which set up the judgment lien as a defense, upon the grounds that the provision in the insurance policy in reference to liens and encumbrances did not include liens created by law, but only those created by contract of parties. In this the court erred. A lien upon property in favor of a stranger, though created by operation of law, may affect the interest of the insured, as much so as one created by the contract of the parties. The reasons which influence the insurer to inquire and ascertain the existence of liens of the one character apply with equal force to liens of the other kind. A lien created by operation of law would be equally potent as one created by contract to incite or induce the insured to destroy his property or to be less careful in its preservation. The insurer has the right to know the exact condition of the property to be insured, and the extent of the interest of the insured therein. The question is plain and broad, "Is there any lien upon the property?" The answer is unequivocal and positive that there is no lien or encumbrance on the property. The question is not, whether there is a contract lien, but any lien or encumbrance.

We recognize the principle that when parties contract with each other they are presumed to do so with reference ²⁷⁴ to facts and laws known to both, whether there is any specific reference to such facts and statutes or not. Thus where a party insures property in those states where by statute a lien is given upon all property for the payment of taxes, it will be presumed that both parties knew of such liens, but not so as to a lien of a judgment or vendor's lien. This would be a fact within the knowledge of the applicant for insurance, and not presumed to be within the knowledge of the insurer. In such cases, it would be the duty of the applicant for insurance, upon proper inquiries, to disclose the condition of the property, and the extent of his absolute and unqualified interest in the property: *Pelican Ins. Co. v. Smith*, 92 Ala. 428; *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189.

We are of opinion the facts show that the brothers of plaintiff, Jeff and B. P. Autrey, owned an interest in the property within the meaning of the contract of insurance. As stated by the plaintiff the facts are substantially as follows: The plaintiff pur-

chased the hay as it stood in the field. He and his two brothers agreed to harvest the hay for market, each to contribute proportionately to this expense, that after the hay was sold, and the rental or purchase money and some machinery and expenses of harvesting and selling were paid for, the remainder of the proceeds was to be equally divided between the three. There was evidence that Jeff Autrey and plaintiff both stated, in the presence of each other, that all three of the brothers were equally interested in the hay. We need not determine whether the contract between the Autreys constituted them tenants in common or not. We are very certain that they owned an interest in the hay which the applicant should have disclosed in response to the inquiry, "Is your ownership of property absolute, unqualified, and undivided?" The court erred in giving the general charge for the plaintiff.

The court also erred in sustaining a demurrer to the plea in which the lien of an existing judgment was pleaded as a defense.

Reversed and remanded.

INSURANCE—JUDGMENT LIENS—WHETHER INVALIDATE. Where a policy of insurance contains a provision that "if the property shall hereafter become mortgaged or encumbered, this policy shall become null and void," this provision will be regarded as relating only to liens voluntarily placed upon the property by the assured, and not as applying to judgments or other liens created by law: *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393, and note; *Baley v. Homestead etc. Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570. A condition against change of possession applies to an involuntary change of possession by legal process, as well as to a voluntary change resulting from the action of the insured himself: *Carey v. German-American Ins. Co.*, 84 Wis. 80; 36 Am. St. Rep. 907, and note; but see *Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375; 32 Am. St. Rep. 752, and note.

INSURANCE—INTEREST OF INSURED.—A condition in a policy of insurance, that it shall be void in case the interest of the insured be other than unconditional and sole ownership, has reference only to the quality of the estate or interest, and is not avoided by any sort of an encumbrance: *Caplis v. American etc. Ins. Co.*, 60 Minn. 376; 51 Am. St. Rep. 535, and note.

PORTER & BLAIR HARDWARE COMPANY v. PERDUE.

[105 ALABAMA, 293.]

MUNICIPAL CORPORATIONS ARE NOT SUBJECT TO GARNISHMENT proceedings unless expressly made so by statute.

MUNICIPAL CORPORATIONS—GARNISHMENT—WAIVER OF EXEMPTION.—A municipal corporation when exempt from garnishment proceedings cannot waive the exemption and confer jurisdiction by appearing in such proceedings against it without objection, and admitting indebtedness for the corporation.

MUNICIPAL CORPORATIONS—GARNISHMENT—SPECIFIC FUND.—The fact that money due from a municipal corporation to defendant in execution, and sought to be reached by garnishment proceedings, has been segregated from the general fund of the corporation, and is held by its treasurer for the specific purpose of paying that particular debt, does not render the corporation subject to garnishment.

MUNICIPAL CORPORATIONS—GARNISHMENT OF OFFICER.—The process of garnishment, whether nominally issuing against a municipal officer or against the corporation itself, is, in reality, a proceeding by garnishment against the corporation, and not maintainable in the absence of statute expressly authorizing it.

Proceedings by garnishment against a municipal corporation. Judgment quashing and dissolving the writ, dismissing the proceedings, and discharging the garnishee. Plaintiff in the garnishment proceedings appealed.

L. M. Lane and C. E. Hamilton, for the appellant.

E. Crenshaw, for the appellee.

²⁹⁷ McCLELLAN, J. Garnishment is a remedy or process of purely statutory creation and existence. There is no authority for a resort to it—courts are without jurisdiction to grant and effectuate it—except in cases and against parties which and who are within the terms of the statute. Public corporations, such as towns and cities, are not within the purview of the statute of garnishment in this state; they are held not to be subject to this process, unless included in unequivocal terms by the letter of the statute, on grounds of public policy; and our statute does not so include them: *Underhill v. Calhoun*, 63 Ala. 216; Code, secs. 2971, 2974, et seq.

But whether the nonliability of such corporations to this process be put upon the idea of exemption merely from the operation of a statute broad enough to embrace them, or upon the idea that they are not embraced at all in the terms of the statute, is of no practical consequence. If they are not within the statute at all, no court has, nor by consent can acquire, jurisdiction to proceed against them in this way; and, if it is a mere matter of exemption, the same public policy which gives life to it is

potent also to prevent the officers and agents for the time being of such corporations from waiving the exemption by appearing without objection and admitting indebtedness for the corporation: 8 Am. & Eng. Ency. of Law, 1135.

The fact that the money due from a corporation to the defendant in execution and sought to be thus reached has been segregated from the general fund of the corporation, and is held by its treasurer for the specific purpose of paying a particular debt, does not alter the case. It is still only a debt from the corporation to the defendant, and the process of garnishment, whether nominally issuing against the officer or against the corporation, is in reality a proceeding by garnishment against the corporation itself, and not maintainable: 8 Am. & Eng. Ency. of Law, 1134, and note 2.

²⁹⁸ These considerations will serve to indicate the grounds of our conclusion that the circuit court did not err in its judgment quashing and dissolving the garnishment against the city of Greenville, dismissing the cause and discharging the garnishee, and said judgment is accordingly affirmed.

MUNICIPAL CORPORATIONS—GARNISHMENT OF.—Public policy forbids that a municipal corporation should be subject to garnishment in any case where its indebtedness arose on account of the exercise by it of governmental functions: *Leake v. Lacey*, 95 Ga. 747; 51 Am. St. Rep. 112, and extended note. See, also, the extended note to *Divine v. Harvie*, 18 Am. Dec. 204.

MUNICIPAL CORPORATIONS—GARNISHMENT.—WHETHER ITS EXEMPTION from garnishment can be waived by a municipal corporation is a mooted question, and will be found discussed in the extended note to *Leake v. Lacey*, 51 Am. St. Rep. 117.

SIMON v. JOHNSON.

[105 ALABAMA, 344.]

AGENCY—AUTHORITY OF SALESMAN TO COLLECT MONEY.—A traveling salesman making contracts for the sale of goods has no implied authority to collect their price, and payment to him by the purchaser in the absence of express authority in him to collect or ratification of such payment by his principal, does not discharge the purchaser who is still liable to the principal for the purchase price of the goods. In such case, evidence of the payment of the debt to the salesman is not admissible as against the principal.

Assumpsit for goods sold and delivered by the plaintiffs to the defendant. Defendant admitted buying the goods, but testified that he purchased them from plaintiffs through their trav-

eling salesman, one Carlisle, to whom he paid their purchase price, taking a receipt therefor with the name of plaintiffs signed to it by said Carlisle. The admission of this evidence, and of said receipt in evidence was objected and excepted to by plaintiffs. Plaintiffs testified that they had never been paid anything by anybody on the account for goods sold by them or their salesman to the defendant, and requested the court to charge that, upon the evidence adduced, the jury must find for the plaintiff. This the court refused to do, giving other instructions. Verdict and judgment for defendant, and plaintiffs appealed.

J. J. Morris and Graham & Steiner, for the appellants.

M. E. Milligan, for the appellee.

346 McCLELLAN, J. There was no evidence adduced below tending to show that Carlisle had any express authority to collect the debt involved in this action from Johnson, the defendant. No such authority is implied in the fact that he, plaintiffs' traveling salesman, sold to the defendant the goods constituting the consideration of the debt. The original debt being admitted, the only other defense open to Johnson was that the plaintiff ratified his unauthorized payment to Carlisle, and this defense he set up and attempted to prove. We are of the opinion, however, that this attempt was entirely abortive, and that there is no evidence in the record **347** tending to sustain it. On this state of case, no evidence of the payment by Johnson to Carlisle should have been received; and the court should have given the affirmative charge requested by the plaintiffs.

If it should be made to appear on another trial that the plaintiffs retained any money for the defendant out of Carlisle's salary, this would be money had and received for Johnson, would belong to him, and he should be allowed to set off the amount of it against the claim of the plaintiffs.

Reversed and remanded.

AGENCY—AUTHORITY OF SELLING AGENT TO COLLECT. Authority to an agent to sell goods does not include authority to collect pay for the goods sold: *Kane v. Barstow*, 42 Kan. 465; 16 Am. St. Rep. 490, and note; *Law v. Stokes*, 32 N. J. L. 249; 90 Am. Dec. 655; *McKindly v. Dunham*, 55 Wis. 515; 42 Am. Rep. 740, and note. An agent employed to sell goods by sample may collect pay therefor, in the absence of a prohibition known to the customer from circumstances, custom, or direct notice: *Tralnor v. Morison*, 78 Me. 160; 57 Am. Rep. 790, and note. A traveling agent to sell goods, who has not the possession of the goods, may still receive payment so as to bind his principal, where such is the general and known usage, and it has been recognized by the principal: *Meyer v. Stone*, 46 Ark. 210; 55 Am. Rep. 577.

LOUISVILLE & NASHVILLE RAILROAD Co. v. STUTTS.

[105 ALABAMA, 368.]

RAILROADS—DUTY TO EMPLOYEES.—A railroad company is not an insurer of the absolute safety of its ways and machinery and its duty is performed by guarding against such dangers and defects as are reasonably probable. The company is not bound to its employes to take precautions against all possible dangers, especially when voluntarily assumed by them at their own convenience and risk.

RAILROADS—DEFECTS IN WAYS OR MACHINERY—ASSUMPTION OF RISKS.—A railroad employe accepts as necessarily incident to his employment all natural and patent dangers in the ways, works, and machinery of the company, as contradistinguished from dangers arising from latent defects, which might, by the exercise of reasonable care on the part of the company or its officers, be discovered and remedied.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—IF DEFECTS COMPLAINED OF are as open and obvious to the servant as they are to the master, the servant cannot recover for an injury arising therefrom.

MASTER AND SERVANT—DEFECTS—NOTICE—ASSUMPTION OF RISKS.—If a servant while engaged in his employment acquires knowledge of any defects in the materials, machinery, or instrumentalities used, and notice thereby of an increased risk of danger, and afterward continues in the service, without objection or notice to the master, he assumes the increased risk, and, although he may continue in the service a reasonable time, after notice to the master of the defect, relying on his promise to remedy it, without assuming the risk of danger therefrom, yet, if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is thereafter guilty of contributory negligence, and cannot recover for injury received through such defect.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE. If a railroad engineer, without exercising ordinary prudence or precaution to avoid danger, rushes into a place, known by him to be dangerous, with his engine at a high rate of speed, he is guilty of contributory negligence, and cannot recover for an injury thus received.

Action to recover against a railroad company for the alleged negligent killing of plaintiff's intestate. Judgment for plaintiff, and defendant appealed.

Simpson & Jones, for the appellant.

N. Parkins and Roulhac & Nathan, for the appellee.

374 HARALSON, J. 1. It may be fairly inferred from the evidence that plaintiff's intestate, Lloyd, was an experienced railroad engineer. He had been running an engine to a freight train for the defendant for two years; and, for two weeks before his death, had been in charge of the engine and engaged in switching cars on the spur-track, where the accident occurred. There is every reason to believe he was well acquainted with the

engine he handled, and with the trestle at the end of the track. The trestle was a short and high one, terminating on the brow of a hill, its height, at the end, being some twenty or thirty feet from the ground. The plaintiff's witness, Thomas Hostlre, a carpenter by trade, who had built trestles and bridges, says he walked over and examined the trestle; and from its end to the switch, it was one hundred and twenty feet, and was strong and well built. There is no evidence to the contrary. As to the engine, it was shown to have been in good order. It had been overhauled and repaired only a short while before, and if there was a defect about it, so as to make it unsafe for use, it was not shown. Parties who were acquainted with the engine before the accident, and up to the time it occurred, and who examined it afterward, put this beyond dispute. The only attempt made to show anything to the contrary was by the witness Hilburn, who said he heard Lloyd say that something, he did not say what, was the matter with the quadrant, and that he used to tell the witness to look out, the lever would hang sometimes, and that he heard him say to Cook, he wished him to fix the ³⁷⁵ engine. What he desired him to fix he did not specify, but he was looking and pointing under the engine when talking. Witness did not know whether Cook fixed it or not—nor did he say at what time the conversation occurred. It was shown to be the duty of the engineer to look over his engine in going from and coming into the yard, and, if it needed anything, to report it to the foreman, whose duty it was to repair defects and keep it in order. There was no attempt to show that there was any defect with anything under the engine at the time of the accident. If there was any defect with the quadrant, as is alleged, Lloyd did not specify it, nor was any effort made to show that he reported any repairs to the foreman, needing to be made. The presumption is, that the foreman, in the absence of proof to the contrary, did his duty in making repairs, when it is shown by experts that, to the day of the accident, the engine was in good order, and we find Lloyd running it without complaint, and without apparent difficulty, to the moment of the accident. So, it may be said that the proof is without conflict that the trestle and the engine were in good condition when the accident occurred, and the defendant was not negligent on the score of a failure to discover defects and repair them.

2. The only danger connected with the use of the trestle and engine was such as was open and obvious to anyone of fair intelligence. The trestle was dangerous for no alleged reason, except

that it was high and short. All high trestles, whether short or long, are obviously dangerous, when not passed with care. Railroads would be much safer without them, and their existence and danger are accepted by employer and employé alike, as necessary and unavoidable. Those witnesses who testified that the structure was dangerous based their opinions upon its height and length, which if properly called defects, were apparent to one person as well as to another. But all the proof shows, without anything to the contrary, that the space between the switch and the end of the trestle—a hundred and twenty feet and four inches by measurement—though short, was sufficient within which to handle an engine, if done with care. Of an engine in good condition it may be said that there is at all times danger connected with its use, especially if not well and carefully handled, and no one knows this and ³⁷⁶ understands it better than the engineer who controls it, and can provide against danger so well as he. And it is well settled, in respect to these natural and patent dangers in the ways, works, and machinery of a railroad company, as contradistinguished from dangers arising from latent defects—which might, by the exercise of reasonable care on the part of the company or of its officers, be discovered and remedied—that the employé accepts them as necessarily incident to his employment. A company is not bound to its employé to take precautions against all possible dangers, especially when voluntarily assumed by them at their own convenience and risk. In no case is the company an insurer of the absolute safety of its ways and machinery. Its duty is performed by guarding against such as are reasonably probable: *Richmond etc. R. R. Co. v. Bivins*, 103 Ala. 142; *Schlaff v. Louisville etc. R. R. Co.*, 100 Ala. 377; *Holland v. Tennessee etc. R. R. Co.*, 91 Ala. 450; *Louisville etc. R. R. Co. v. Boland*, 96 Ala. 632. In this case, every alleged defect in the engine and trestle brought to view by the evidence was open and obvious to the engineer as well as to his employer.

3. Another principle of controlling importance, which after very grave consideration may be regarded as finally settled in this court, is, that if an employé knows of defects such as are here complained of, and continues in the employment of the company, after the lapse of a reasonable time for them to be remedied or removed, he assumes this additional risk—even if not incident to his original employment. We had better quote the rule as established: "If the employé, while engaged in the service, acquires knowledge of any defects in the materials, machinery, or instrumentalities used, and notice thereby of an in-

creased risk of danger, and afterward continues in the service, without objection or notice to the employer, he assumes the increased risk himself; but he may notify the employer of the defect, and continue in the service for a reasonable time, relying on the promise of the employer to remedy the defect, yet, if the defect is not remedied, within the promised time, his further continuance in the service is at his own risk, and he is guilty of contributory negligence: Birmingham etc. Electric Co. v. Allen, 99 Ala. 359; Georgia etc. Ry. Co. v. Davis, 92 Ala. 309; 25 Am. St. Rep. 47; Louisville etc. R. R. Co. v. Hall, 87 ³⁷⁷ Ala. 708; 13 Am. St. Rep. 84; Eureka Co. v. Bass, 81 Ala. 201; 60 Am. Rep. 152.

Here, as we have seen, if there were any latent defects about the engine and trestle, which the defendant failed to discover and remedy, it is not shown. If the engineer discovered any, and reported them, which were not remedied, that fact is not shown. The only defects brought to light and complained of were patent, and understood by the engineer as well as by the company, and he continued in its service, notwithstanding. This, without more, is sufficient to foreclose his complaint.

4. It is said, however, that the stop-block at the end of the trestle was insufficient and dangerous. If it was, it belonged to the class of open, obvious defects, of which the engineer was well aware, while in the employment of defendant, and at the time of his service, and to which he raised no objection, and we might dismiss this complaint with what has already been said. But, let it be added, that the proof as to the block and its insufficiency and danger has reference to it specially as an appliance for stopping a moving engine. It was shown that stops at the end of a track were generally intended for cars, and not for moving engines. For the one purpose they were generally sufficient, and for the other insufficient. The evidence, without conflict in its tendencies, shows that no stop-block that could have been devised and placed at the end of this trestle could have withstood the weight and force of this engine, propelled at the speed it was moving on the occasion of the accident. Plaintiff's own witness, Thomas Hostler, who was corroborated by other witnesses, testified that he never saw a stop-block that would stop an engine with a head of steam, without wrecking it; and, from the evidences on the timbers at the end of the trestle, and the condition of the bolts, he would say that the engine struck the block with great force, and that no sort of stop-block would have halted it. If sufficient resistance had been offered by it, the engine would

have run off the track, or torn down the trestle. If this evidence be true, and there is nothing to contradict it, it was no defect about the stop-block that caused the trouble, but rather the weight of the engine and the resistless force with which it was thrown against it by the engineer. The causal connection between the block and the injury was lacking: *Western Ry. Co. v. Mutch*, 97 Ala. 194; 38 Am. St. Rep. 179.

378 5. And further, without stopping to review the evidence, of which there is much, it may be said it shows without conflict that the conduct of the engineer in controlling his engine on the occasion of the accident contributed proximately to his death. All agree that the switch was what is known and called a "close place," which requires the close attention and caution of an engineer; and yet we see nothing to warrant the belief that the trestle, in the good condition it was shown to have been, and with such an engine as the engineer was handling, might not, in the exercise of prudence on the part of the engineer, have been used for an indefinite time, without liability to accident, from any known or apparent danger. It was shown that the engineer ran upon the trestle with too great speed to comport with safety. It appears that his course in this regard had been observed, and Hatheway, the engine hostler of defendant's yard at the time, assumed, as he expressed it, "to get after Lloyd about going on the switch so fast," when he replied: "You see that hickory limb at the end of the trestle? If she goes over, I will catch on that"; and the witness added: "He went on the switch and on the trestle faster than I liked. I would often get off. I told him I was afraid of him." He sat on his seat also, with his left foot under him and his right extended over his box. All the witnesses, who were competent and who testified on the subject, say he ought, in the exercise of prudence, and in order to have his engine under control, to have stood up, and used both hands, one on the reverse, and the other on the throttle lever. It was shown the book of rules of the company required the engineer in close places to stand, in order to handle his engine the better, and this he should not have neglected: *Warden v. Louisville etc. R. R. Co.*, 94 Ala. 279. He had both hands on the throttle lever. The cylinder cocks were closed, as the proof tends to show, and they should have been open. The experts say again, that going at a slow rate of speed, and observing the foregoing precautions, he might have stopped the engine within a very short distance, and some of them say, within a foot or two, and reversed and returned without risk of peril. But failing in these precautions, so import-

ant to be exercised at such a time and place, he lost control of his engine, probably because confused, and ³⁷⁹ went forward with great and ruinous force against the stop and over the precipice. Our conclusion is, after a careful review of the evidence, that it shows, without any conflict, that deceased was careless, almost to recklessness, and thereby brought the disaster on himself, in which he lost his life.

8. There is no proof to show any willful, wanton, and intentional negligence on the part of defendant, as averred in the complaint.

Whether considered as a common-law action, or one under the employe's act, the plaintiff has failed to make out a case. The proofs justified the general charge for the defendant, and it should have been given. The judgment below will be reversed and the cause remanded.

MASTER AND SERVANT.—THE DUTY OF A MASTER TO HIS SERVANT requires the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business in which such servant is employed and keeping such appliances in repair, including the duty of making inspection and test at proper interval: *Nord Deutscher etc. S. S. Co. v. Ingebregsten*, 57 N. J. L. 400; 51 Am. St. Rep. 604, and note.

MASTER AND SERVANT—ASSUMPTION OF RISK GENERALLY.—A person, when he enters the service of another, assumes only such risks as are usually incident thereto: *Settle v. St. Louis etc. R. R. Co.*, 127 Mo. 336; 48 Am. St. Rep. 633, and note.

MASTER AND SERVANT—ASSUMPTION OF RISKS—PATENT DEFECTS.—A servant is bound to know, and assumes the risk of, all defects in appliances about which he is employed that are open to observation or can be ascertained by the ordinary exercise of the senses: *Taylor v. Wootan*, 1 Ind. App. 188; 50 Am. St. Rep. 200, and note.

MASTER AND SERVANT—NOTICE OF DEFECTS—CONTINUING IN SERVICE.—If a servant, knowing of a defect in machinery, materials, or premises furnished for his use, without complaint or promise from the master or superior servant to repair, continues to use them, he assumes the risk and waives all claim against the master for injury therefrom: *Breckenridge Co. v. Hicks*, 94 Ky. 362; 42 Am. St. Rep. 361, and note; but see *Meador v. Lake Shore etc. Ry. Co.*, 138 Ind. 290; 46 Am. St. Rep. 384, and note.

BAYZER v. McMILLAN MILL COMPANY.

[105 ALABAMA, 395.]

WATERS AND WATERCOURSES—NAVIGABLE STREAMS.

A fresh water stream above tide water is navigable and a public highway only when it is susceptible of being used in ordinary condition, for a highway of commerce, over which there may be trade, travel, transportation, or valuable floatage for a season or considerable portion of the year. All fresh water streams which have the requisite volume of water only occasionally and for brief periods, as the result of freshets, are unnavigable and private property.

WATERS AND WATERCOURSES—NAVIGABLE STREAMS.

A fresh water creek above tide water not declared public by law, not navigated by boats, keels, or lighters of any kind, and not utilized for any kind of transportation of commodities, except sawlogs and lumber, and for this only at spasmodic and occasional periods in the winter or spring as the result of freshets, is not a navigable stream, but is private property, which may be obstructed without liability for damages.

Action to recover damages for the obstruction of an alleged navigable stream, known as "Pigeon Creek." Judgment for defendants, and plaintiffs appealed.

Farnham & Crum and Gamble & Powell, for the appellants.

Stallworth & Barnett and J. M. Davidson, for the appellees.

397 HARALSON, J. The question as to what constitutes a navigable stream, as contradistinguished from a private one, has from an early day been the subject of many decisions of this court. This stream is above tide water. In determining the navigability of such streams, the test is to be found in their navigable capacity. As was said in *The Daniel Ball*, 10 Wall. 557: "Those rivers must be regarded as public, navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In *Morrison v. Coleman*, 87 Ala. 657, which is one of our latest adjudications on the subject, this court, after a review of the authorities, announced its conclusion as follows: "We declare, as the result of our own rulings and of the weight of authority, that a fresh water stream above tide water is navigable and a public highway when, and only when, it is susceptible of being used, in ordinary condition, for a highway of commerce, over which there may be trade, travel, transportation, or valuable floatage. We are not to be understood as affirming that, to be a navigable stream or public highway, it must be susceptible of

the enumerated uses for the entire year. Most inland streams contain a greater volume of water in winter than in summer. Our precise meaning is, that for a season or considerable part of the year, it ³⁹⁸ must contain that depth of water which fits it for such transportation. It excludes all those streams which have the requisite volume of water only occasionally, as the results of freshets, and for brief periods, as unnavigable, and private property." Again, it was said in *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439: "In determining the character of a stream, inquiry should be made as to the following points: whether it is fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity are sufficiently long to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and how long it has been so used; whether it was meandered by the government surveyors or included in the surveys; whether, if declared public, it will probably in future be of public use for carriage. And in the application of these inquiries to the facts of the case, it is to be remembered that the onus probandi is upon the party claiming that the stream above tide water is public." In the case last cited, many reasons are stated, in the interest of the public why such streams should not be held to be public: "Every milldam on any of those creeks, every bridge over them, every water gap, and every footlog, could be treated as a nuisance, at the option of any individual who might think proper to go upon the stream and prepare a raft of timber to await a rise from a freshet to float his raft down; and he might sue the owners of mills for all damage sustained in consequence of the interference of the same."

Again, it has been held that a creek, not affected by the ebb and flow of the tide, which had never been declared a public highway by legislative authority, and was not treated as a navigable stream by the United States surveyors, is not navigable or public, though during twenty years keel-boats, loaded with cotton, had been several times floated, and timber and lumber rafted down it during the winter season, but during the summer, there was not sufficient water for these purposes: *Ellis v. Carey*, 30 Ala. 725; *Lewis v. Coffee County*, 77 Ala. 192; 54 Am. Rep. 55.

When the facts are ascertained, whether a stream is navigable or public is a question of law. In this case, ³⁹⁹ the facts bearing on this inquiry are not in conflict. It does not appear that Pigeon Creek has ever been utilized for any other kind of transporta-

tion of commodities for market, other than sawlogs and lumber, and this at spasmodic and occasional periods in the winter or spring as the result of freshets; or that for any considerable part of the year did the depth of its water fit it for such transportation; or that any boats, keels, or lighters, propelled by steam, sail, pole, or oar had ever navigated its waters; or that it was exempt from the public surveys of the government, as a public stream, or declared to be such by the legislature of the state. Nor was there any evidence of the character and extent of the forests in the country through which it ran, and the number of people engaged in the mill or rafting business, so that it might be seen to what extent it had been or might be utilized in the future for purposes specified in the complaint. There does not appear that there was ever, at any time, such a state of facts as, under the foregoing and our other adjudications, would authorize us to declare this to be a public or navigable stream: *Bullock v. Wilson*, 2 Port. 436; *Peters v. New Orleans etc. R. R. Co.*, 56 Ala. 528; *Walker v. Allen*, 72 Ala. 457; *Sullivan v. Spotswood*, 82 Ala. 163; *Harold v. Jones*, 86 Ala. 274.

The plaintiffs based their recovery on the allegation that this creek was, at the time of the damage complained of, a common and public highway for the purposes specified. Their right of recovery, in any event, is rested on their making good this averment, which they have failed to do. The general charge for defendant, if requested, might have been well given; and since plaintiffs, in no event, could recover, it is unnecessary to consider the errors assigned. If any existed, they were harmless.

Affirmed.

WATERS—NAVIGABLE STREAMS.—The navigability of fresh water nontidal streams is a question of fact, and the burden of proof must be assumed by him who claims them to be navigable, and he must show that they are, in fact, navigable for boats or lighters and susceptible of valuable use for commercial purposes in a natural state for such length of time during the year as will make them valuable as public highways: *Gaston v. Mace*, 33 W. Va. 14; 25 Am. St. Rep. 848, and note. Navigable waters include not only those in which the tide ebbs and flows, but those which are navigable in fact and afford a channel for commerce, or subserve some other useful beneficial purpose: *Lamprey v. State*, 52 Minn. 181; 33 Am. St. Rep. 541. In all of the original thirteen states, except North Carolina, Pennsylvania, and Virginia, it is held that rivers above the ebb and flow of the tide, and rivers in which there is no tide, are non-navigable: Extended note to *Miller v. Mendenhall*, 19 Am. St. Rep. 228. See, also, the note to *St. Louis etc. Ry. Co. v. Ramsey*, 22 Am. St. Rep. 201.

COBB v. GARNER.

[105 ALABAMA, 467.]

PROBATE SALES—COLLATERAL ATTACK UPON.—In the absence of fraud or collusion, the judicial determination by a probate court, that there are debts against an estate over which it has jurisdiction, and that a sale of the land is necessary, is conclusive against all who are parties to that proceeding and upon a chancery or other court in any collateral proceeding or suit, so far as the rights of bona fide purchasers are concerned. Parties to such decree cannot impeach the sale collaterally on the ground that they were ignorant of their rights, that such debts were barred by the statute of limitations, and for fraud, the facts of which are not stated.

LIMITATIONS OF ACTIONS.—DEBTS AGAINST A DECEDENT'S ESTATE evidenced by his written obligation under seal for the payment of money are not barred by the statute of limitations until the expiration of ten years from maturity.

PROBATE SALES—INJUNCTION AGAINST JUDGMENT.—In a suit to set aside a regular and authorized probate sale of land and to enjoin the purchaser from enforcing a judgment obtained by him in an action of unlawful detainer against the complainants in possession, an injunction should not be granted in the absence of an allegation of the purchaser's insolvency.

Martin & Bouldin, for the appellant.

J. E. Brown, for the appellees.

469 COLEMAN, J. One James A. Toney, having been appointed, gave bond and qualified as the administrator of the estate of Celia Berry, deceased. Upon his petition and proof taken as in chancery proceedings, the probate court decreed the sale of certain lands for the payment of debts of the estate. At the sale William M. Cobb, appellant, became the purchaser, paid the purchase money, and received a deed of conveyance to the lands. At the time of the proceedings in the probate court for the sale of the land, and at the time of the sale and purchase by William M. Cobb, the appellees, Harriet Garner and Jane Connelly, were in possession of the lands as the children and heirs of Celia Berry, deceased. William M. Cobb instituted a suit for unlawful detainer against them, before a justice of the peace, and recovered a judgment for the possession. Thereupon, appellees filed the present bill against William M. Cobb, and prayed that the decree of sale by the probate court be set aside and annulled, the deed to Cobb, the purchaser, be canceled as a cloud upon their title, and that the respondent be enjoined from further prosecuting his action for the recovery of the possession of the land. The court issued the writ of injunction as prayed for in the bill. The averments of the bill upon which complainants rely for relief are, that they were ignorant of their rights, and did not contest the proceeding in the probate court for the sale of the land, and that

the debt against the estate, for payment of which the land was decreed to be sold, was barred by the statute of limitation; and there is a general charge of fraud and collusion.

The respondent answered the bill and denied all the material averments of facts upon which the complainants base their right to relief, and with their answer demurred to the bill and moved to dismiss it for want of equity. The case was set down for hearing upon a motion to dissolve the injunction upon the denials of the answer and the want of equity. The motion to dissolve the injunction was denied, and respondents appealed.

So far as can be ascertained from the averments of the 470 bill, the proceedings in the probate court were regular and valid, and the court had jurisdiction of the parties and subject matter. The complainants were parties to those proceedings. Their ignorance that their rights were involved affords no excuse for not appearing and contesting the sale of the land. If there were no debts against the estate, it was their bounden duty to appear and contest the application. If the proof was insufficient, or the proceedings irregular, their remedy was by appeal. The probate court had jurisdiction and judicially ascertained that there were debts against the estate, and that it was necessary to sell the land for the payment of the debts. In the absence of fraud or collusion, the judicial determination by the probate court, that there were debts against the estate and that a sale of the land was necessary, is conclusive upon all who were parties to that proceeding, and conclusive upon the chancery or other court, in any collateral suit or proceeding, so far as the rights of bona fide purchasers of the land at a sale, had in pursuance of the decree, are concerned: *Kent v. Mansel*, 101 Ala. 334; *Pettus v. McClannahan*, 52 Ala. 55; *May v. Marks*, 74 Ala. 249; *Pollard v. Hanrick*, 74 Ala. 334. The cases of *Teague v. Corbitt*, 57 Ala. 529, and *Boykin v. Cook*, 61 Ala. 472, are not in conflict with this principle. Whether an administrator is entitled on his settlement to reimbursement out of proceeds of land for money paid by him on a debt which had been barred by the statute of limitations, is wholly a different question. The debt against the estate of Celia Berry seems to be evidenced by a written obligation for the payment of money, which became due in 1887, executed under seal. It requires ten years to effect a bar against an action founded upon a writing under seal: Code 1886, sec. 2614. The act of February 16, 1891 (Acts 1890-91, p. 755), which prohibits the payment of any debt against an estate which may have been barred in the lifetime of the decedent, does not apply.

In actions to recover possession of land, instituted before justices of the peace, the title is not involved. There is no averment in the bill which attacks in any manner, the justice, regularity, or validity of the respondent's right to recover in the justice court.

The averment of fraud and collusion, as affecting the probate court proceeding, is general. In what the fraud ⁴⁷¹ consists is not stated. The complainants do not pretend they were deceived or overreached. Their excuse is, that they were ignorant and did not know that their rights were involved in the proceeding to sell the land.

From the identity of the names to the written obligation, which constitutes the debt against the estate of Celia Berry, to pay which the land was sold, and other evidence, we infer that complainants were comakers and bound as sureties for their mother. The facts tend to show that the purchaser paid full value for the land, and that the purchase money must go to the satisfaction of this debt, for which complainants were bound. If, after they have reaped such a benefit from the sale of the land, they are permitted to recover or retain the land, in their own right, the result would present a case of "masterly inactivity," rather than one of timidity and ignorance.

The bill does not charge that respondent is insolvent, and the facts tend to show that he is amply able to respond to any judgment that may be recovered against him. We are of opinion the court should have dissolved the injunction, and a decree will be here rendered to that effect. We will not dismiss the bill, but remand the case that complainants may amend, if they can, so as to aver fraud in the procurement of the decree in the probate court, and to connect the purchaser therewith.

Reversed and rendered in part and remanded.

PROBATE SALES.—COLLATERAL ATTACK on an order of the probate judge directing a sale cannot be successfully made when he had jurisdiction of the subject matter and the parties. Jurisdiction over the subject matter attaches upon the filing of a petition in sufficient form; *Hodge v. Fabian*, 31 S. C. 212; 17 Am. St. Rep. 25. Proceedings in probate for the sale of a decedent's estate are in rem, and cannot be collaterally attacked: *Note to Goodwin v. Sims*, 11 Am. St. Rep. 27, 28; *Daughtry v. Thweatt*, 105 Ala. 615; post, p. 146; to the same effect, see *Lyne v. Sanford*, 82 Tex. 58; 27 Am. St. Rep. 852, and note. The judgment of a probate court confirming an adjourned sale of real estate made by an administrator is final and conclusive until set aside in a direct proceeding, and cannot be collaterally attacked: *Noland v. Barrett*, 122 Mo. 181; 43 Am. St. Rep. 572 and note.

MOULTHROP v. HYETT.

[105 ALABAMA, 493.]

DAMAGES.—PROFITS which the purchaser of a chattel expects to make by its use are not recoverable in an action for damages against the seller for its nondelivery according to the terms of sale, or for its want of capacity to fulfill the uses or purposes for which it was intended. Such profits are too remote and speculative.

DAMAGES.—LOSS OF PROFITS cannot be made the measure of damages for breach of contract, when the profits are speculative, conjectural, dependent on chances, or have no reference to the nature of the contract and the breach; nor when the damages largely exceed the contract price, unless such a result was within the contemplation of the parties.

DAMAGES.—LOSS OF PROFITS AS.—It is only when the loss is indisputable and the amount can be estimated with almost absolute certainty, that loss of profits forms the proper measure of damages.

DAMAGES.—LOSS OF PROFITS.—BREACH OF WARRANTY.—In an action to recover the purchase price of machinery, the purchaser cannot recoup as damages the prospective profits which he could have made, if the capacity of the machinery had been as warranted.

O. Kyle, for the appellant.

Wert & Speake, for the appellee.

⁴⁹³ McCLELLAN, J. This is an action by Hyett & Smith on a promissory note for five hundred dollars executed to them by Moulthrop & Stevens. The consideration of the note was a brick-drying machine, called a "Smith Hot Blast Heater, No. 45." The defendants ⁴⁹⁴ pleaded in recoupment that Hyett & Smith, through their agent who made the sale, warranted that the machine would dry 25,000 bricks in twenty-four hours, that it in fact would not dry more than from 7,500 to 10,000 bricks in that time, and that, in consequence, they were damaged in the sum of \$600, which they offered to recoup against plaintiff's demand, praying judgment over in their favor for the excess.

The trial was had without jury, the judge at the request of the parties, making a special finding of facts. There were several rulings made on the pleadings and the competency of testimony, to which exceptions were reserved by the defendant. None of these rulings, however, had any bearing upon the point on which the case was decided against the defendants, and whether they were erroneous or not is wholly immaterial if the judge of the city court correctly adjudged that particular point, since, if erroneous, no injury resulted to the defendants.

The decision of the court was, "that defendants' plea of recoupment, in consequence of the alleged failure of considera-

tion, is not sustained by that character of evidence from which the law can fix defendants' damages." The evidence in this connection was to the effect that for six months after the machine was put in operation there was an active demand for brick, that if the heater had had a drying capacity of 25,000 per day as represented, the defendants could have made from 30,000 to 40,000 brick a week, but that with its actual capacity they "made on an average from 15,000 to 18,000 brick a week, and that their profit on the brick manufactured by them during that period was \$3.50 per thousand. We concur with the trial court that this evidence did not entitle the defendants to damages by way of recoupment, or otherwise, against the plaintiffs. The damages which it tends to show are entirely too speculative, conjectural, uncertain, and far beyond the contemplation of the parties to be recoverable. The profits which the purchaser of a chattel expects to make by the use of it are not recoverable in an action for damages against the seller for its nondelivery according to the terms of the sale—and the principle is the same where the chattel is delivered but is incapable of the uses—or less capable—for which it was intended—because the loss of them is neither the necessary nor the natural consequence of the seller's failure to ⁴⁰⁵ deliver the thing sold, and could not, therefore, have been within the contemplation of the parties, and for the further reason that mere profits existing only in expectancy—profits which the party believes he would have made but for the untoward circumstances complained of—"are incapable of that clear and satisfactory proof which the law requires to constitute recoverable damages": *Reed Lumber Co. v. Lewis*, 94 Ala. 626, and authorities there cited: 5 Am. & Eng. Ency. of Law, 32, 34; *Pennypacker v. Jones*, 106 Pa. St. 237; *McKinnon v. McEwan*, 48 Mich. 106; 42 Am. Rep. 458. This last case is strikingly analogous to the one at bar. In the note of it found in the Encyclopedia, and which is fully supported by the opinion itself, it is said: "Loss of profits cannot be made the measure of damages for breach of contract where the profits are conjectural, speculative, dependent on chances, or have no reference to the nature of the contract and the breach; nor where the damages largely exceed the contract price, unless such a result is in contemplation of the parties." And in *Allis v. McLean*, 48 Mich. 428, the owner of a sawmill contracted for "wrought feed friction works" to be placed in the mill early in March, and notified the other party that for every day's delay in putting them in he would suffer \$150 damages. The works were not put in until

July, though frequently promised, but the mill was furnished with other works which enabled it to be operated except for sixteen and one-half days, during which it lay idle. Yet, even upon these facts it was held that the lost profits from the inability to manufacture lumber for that time were too uncertain to provide a measure of damages for the breach of the contract. The court said: "We had occasion, in *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, decided at the last term, to pass upon a question much like the one which arises here. In that case, as in this, a millowner had contracted for machinery to be furnished by a specified day, and he sought to recover profits lost by reason of his mill lying idle, as damages for the failure to perform the contract in time. It seems reasonable that where profits are thus lost the defaulting party should make them good, for the machinery is purchased with a view to the profits, and the contract would not be entered into if the profits were not expected and counted upon. But the difficulty in measuring damages ⁴⁹⁶ by profits is, that they are commonly uncertain and speculative, and depend upon so many contingencies that their loss cannot be traced with reasonable certainty to the breach of contract. When that is the case, they are said to be too remote; and the damages must be estimated on a consideration of such elements of injury as are more directly and certainly the result of the failure in performance. But, in some cases, profits are the best possible measure of damages, for the very reason that the loss is indisputable and the amount can be estimated with almost absolute certainty. The case of a contract for the delivery of grain, or any other article which at all times finds a ready sale at a current market price, is an instance; if the contract is not performed, the purchaser may recover the advance beyond the purchase price; and this, though not recovered under the name of profits, is really nothing else. It often happens, also, that one contract, the performance of which will result in certain and definite profits, will be dependent upon the performance of another; and if the second contract is broken, the loss of definite and fixed profits under the other is a necessary and immediate consequence. There is no difficulty in saying in some such cases that profits lost are the proper measure of damages: *Loud v. Campbell*, 26 Mich. 239; *Booth v. Spuyten etc. Rolling Mill Co.*, 60 N. Y. 487; *Salvo v. Duncan*, 49 Wis. 151; *Hitchcock v. Galveston*, 3 Woods, 287; *Fiegel v. Latour*, 81½ Pa. St. 448; *James v. Adams*, 8 W. Va. 568; *Waters v. Towers*, 8 Ex. 401. But the profits of running a sawmill are proverbially uncertain, indefinite,

and contingent. They depend on many circumstances, among which are capital, skill, supply of logs, supply and steadiness of labor; and one man may fail while another prospers, and the same man may fail at one time and prosper at another, though the prospective outlook seems equally favorable at both times. Estimates of profits seldom take all contingencies into the account, and are therefore seldom realized; and if damages for breach of contract were to be determined on estimates of probable profits, no man could know in advance the extent of his responsibility. It is, therefore, very properly held in cases like the present that a party complaining of a breach of contract must point out elements of damage more certain and more directly ⁴⁹⁷ traceable to the injury than prospective profits can be: *Fleming v. Beck*, 48 Pa. St. 309; *Pittsburg Coal Co. v. Foster*, 59 Pa. St. 365; *Strawn v. Cogswell*, 28 Ill. 457; *Frazier v. Smith*, 60 Ill. 145; *Howe Machine Co. v. Bryson*, 44 Iowa, 159; 24 Am. Rep. 735."

The entire soundness of these views is aptly illustrated in the case at bar. Here the machine was operated for six months, and its operation appears to have been stopped because of circumstances wholly disconnected with the machine itself and wholly fortuitous. But for these untoward occurrences, namely, the outbreak of an epidemic of yellow fever in Decatur and New Decatur, and the collapse, from that among other causes, of the building boom that had existed there during the six months of operation, it is fair to assume that the machine would have continued a much longer time in operation, possibly until the present time. The nearest approach that the defendants' evidence makes to the amount of lost profits by reason of the machine's not coming up to representations during the six months they used it is from \$42 to \$87.50 per week, or somewhere from \$1,092 to \$2,275 for the six months. The evidence no more tends to show the one amount than it tends to show the other; and there is confessedly no certainty that either is the true amount, or even, we feel justified in saying, that any ascertainable amount greater than the less and less than the greater of the sums named would truly represent the lost profits of the defendants. But even the smaller sum far exceeds the price of the machine. Can it be possible that the plaintiffs should, in six months, be called on to pay, as damages for failure in respect of the machine's efficiency, a sum somewhere from one and a half to three times the price of the thing sold? And had the fever not come, and the boom continued from 1887 to the present time, the damages, ac-

cording to defendants, would have been somewhere from \$15,000 to \$32,000 for the failure of a \$750 machine to accomplish fully what was claimed for it. And even if the time be computed to suit brought, the damages would be somewhere from \$2,200 to \$4,600. And this, too, when it seems the defendants had at all times the right, which the plaintiffs were at all times ready to effectuate, to return the machine to the seller. It is absurd to say that such damages were in the contemplation ⁴⁹⁸ of the parties, or that they were in any sense the necessary or natural consequence of the partial incapacity of the machine. And the uncertainty of the amount of such profits on the face of defendants' evidence, they placing it indefinitely from \$1,000 to \$2,000, is accentuated and emphasized by the entirely fortuitous causes—the occurrence of fever and the collapse of the boom which, if something else equally casual and fortuitous had not subsequently arrested the flow of profits not made, prevented the damages from amounting to from \$15,000 to \$32,000.

There is no way of ascertaining the amount of such damages. They are not within the contemplation of the parties. They are not the necessary or natural consequence of the wrong complained of. They are not recoverable.

And the judgment of city court is affirmed.

DAMAGES—LOSS OF PROSPECTIVE PROFITS AS ELEMENT OF.—Prospective profits are not allowed as damages for a tort or for the breach of a contract unless they are the clear, proximate, and natural results of the wrong, and are confined to the principal thing complained of and to its natural attendant circumstances; *Martin v. Deetz*, 102 Cal. 55; 41 Am. St. Rep. 151. In an action to recover for the breach of a contract for furnishing machinery and repairing a flouring mill, the measure of damages is the fair rental value of the mill during the time the owner is deprived of its use after the expiration of the time for the performance of the contract; but prospective profits of such mill are too speculative to be considered as damages: *Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156; 30 Am. St. Rep. 463, and note. If one party breaks a contract which the other party has partly performed, and the violator then completes the work himself from which he reaps the profits which the other party might have made, he cannot escape liability for damages, if the other party can show the profits made while he was executing it, and the benefits reaped from its subsequent completion. The measure of damages is the profits and benefits remaining after the cost of doing the work has been deducted from the amount agreed to be paid for doing it; *Hitchcock v. Supreme Tent etc.*, 100 Mich. 40; 43 Am. St. Rep. 423. One engaged in doing a profitable piece of work, who has his implements wrongfully seized and sold under attachment, whereby he is prevented from performing his contract, may recover the profits of the contract as an element of damages in an action on the attachment bond, where such profit is readily ascertainable: *State v. Andrews*, 39 W. Va. 35; 45 Am. St. Rep. 884, and note. See, also, the extended notes to *Griffin v. Colver*, 69 Am. Dec. 725; *Sitton v. McDonald*, 60 Am. Rep. 488, and *McKinnon v. McEwan*, 42 Am. Rep. 461.

KLING v. CONNELL.

[105 ALABAMA, 590.]

EXECUTORS AND ADMINISTRATORS—COLLATERAL ATTACK.—A GRANT of letters of administration by the probate court of one county on the estate of a decedent who resided in another county at the time of his death, is not void, but merely voidable, and cannot be collaterally attacked nor questioned otherwise than in a direct proceeding brought for that purpose. A motion by sureties on the bond for such administration to quash executions issued against them as sureties, on the ground that the grant of administration was made in the wrong county, is a collateral attack.

EXECUTORS AND ADMINISTRATORS—GRANT OF ADMINISTRATION—COLLATERAL ATTACK.—It is presumed that the probate court before making an appointment of an administrator of the estate of a deceased person has ascertained the existence of the jurisdictional facts, without which the power of appointment could not be legally exercised. Such grant of administration, when made, cannot be collaterally assailed otherwise than in a direct proceeding.

EXECUTORS AND ADMINISTRATORS—GRANT OF ADMINISTRATION—ATTACK UPON.—If an administrator appointed by the probate court of the wrong county accepts the appointment, and, acting thereunder, obtains possession of the assets of an estate and converts them, neither he nor his sureties can question the validity of his appointment. The fact that the administration bond was signed several years before the grant of administration is immaterial, if the obligors signed it with reference to the administration of all estates that might be committed to the hands of the administrator by the order of the court of that county.

Petition to quash executions issued against the sureties on an administrator's bond. Joseph Espalla, the administrator in question of the estate of Mrs. E. B. Rupert, deceased, converted fifteen hundred and seventy-two dollars of the funds of said estate to his own use. An execution against him, issued in pursuance of a judgment for said amount, was returned "no property found." Separate executions were subsequently issued against the sureties on his administration bond. Judgment dismissing the petition, and the petitioners appealed.

Overall, Bestor & Gray, for the appellants.

McIntosh & Rich, for the appellees.

⁵⁹⁵ HARALSON, J. In *Coltart v. Allen*, 40 Ala. 155, 88 Am. Dec. 757—the statute having reference to the authority of the probate court to grant letters of administration on the estate of decedents being the same then as now—it was held that the grant of letters of administration by the probate court of Jackson county on the estate of a decedent, who resided in Madison county at the time of his death, was not void, but merely voidable, and that the grant could be set aside only by a direct

proceeding for the purpose. The principle as there stated is, "that the constitution gives to the probate courts a general jurisdiction to grant administration. The statute distributes the cases arising under the grant among the different courts of the state according to locality; and the court having jurisdiction over a certain class of cases, its error in adjudging some particular case belonging to that class, which properly pertains to the same court in another locality, does not make the judgment void, but simply voidable by a direct proceeding for that purpose." To the same effect is the case of *Barclift v. Treece*, 77 Ala. 528. The doctrine laid down in *Coltart v. Allen*, 40 Ala. 155, 88 Am. Dec. 757, has been followed and enforced in many subsequent decisions of this court, and it may be regarded as settled that when the court of probate makes an appointment of an administrator of the estate of a deceased person, it will be presumed that it previously ascertained the existence of the jurisdictional facts, without which the power of appointment could not be legally exercised; and its validity will not be permitted to be collaterally assailed, or questioned otherwise than in a direct proceeding for the purpose; and even when so assailed successfully such an appointment would not be void but merely voidable: *May v. Marks*, 74 Ala. 253; *Bean v. Chapman*, 73 Ala. 144; *Landford v. Dunklin*, 71 Ala. 603; *Ex parte Hardy*, 68 Ala. 333, 334; *Burke v. Mutch*, 66 Ala. 569.

2. The petition of *Espalla* to be appointed administrator recites the fact that *Mrs. Rupert* was an inhabitant of the county of *Mobile*, at the time of her death; ⁵⁹⁶ and the order of the court making the appointment also recites that, in his application for letters of administration, said *Espalla* represented that decedent when she died was an inhabitant of the county of *Mobile*, and left property in the state of the supposed value of two thousand dollars. We must presume, therefore, that the jurisdictional fact that *Mrs. Rupert* was an inhabitant of the county of *Mobile*, at the time of her death, as well as all other questions relating to the proper appointment of her administrator, were judicially ascertained, as preliminary to the granting of the letters of administration on her estate. This appointment until revoked was conclusive evidence of the administrator's authority to act, which authority extended to all the property of the deceased in the state; and the appointment excluded the jurisdiction of every other probate court to grant letters of administration on said estate: *Barclift v. Treece*, 77 Ala. 528. The filing of the petition by appellants to quash said executions on the grounds set

up must be held as a collateral attack on the validity of the appointment of said administrator by the probate court of Mobile, and cannot be sanctioned.

3. Again, it appears from said petition that said administrator accepted his appointment as such by said probate court, and, acting under the grant, obtained possession of the assets and converted them. Neither the administrator nor his sureties, after this, can be heard to question the validity of the grant. That the bond of the administrator, as general administrator, was signed several years before the grant of administration can make no difference, since the obligors signed in reference to the administrations of all estates that might be committed to the hands of the administrator by the order of the probate court of Mobile county: *Plowman v. Henderson*, 59 Ala. 559; *Burnett v. Nesmith*, 62 Ala. 261; *Person v. Thornton*, 86 Ala. 310.

From what has been said, the other questions raised and discussed, if of any merit, necessarily disappear.

We find no error in the ruling of the court below, and its judgment is affirmed.

EXECUTORS AND ADMINISTRATORS—APPOINTMENT—COLLATERAL ATTACK.—The appointment of an administrator rests exclusively within the jurisdiction of the probate court, and its legality cannot be questioned in any other court or collaterally attacked: *McFarland v. Stone*, 17 Vt. 165; 44 Am. Dec. 325, and note; *Driggs v. Abbott*, 27 Vt. 580; 65 Am. Dec. 214; *Johnson v. Beazley*, 65 Mo. 250; 27 Am. Rep. 276. A grant of letters of administration to one who did not live within the jurisdiction of the court at the time of his death is void and may be attacked collaterally: *People's Sav. Bank v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894, and note. See, also, the notes to *Ex parte Maxwell*, 79 Am. Dec. 65-67, and *Melia v. Simmons*, 80 Am. Rep. 748, 749.

DAUGHTRY v. THWEATT.

[105 ALABAMA, 615.]

PROBATE SALES—COLLATERAL ATTACK.—A proceeding in a probate court for the sale of a ward's property is a proceeding in rem, and the jurisdiction of the court attaches when the application for an order of sale, made by the proper party, and disclosing a statutory ground for the sale, is presented to, and recognized by, the court. Whatever of error or irregularity may thereafter intervene, must be corrected by an appropriate revisory remedy, and is not a ground for collateral attack on either the decree or the sale made thereunder.

PROBATE SALES—COLLATERAL ATTACK.—A probate sale of a ward's property for the purpose of reinvestment, made on proper application and showing by the guardian, cannot be collaterally attacked on the ground that it was made without notice to the ward and without the appointment of a guardian ad litem for him,

PROBATE SALES—GUARDIAN AD LITEM.—Probate sales of a ward's property made by the probate court on proper application and showing by the guardian are proceedings in rem, in which the appointment of a guardian ad litem to represent the ward is not required or authorized.

Ejectment. Judgment for defendant and plaintiff appealed.

P. B. McKenzie, for the appellant.

G. L. Comer, for the appellee.

⁶¹⁶ **BRICKELL, C. J.** This was a statutory real action for the recovery of two parcels of land situate in the city of Eufaula, in which the appellant was plaintiff and the appellee was defendant. The facts are, that the legal estate in the premises at one time resided in the appellant. In December, 1881, the mother and guardian of appellant, who was then of the age of ten years, in the capacity of guardian, presented to the judge of the court of probate of the county of Barbour, in which county she and the appellant then resided, and in which county the premises were then situate, a petition in writing verified by affidavit, praying an order authorizing the sale of the premises, and for the reinvestment of the purchase money. The material allegations of the petition were that the premises were a residence lot in the city of Eufaula, which could be made a source of income only by renting; that it was expensive to keep them in repair; that owing to their location, and the nature of the property, the income they would yield would be but a small percentage of their actual value, not amounting to legal ⁶¹⁷ interest, which would be considerably reduced by payments for taxes, insurance, and repairs, and that the premises were the only real estate owned by the appellant. The judge of probate, having examined witnesses, made an order authorizing the sale of the premises for cash, requiring notice of the time, place, and terms of sale to be given in precise conformity to the requirements of the statute. The sale was made, the purchase money paid, a report of it made, a confirmation of the report by the probate judge, and an order made directing a conveyance to the purchaser which was executed, the purchaser entering into possession, and, under mesne conveyances from him, the appellee deduces title.

The statute under which the proceedings were had provided: "For good cause shown, the judge of probate may authorize the sale of personal and real property of the ward, in such manner as he may direct; and direct its reinvestment in bonds, notes, or bills of exchange, at interest on mortgage security, or in other prop-

erty, in the name of the ward; but no sale of real estate must be had on less than forty days' notice, which notice must be published once a week for three successive weeks in a newspaper nearest the place where the sale is to be made; and returns of sales must be made and confirmed as in sales of land by administrators": Code 1876, sec. 2785. The jurisdiction conferred on the judge of probate could not be called into exercise without an application disclosing good cause for the sale of property real or personal. The statute is part of a system regulating the relation of guardian and ward, declaring the duties of the guardian, and committing to him the management and control of the ward's estate. He is the proper party to make the application. The application must have shown that the necessities or interests of the ward required the sale; and, when this was shown, the jurisdiction of the judge of probate attached.

It is not controverted that the averments of the petition were sufficient to call into exercise the jurisdiction of the judge, necessitating that he should act and move in its exercise. The proposition is, that he could not proceed to an order of sale without notice to the ward, and without the appointment of a guardian ad litem to represent her. The proceeding the statute authorizes has in it no element of an adversary suit in personam. All ⁶¹⁸ such proceedings under analogous statutes authorizing the court of probate, or the judge of the court of probate, to license or confer power on executors or administrators, to make sales of lands, or of personal property, since the case of *Wyman v. Campbell*, 6 Port. 219, 31 Am. Dec. 677, have been regarded as proceedings in rem; and jurisdiction of the thing, and not of the person, as imparting validity to the proceeding when collaterally assailed: 1 *Brickell's Digest*, secs. 351, 352, p. 939. The jurisdiction of the judge of probate must have attached, or there could not have been notice to, or the appointment of a guardian ad litem for, the ward. The one or the other would have been but movements in the exercise of the jurisdiction, attaching on the filing of the application for the sale. The notice and appointment of the guardian ad litem would have been vain and nugatory, if the application had not shown good cause for the sale. Without the application there would not have been jurisdiction of the subject matter, and jurisdiction of the person, however plenary, could not have rendered the order of sale valid. The principle is now too firmly ingrafted on our jurisprudence to be drawn into controversy, that in proceedings of this character, the jurisdiction of the court of probate, or of the judge of

probate, attaches when an application for an order of sale is made by a proper party, disclosing a statutory ground for the sale, and is presented to and recognized by the court or judge. Whatever of error or irregularity may thereafter intervene must be corrected by an appropriate revisory remedy; because of such error or irregularity, the decree cannot be collaterally assailed. The numerous authorities affirming this doctrine need not be referred to; they are known to and read by all the profession. The order of sale was not capable of impeachment upon either of the grounds on which it was assailed.

We must not be understood as assenting to the proposition that notice to the ward, or the appointment of a guardian ad litem for her, was essential to the regularity of the proceeding. The statute makes no such requirement, and for the obvious reason, as we have said, that an adversary proceeding in personam is not contemplated. The application for the sale made by the guardian in her representative capacity, not in any individual right, would seem to be but the application of the ward speaking ⁶¹⁹ and acting through her legal representative. Notice to the ward could only inform her of the pendency of her own proceeding, and warn her of a decree, or order sought to meet her necessities or interests: *Mohr v. Manierre*, 101 U. S. 417. A guardian ad litem could have no duty or office to perform which the law had not devolved on the general guardian. Whenever a guardian ad litem is deemed necessary for the representation of the ward in the court of probate, the statutes provide expressly for his appointment. In the proceeding for the sale of lands under the statute to which we have referred, there is no authority for, or the requirement of, such an appointment. This question the necessities of the case do not require us to decide, and we prefer to rest our conclusions on the settled doctrine, which has so long prevailed in this state, touching the character and validity of sales made under the orders or decrees of the court of probate.

We find no error in the judgment, and it must be affirmed.

PROBATE SALES—COLLATERAL ATTACK.—Proceedings in probate for the sale of a decedent's estate are in rem, and cannot be collaterally attacked: *Note to Goodwin v. Sims*, 11 Am. St. Rep. 27, 28. See, also, *Cobb v. Garner*, 105 Ala. 467; ante, p. 000, and note.

GUARDIAN AND WARD—SALES—NOTICE—COLLATERAL ATTACK.—Whether one of two guardians named in a will has authority to institute proceedings for the sale of a ward's property is for the court to determine upon the hearing of the petition, and is not the subject of collateral inquiry: *Fitzgibbon v. Lake*, 29 Ill. 165; 81 Am. Dec. 302. A decree of sale of an infant's property cannot be col-

laterally attacked for mere irregularities in the proceedings where the court has jurisdiction: *Hunter v. Hatton*, 4 Gill, 115; 45 Am. Dec. 117.

GUARDIAN AND WARD—SALES—NOTICE—APPOINTMENT OF GUARDIAN AD LITEM.—Wards need not be made parties to proceedings, nor is a guardian ad litem for them required on an application by a guardian for an order to sell the realty of his ward: *Smith v. Race*, 27 Ill. 387; 81 Am. Dec. 235, and note; but see *Loyd v. Malone*, 23 Ill. 43; 74 Am. Dec. 179, and note. The application by a guardian for a license to sell the real estate of his wards for their maintenance and education is a proceeding in rem, and notice to them of such application is not necessary to the jurisdiction of the court to grant the license, though it might be otherwise with an application to sell for the purposes of paying debts: *Myers v. McGavock*, 39 Neb. 843; 42 Am. St. Rep. 627, and note.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

MAIER v. FREEMAN.

[112 CALIFORNIA, 8.]

CHATTEL MORTGAGE, LIEN OF ON PROCEEDS, WHEN DOES NOT EXIST.—If a mortgagee of chattels authorizes the mortgagor as his agent, to sell the mortgaged property, and to deposit the proceeds in a bank, to be applied on the mortgage debt, and a sale is made under such authorization, the lien of the mortgage does not attach to the proceeds, and they are subject to attachment by the other creditors of the mortgagor.

NEITHER A TRUST NOR AN EQUITABLE ASSIGNMENT is created in favor of a mortgagee of chattels on the proceeds of their sale when he authorizes the mortgagor to sell them, to collect the proceeds of the sale, and to deposit them in a bank, to be applied on the mortgage debt.

A SALE OF CHATTELS IS NOT COMPLETE until the property has been delivered to the purchaser so as to impose any obligation on him to pay the purchase price.

A GARNISHMENT IS PREMATURE when it is based upon a writ against the vendor of chattels, and is served on the purchaser before they have been delivered, and, therefore, before it is certain that any sale will be perfected, or any sum of money will ever become due to the vendor on account of the sale.

A GARNISHMENT UNDER EXECUTION IS SUBJECT TO THE LIEN OF ATTACHMENTS previously levied in actions which have subsequently been prosecuted to judgment.

Ben. Goodrich, A. B. McCutchen, and John D. Pope, for the appellants.

Allen & Flint, and Graves, O'Melveny & Shankland, for the respondents.

10 BRITT, C. The plaintiff Maier, being indebted in the sum of \$2,898.90 for sheep purchased by him from one Nellis, and conflicting claims being made upon him for the money by several creditors of Nellis, he instituted this action against said creditors and Nellis to compel them to interplead concerning

their several pretensions. This being done, after trial the court entered judgment awarding the fund (which Maier had then paid into court) to certain of the defendants who had summoned Maier as garnishee in the course of actions prosecuted by them, respectively, against Nellis. By such determination of the court, the demands of Haas, Baruch & Co., a copartnership, and of defendant Perkins are to be first paid, and the fund is sufficient to satisfy them in full; the residue thereof is to be paid to defendant Boyce, and is not sufficient to pay the whole of his claim.

Defendants Freeman, Kimball, and Hoskins constitute a copartnership engaged in business in the territory of Arizona, under the firm name of the "Arizona Central Bank," they having complied with the laws of the territory respecting fictitious names of partnerships, and ¹¹ being authorized to carry on business under that name. They claim the whole of the fund in dispute by reason of a chattel mortgage made by Nellis to them upon the said sheep, and certain other transactions they had with him touching the sheep, before the sale thereof to Maier. The court gave judgment in favor of Freeman and his said copartners against Nellis personally for the unpaid amount of the debt specified in the mortgage—something over four thousand dollars; they appeal from that portion of the judgment which applies the fund to the payment of the attaching creditors. Boyce appeals from so much of the judgment as postpones his demand to those of Haas, Baruch & Co. and Perkins.

The appeal of Freeman, Kimball, and Hoskins presents several interesting questions (some of them not necessary to be now considered) which have been argued by their counsel ably and ingeniously; but, in our opinion, the judgment adverse to them was right.

On November 28, 1893, before the debt specified in the mortgage became due, the mortgagees agreed with Nellis in writing as follows:

"We hereby appoint William Nellis as agent to take six cars of sheep to California, one of which goes to San Bernardino and five to Los Angeles, he to turn over the proceeds of said sheep to us, to be applied upon his mortgage to us, which said mortgage covers said sheep. This applies to these six cars only, and extends for ten days only from this date, said sheep to be shipped in our name. ARIZONA CENTRAL BANK, M'tgees.

"11-28-'93.

By J. H. Hoskins."

Appellants allege that it was part of the agreement between the parties to the mortgage that the mortgagor should deposit

the net proceeds of the sale of the sheep in a bank at Los Angeles to the credit of the mortgagees; also that the sale and delivery of the sheep to Maier was made pursuant to such agreement; and so in substance was the finding of the court. Now, plainly, by this agreement the mortgagees intended, upon a sale by Nellis, that title to the sheep should pass to the purchaser ¹² free of the lien of their mortgage, and that the proceeds of the sale should be paid to Nellis, and on these facts the lien on the sheep was not translated to the proceeds in the hands of the purchaser. *White Mountain Bank v. West*, 46 Me. 15, 20, is a case directly in point, and we agree with the view there stated, that "from the time of sale the lien of the mortgage was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him." There are many decisions that the mortgagee of chattels may authorize the mortgagor to sell the encumbered property and apply the proceeds of sale upon the debt secured, and that such an agreement does not render the mortgage fraudulent in law, nor affect the lien thereof prior to the sale: *Bracket v. Harvey*, 91 N. Y. 221; *Murray v. McNealy*, 86 Ala. 234; 11 Am. St. Rep. 33; *Lane v. Starr*, 1 S. Dak. 107, and cases cited; but we have found no case in which the lien was held to attach to the proceeds unpaid by the purchaser. The doctrine of the case from 46 Maine, above cited, is that if the mortgagee "wished to reach the proceeds in the hands of the purchasers, he, like other creditors, should have resorted to a trustee process under the statute."

It is urged for the mortgagees that the agreement of November 28, 1893, operated to create a trust in their favor in the fund to be derived from the sale, or an equitable assignment of such fund to them. It seems to us there might be more color for this contention, or some part of it, if the mortgage had vested the title to the sheep in the mortgagees, as was the rule of the common law; but under our law, and presumptively under that of Arizona, the title remained in Nellis: Civ. Code, sec. 2888; *Bank of Ukiah v. Moore*, 106 Cal. 681. He being the owner and possessed of the sheep, to say that his agreement created, as against creditors, a trust in, or an assignment of, the proceeds of a sale which he had not then made, or, so far as shown, contracted to make, is to say that he could create a secret trust in the ¹³ sheep or a pledge thereof and yet retain possession of them—contrary to the statutes: Civ. Code, secs. 2988, 3440. Authorities are cited to show that such enactments have no application to choses in action; but the agreement of November

28th did not purport to deal with a chose in action. And, aside from other considerations, the retention by Nellis of the authority to collect the anticipated fund to arise from the sale was inconsistent with the idea of an equitable assignment of the same: *Christmas v. Russell*, 14 Wall. 69, 84; *Christmas v. Griswold*, 8 Ohio St. 558.

The appeal of Boyce is easier of disposition. By the contract of sale between Nellis and Maier the former was to deliver the sheep at Maier's slaughterhouse, about five miles from the railroad station at Los Angeles; they were to be weighed at the slaughterhouse, and be paid for at the rate of three cents per pound. The garnishment in the suit of Boyce against Nellis was served on Maier after the sheep had been unloaded at the station and while they were yet in charge of Nellis' employés and before they had reached the slaughterhouse or had been weighed; consequently, before the sale was complete and before any credit existed in favor of Nellis and against Maier, and when it was not certain that any ever would exist. The law aids the vigilant, but in this instance the creditor was vigilant overmuch, and his attachment was invalid. The garnishment under his subsequent execution was after the attachments of the other creditors had been levied and perfected by judgment, and they were rightly held entitled to precedence in the distribution of the fund: *Early v. Redwood City*, 57 Cal. 193; 1 *Freeman on Executions*, sec. 165. The judgment should be affirmed.

Haynes, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion, the judgment is affirmed. Garoutte, J., Van Fleet, J., Harrison, J.

Hearing in Bank denied.

CHATTEL MORTGAGES—SALE BY MORTGAGOR—RIGHT TO PROCEEDS.—A mortgage of personal property does not cover personal property purchased with the proceeds of the sale of the mortgaged property: *Rose v. Bevan*, 10 Md. 466; 69 Am. Dec. 170, and note. A recorded chattel mortgage providing that the mortgagor may sell the mortgaged property from time to time, replacing that sold with others of like kind and value, the substituted property to be subject to the terms of the mortgage, is valid, and where the mortgagee takes possession with the consent of the mortgagor, he can hold the property, original and substituted, as against a subsequent attaching creditor of the mortgagor: *Peabody v. Landon*, 61 Vt. 318; 15 Am. St. Rep. 903, and extended note at page 916; to the same effect see *Roundy v. Converse*, 71 Wis. 524; 5 Am. St. Rep. 240, and note. See, also, the notes to the following cases: *Ford v. Williams*, 67 Am. Dec. 87; *Barnet v. Fergus*, 99 Am. Dec. 550, and *Pulkifer v. Page*, 54 Am. Dec. 595.

SALES—DELIVERY.—In a sale of goods generally the contract is executory and no property in them passes and the sale is not com-

plete until delivery: *State v. Wernwag*, 116 N. C. 1061; 47 Am. St. Rep. 873, and note.

GARNISHMENT—NECESSITY FOR POSSESSION BY GARNISHEE.—To render a person liable as garnishee in Wisconsin he must have in his possession belonging to the defendant, "property, money, credits, or effects," or he must be indebted to the defendant: *Smith v. Davis*, 1 Wis. 447; 60 Am. Dec. 390, and note; *Carson v. Allen*, 2 Pinney, 457; 2 Chand. 123; 54 Am. Dec. 148.

ATTACHMENTS—PRIORITY.—Successive attachments should be satisfied in the order of their priority: *Hepp v. Glover*, 15 La. 461; 35 Am. Dec. 206, and note; *Kennon v. Ficklin*, 6 B. Mon. 414; 44 Am. Dec. 776, and note; *McComb v. Reid*, 28 Cal. 281; 87 Am. Dec. 115.

O'CONOR v. MORSE.

[112 CALIFORNIA, 31.]

A SURETY IS, by the Civil Code of California, one, who, at the request of another and for the purpose of securing him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor.

PRINCIPAL AND SURETY.—THE MAKER OF AN ACCOMMODATION NOTE given as collateral security for the payment of another note is a surety, and will be released by any act which would release any other surety.

SURETY, RELEASE OF BY REFUSAL TO ACCEPT PAYMENT.—If one of several sureties or of persons who have made an accommodation note as collateral security for another note, offer to pay the latter, and take an assignment thereof, and the holder refuses to accept such payment and give such assignment, and the maker afterward becomes insolvent, the surety is released.

A SURETY IS ENTITLED TO AT ONCE PAY THE DEBT and to thereupon proceed against his principal, and a creditor refusing such payment releases the surety.

A SURETY TENDERING PAYMENT OF A DEBT IS RELEASED if the creditor refuses to accept it.

ONE OF SEVERAL MAKERS OF A NOTE IS ENTITLED TO PAY IT, and to proceed against his comakers for contribution, and if the creditor refuses to accept such payment such maker is thereby released, as to the part due from the comakers, if they subsequently become insolvent.

PRACTICE.—THE FINDING that a person who had occupied the relation of a surety, had offered to pay the debt for the purpose of proceeding against his cosureties, and that such offer was refused by the creditor, and that such person at the trial offered to prove the solvency of the cosureties at the time of making such offer and their subsequent insolvency, and that the evidence was excluded, is equivalent to a finding that they were so solvent, and subsequently became insolvent.

TENDER, WHEN EQUIVALENT TO PAYMENT.—An offer on the part of a surety to pay money need not, on its refusal, be followed by the depositing of the money in the name of the creditor with some bank. Such offer and refusal are equivalent to actual payment, for the purpose of releasing the surety.

J. W. Hughes, for the appellant.

V. E. Shaw, for the respondent.

³² BELCHER, C. This is an action upon a non-negotiable promissory note for thirteen hundred and eight dollars ³³ and ninety-five cents, bearing interest at the rate of one per cent per month, compounding monthly.

The case was tried by the court without a jury, and the findings were in substance as follows: On October 31, 1890, the defendants, E. W. Morse, C. E. Heath, and J. H. Braly, executed and delivered the said note to one F. W. Stewart, to be used as collateral security for his own note, to be given to the Consolidated National Bank of San Diego. Thereafter, Stewart executed his own non-negotiable note for the same sum to the said bank, and, as collateral security for the payment thereof, duly indorsed, assigned, and delivered to the bank the said note. On the day of its date, defendant Braly paid on said note one-third of the amount due thereon, to wit, four hundred and thirty-six dollars and thirty-two cents. The interest on the note was paid up to October 30, 1891, but no other payments on account of interest or principal were ever made.

On May 11, 1893, the bank was still the owner and holder of the said note. On that day, the defendant Braly, through his duly authorized agent, J. C. Braly, called at the bank and offered to pay the said note, but stated that he did not want it stamped "paid" upon its face, but wanted such an indorsement made as would show the amount paid, and that it had been paid by J. H. Braly. In answer to a question by the cashier as to what he intended to do with the note, he replied that he was instructed to turn it over to attorneys to bring suit on it. From what was said, the cashier understood that he wanted the note so indorsed that J. H. Braly could sue upon it, and he referred the matter to Mr. Howard, the president of the bank, and stated to him that accepting payment "would result in a suit against Heath and Morse." Mr. Howard replied to the cashier, in the absence of Mr. Braly, "that is a matter we must consider." He further said that "the relations of Mr. Morse and Heath to the bank were such that the matter must be considered before suit could be allowed." The cashier then told Mr. Braly to call the next day, and at that ³⁴ time or later the president stated to the cashier that he did n't care to have Mr. Stewart and Mr. Morse sued. Braly went back to the bank the next day, as requested, and Mr. Howard, the then president of the bank, stated to him "that they had concluded to hold the note and make it out of the other parties."

Defendant Braly offered to prove by defendants Morse and

Heath that they were solvent at the time he offered to pay the bank, but that on the twenty-fifth day of August, 1893, they, and each of them, became insolvent, and have continuously since been insolvent; which offered evidence the court excluded, upon the ground that it was irrelevant, incompetent, and immaterial, to which ruling defendant Braly duly excepted.

And, as conclusions of law, the court found that the effect of the offer to pay, on May 11th, was to stop the running of interest and to release said defendant Braly from the obligation to pay attorneys' fees, but that he was not released from his obligation to pay the note, and that plaintiff was entitled to judgment against the three defendants for the principal due on the note, with interest thereon to May 11, 1893, amounting to one thousand and sixty-eight dollars and twenty-five cents.

Judgment was accordingly so entered, from which the defendant Braly appeals on the judgment-roll alone.

The Civil Code, section 2831, declares a surety to be "one who, at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor."

In *Montgomery v. Sayre*, 91 Cal. 206, the action was upon a promissory note given as collateral security under circumstances similar to those found here, and it was held that the maker of the note was, in law, a surety.

The note in suit was executed to be used as collateral security for the payment of Stewart's note, and was accepted and held by the bank as such collateral security. ³⁵ The appellant must, therefore, be regarded as only a surety, and the question is, Was he exonerated from liability on the note by the refusal of the bank to accept payment thereof, because it would result in a suit against the comakers, and "they had concluded to hold the note, and make it out of the other parties?"

"A surety is exonerated: 1. In like manner with a guarantor; 2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety, or inconsistent with his rights, or which lessens his security; or 3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do": Civ. Code, sec. 2840.

In *Hayes v. Josephi*, 26 Cal. 535, the action was to recover from a surety on an undertaking, given for the release of an attachment, the amount of the judgment subsequently recovered.

The defense was, that subsequent to the recovery of the judgment, the surety tendered to the creditor the full amount of the judgment, and he refused to receive it, and that at that time the judgment debtor was solvent, but afterward, and before the commencement of the action, became, and ever since had been, wholly insolvent.

At the trial, the court refused to admit evidence in support of the allegations of the answer, and gave judgment for the plaintiff on the pleadings. On appeal, it was held that the offered evidence should have been admitted, and that, if the facts alleged were established, the surety was discharged from his obligation on the undertaking. In the opinion of the court rendered by Sawyer, J., it is said: "The law requires the creditor to act in the utmost good faith toward the surety, and will not permit him to do anything that will unnecessarily tend to prejudice his interests. The creditor will certainly not be permitted to place obstacles in the way of the surety, which tend to hinder him in the pursuit of such remedies as are guaranteed to him by the law. The surety is entitled to pay the debt, and thereby at once³⁶ acquire the right to proceed against the principal. . . . If it is the legal right of the surety to pay the debt, and at once proceed against the principal debtor, it necessarily follows that he is entitled to have the money accepted by the creditor in order that he may proceed. It is the duty of the creditor to receive it, and a gross violation of duty and good faith on his part to refuse, thereby interposing an insurmountable obstacle in the way of the pursuit by the surety of his most prompt and efficient remedy. . . . If the creditor refuses to receive the money when tendered, he as effectually prevents the surety from promptly pursuing his most efficient remedy as he would by entering into a valid contract with the debtor to extend the time of payment. The reason why a valid contract between the creditor and principal to extend the time of payment discharges the surety is, as we have seen, because the creditor, by his further contract, places an obstacle in the way of prompt and efficient action on the part of the surety to protect his interest. The principle applies here with equal force."

In *Sharp v. Miller*, 57 Cal. 415, this court said: The plaintiff "refused to accept the money which was offered. Having tendered the money, the defendants, as sureties, did all they contracted to do. The tender made, although it was refused, was equivalent to a payment by them: *Solomon v. Reese*, 34 Cal. 28, 36. And by it they were discharged from their obligation as

sureties upon the appeal bond: *Hayes v. Josephi*, 26 Cal. 535." The note in suit was held by the bank as collateral security, and appellant was liable thereon as principal for one-third, which he paid, and as cosurety with Morse for one-third, and as cosurety with Heath for one-third: *Chipman v. Morrill*, 20 Cal. 136. He had a right to pay the balance due on the note, and to look to his comakers for their pro rata shares thereof. The bank refused to accept the money because it did not want the comakers sued. But this the bank had no right to do, ³⁷ and, as said in *Hayes v. Josephi*, 26 Cal. 535, the refusal was a gross violation of duty and good faith on its part.

It is objected, however, that it does not appear that appellant was prejudiced by the refusal, since there is nothing to show that Morse and Heath subsequently became insolvent, the finding to the effect that appellant offered to prove their solvency and subsequent insolvency, which evidence was excluded, having no place in the record.

It is true that findings should be of the ultimate facts, but this finding cannot be disregarded on the ground urged. It is found in the record, and, so far as appears, was made and accepted without objection on either side. It must be assumed, therefore, for the purposes of this appeal, that the facts were as appellant offered to prove them to be.

It is further objected that appellant was not discharged from liability on the note, because he did not comply with the provisions of section 1500 of the Civil Code, which reads as follows: "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute, and notice thereof is given to the creditor."

A similar objection was made and overruled in *Randol v. Tatum*, 98 Cal. 390. On page 395 it is said: "E. A. Billings did not, when plaintiff refused to receive her money in payment of rents, deposit the same, or any part of it, in a bank or elsewhere, in compliance with the provisions of section 1500 of the Civil Code." And, after a full discussion of the question, it is said at the close of the opinion: "Even if the obligation of defendants must be regarded as that of sureties for the payment of a debt, still I think the tender sufficient to discharge the sureties."

As the case is presented on the record here, we think it clearly appears that the appellant was exonerated from ³⁸ liability on

the note, and that the court erred in rendering judgment against him.

The judgment should be reversed and the cause remanded.

Vanc lief, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded.

McFarland, J., Temple, J., Henshaw, J.

SURETY—WHO IS.—A surety is one who undertakes to pay at all events if the principal does not: *Saint v. Wheeler etc. Mfg. Co.*, 95 Ala. 362; 36 Am. St. Rep. 210, and note.

SURETYSHIP—ACCOMMODATION PAPER.—The contract and liability of an accommodation party are, in general, those of a surety for the party accommodated: *Extended note to Altoona Second Nat. Bank v. Dunn*, 31 Am. St. Rep. 745.

DAILEY v. SUPERIOR COURT.

[112 CALIFORNIA, 94.]

CONSTITUTIONAL LAW, THEATRICAL REPRESENTATION, RESTRAINT OF IS A RESTRAINT OF LIBERTY OF THE PRESS.—A play purporting to represent the facts involved in a criminal case then pending in the courts, and which, if produced, it is alleged, will deprive the accused of a fair trial, cannot be prohibited by the court having jurisdiction of the case, and its order purporting to impose such prohibition is void, if the constitution of the state guarantees to every citizen the right to freely speak, write, and publish his sentiments on all subjects.

A CONTEMPT OF COURT CANNOT BE RESTRAINED by an order of court made in advance. Hence a court has no power by order to prevent a theatrical representation which it is alleged will, if allowed to be produced, prevent the accused from having a fair and impartial trial on a capital offense for which he has been indicted.

Carroll Cook, for the petitioners.

A. W. Thompson, W. S. Barnes, district attorney, John H. Dickinson, Eugene N. Deuprey, and Edgar D. Peixotto, assistant district attorney, for the respondents.

⁹⁰ **GAROUTTE, J.** One Durrant was upon trial in the city of San Francisco, charged with murder, and, while the jury was being impaneled, the petitioner, Dailey, advertised by posters and newspapers that he would produce in a certain theater in said city of San Francisco a play entitled "The Crime of a Century." Thereupon, Durrant presented an affidavit to the court wherein his trial was pending, setting forth that said play was based upon the facts of his case, as established at the prelimin-

ary examination and the coroner's inquest, and that the production of said play during the progress of his trial would be an interference with the administration of justice, and deprive him of a fair and impartial trial. The affidavit was full and complete as to details, but we see no purpose to be subserved by further statement of the allegations therein set out. Upon the presentation of the affidavit, the superior court made an order directing this petitioner, Dailey, to desist and refrain from giving any public performance of said play, and further ordered him to cease from advertising the same. The present proceeding is one of certiorari to review the action of the court in making the aforesaid order, it being insisted that the trial court thereby exceeded its power and jurisdiction. The record before us incidentally develops that this order was subsequently served upon petitioner, that he defied the power of the court in making it, produced the play, and was adjudged guilty of contempt; but with those matters we are not now concerned.

The production of a tragedy or comedy upon the theatrical stage is a publication to the world by word of mouth of the text of the author, and, as to the question here presented for our consideration, it is immaterial whether the words be publicly spoken from the stage or upon the hustings, or go out to the world through the channels of the printing-press. By the constitutional ⁹⁷ provision we are about to invoke a citizen may speak, write, or publish his sentiments with equal freedom, and this case now stands before us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court where such trial was pending and in progress, believing such publication would interfere with the due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper.

We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this proceeding, for such order was an attempted infringement upon rights guaranteed to every citizen by section 9, article 1, of the constitution of this state. That section provides: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited,

but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. This provision of the constitution as to freedom of speech varies somewhat from that of the constitution of the United States, and also more or less from the provisions of many state constitutions treating of this question; but, if there is a material difference in the various provisions, it works no ^{as} harm to this petitioner, for the provision here considered is the broader, and gives him greater liberty in the exercise of the right granted.

The meaning of this provision, or others of similar import, has been declared with unanimity by all commentators upon the law. Blackstone declares that the liberty of the press consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matters when published. He says: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done before and since the revolution of 1688, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. . . . Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment."

Story, in his work upon the Constitution, section 1885, declares: "Indeed, the liberty of the press, as understood by the law of England, is the right to publish without any previous restraint or license; so that neither the courts of justice nor other persons are authorized to take notice of writings intended for the press; but are confined to those which are printed."

De Lolme, in his Constitution of England, page 872, declares: "Liberty of the press consists in this: that neither courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed." In *Ex parte Barry*, 85 Cal. 607,

20 Am. St. Rep. 248, the foregoing doctrine is reiterated and approved.

It would seem that the jurisdiction here attempted to be exercised would essentially belong to a court of equity; ⁹⁹ yet, even if this proceeding for a restraining order had been inaugurated in such a forum, it would have signally failed. In Story's Equity Jurisprudence, section 948 a, the author says: "But the utmost extent to which courts of equity have gone, in restraining any publication by injunction, has been upon the principle of protecting the rights of property in the book or letters sought to be published. They have never assumed, at least since the destruction of the court of star chamber, to restrain any publication which purports to be literary work, upon the mere ground that it is of a libelous character and tends to the degradation or injury of the reputation or business of the plaintiff who seeks relief against such publication." And this principle was declared by the learned chancellor in *Brandreth v. Lance*, 8 Paige, 26, 34 Am. Dec. 368, wherein he said: "It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the legislature has decided, cannot safely be intrusted to any tribunal consistently with the principles of free government." After referring to the court of star chamber, he proceeds: "Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation."

In effect, the order made by the trial court in this case was one commanding the petitioner not to commit a contempt of court, and such a practice is novel in the extreme. The court had ample power to protect itself in the administration of justice after the contempt was committed. As to the offender, it could punish him; as to the defendant on trial, he could be deprived of no rights by any act of this petitioner. If the publication ¹⁰⁰ deprived him of a fair and impartial trial at that time, a second trial would have been awarded him.

We conclude that the order made by the trial court was an attempted restraint upon the right of free speech, as guaranteed by the constitution of this state, and that petitioner's mouth could not be closed in advance for the purpose of preventing an utterance of his sentiments, however mischievous the prospective re-

sults of such utterance. He had the right of free speech, but at all times was responsible to the law for an abuse of that right.

For the foregoing reasons the order is annulled, as being beyond the power of the court to make.

Harrison, J., Van Fleet, J., Henshaw, J., and Beatty, C. J., concurred.

JUSTICE McFARLAND dissented. He claimed that all the provisions of the constitution should be construed together, and effect given to each, when possible; that the provision guaranteeing that every citizen may freely speak, etc., should be construed in view of that large and important part of the constitution creating the judicial department of the government and giving it the usual and necessary power of courts; that one of the most essential of these powers is that of protecting the court against unlawful intrusion upon its orderly conduct of business, and of insuring litigants in a pending proceeding the free and unembarrassed administration of justice; that in the case before the court a trial was gravely proceeding in which the life of a man was at stake, and an act was about to be done which, it was admitted, would be an interference with the administration of justice, and would deprive the accused of a fair and impartial trial; and finally that it is not possible that the court in such a contingency is without power to protect the defendant from an act which would deprive him of such a trial. The claims thus made appear to us to be unanswerable, and we are confident they are not answered in the opinion of the majority of the judges. The idea that the constitution guarantees the liberty to do the act complained of, subject only to liability to compensate the party injured, carried to its logical end involves the assertion that the accused after being convicted of murder through a wrongful act has a sufficient remedy in a prosecution of the wrongdoer for contempt of court, or in an action to recover damages.

CONTEMPT—LIBERTY OF THE PRESS.—It is a contempt to publish remarks in a newspaper which have a tendency to prejudice the public with respect to the merits of a cause pending in court and corrupt the administration of justice: *Respublica v. Oswald*, 1 Dall. 319; 1 Am. Dec. 246, and note; *Myers v. State*, 46 Ohio St. 473; 15 Am. St. Rep. 638, and note; *State v. Judge*, 45 La. Ann. 1250; 40 Am. St. Rep. 282, and note; *Matter of Sturoc*, 48 N. H. 428; 97 Am. Dec. 626, and note. The liberty of the press to fairly criticize the official conduct of a judge or the decisions or proceedings of courts and to expose any wrongful, corrupt, or improper act of a judicial officer, will be carefully preserved and protected by the court; but if a newspaper publisher prints and circulates unjust censures or false charges concerning such matters he will be held strictly accountable and punished for contempt: *Ex parte Barry*, 85 Cal. 603; 20 Am. St. Rep. 248, and note. See, also, the note to *In re MacKnight*, 28 Am. St. Rep. 461, and the full discussion of the subject to be found in the extended note to *State v. Galloway*, 98 Am. Dec. 414-420.

DE LA MONTANYA v. DE LA MONTANYA.

[112 CALIFORNIA, 101.]

JURISDICTION OF ABSENTEES.—Process cannot go beyond the state, and compel a person in another state to return to the state where an action is pending, and to there make a defense, though he is a native of, and has a domicile in, such state. Hence a personal judgment against one who was not in the state when the action was commenced nor afterward, and who did not appear voluntarily, nor otherwise, is void.

DIVORCE, JUDGMENT AGAINST ABSENTEE.—A judgment in a suit for divorce awarding plaintiff the care, custody, and control of her minor children, and declaring that she shall have the right at any future time to apply to the court for an allowance, based upon constructive service of process, is void, though the defendant was a native of, and domiciled within, the state, if he and the children were, at the commencement of the action, and ever thereafter, beyond the state.

DIVORCE—JURISDICTION OVER CHILDREN NOT IN THE STATE.—In a suit for divorce against a defendant who had taken his children, and fled with them from the state before it was commenced, a judgment awarding to plaintiff the custody and care of such children is void, if the process was served beyond the state.

DIVORCE AGAINST ABSENTEE, JURISDICTION TO AWARD ALIMONY.—A court in a suit for divorce has no jurisdiction to award alimony as against a defendant when he was not within the state when the suit was commenced, nor afterward, nor did he appear in the action voluntarily or otherwise.

JUDGMENT.—A MOTION MAY BE ENTERTAINED TO VACATE A JUDGMENT, though the moving party does not come into court, nor make an affidavit of merits, nor otherwise submit himself to its jurisdiction, where the ground of the motion is that the judgment, or the part sought to be vacated, is void because the court did not have jurisdiction of the person of the defendant, the process having been constructively served on him beyond the state.

APPELLATE PROCEDURE.—AN APPEAL MAY BE PROSECUTED FROM AN ORDER REFUSING TO VACATE A JUDGMENT where there is no other method in which the right of the appellant to the relief sought by him can be presented to the appellate court, and the facts on account of which he bases his claim to relief do not appear from an inspection of the judgment-roll.

Dorn & Dorn, for the appellant.

Garber, Boalt & Bishop, for the respondent.

¹⁰⁵ **TEMPLE, J.** This is an action to obtain a divorce in which the plaintiff also asked for the exclusive custody and control of two children, the issue of the marriage, and also for permanent alimony, as well as for a suitable allowance to enable her to prosecute this action.

¹⁰⁶ The defendant and the children, who were, of course, infants, were absent from the state when the suit was commenced, and have ever since remained absent. No personal service of the summons was had on the defendant, and he did not appear in the

action. An attempt was made to serve the summons by publication.

It is claimed that the service was void, because not made as required by the laws of this state, but I shall assume that such attempt at a constructive service was in accordance with the statute in every respect.

The defendant was born, and during his whole life had lived, in this state. He left the state on the twentieth day of November, 1893, with two children of plaintiff and defendant, proceeding to New York, and on the ninth day of December, 1893, left New York for Paris, France, where he arrived with his children on the nineteenth day of December. January 4, 1894, he made application to the ministry of justice of France for express permission to be domiciled in France. Such permission was granted on the fourteenth day of July, 1894. Since December 19, 1893, defendant has resided in France with his children, and neither he or either of the children have since been within this state.

This suit was commenced two days after the departure of the defendant from the state, and it is claimed that defendant left the state and took the children for the express purpose of evading the jurisdiction of the courts of this state.

As stated, the defendant did not appear in said action and the publication of summons having been made, in due time the default of the defendant was entered, and the court proceeded to hear the cause, and on the sixteenth day of May, 1894, judgment was rendered against defendant, wherein it was adjudged: 1. That the marriage be dissolved; 2. That the exclusive custody, care, and control, and education of the children be awarded to plaintiff; and 3. That plaintiff "shall have the right, at such time in the future as she shall be advised, to apply to the court for such suitable ¹⁰⁷ allowance and sum to be paid her by said defendant for her support during her life, and such further sums as may be necessary in order to enable her to make proper compensation to her attorneys and counsel in said action, and to enforce this decree and judgment."

On the seventh day of September, 1894, on due notice, the defendant moved the court for an order: 1. Vacating the judgment in so far as the same relates to alimony, or any provision for the support of plaintiff or for the support of the children of plaintiff and defendant; 2. Vacating the judgment so far as it relates to the care, custody, and control of the children; 3. Vacating the judgment so far as it relates to alimony or allowance for the sup-

port of plaintiff or the children, and for an order striking out from the judgment all the provisions relating to, or providing for, alimony or support for the plaintiff, or the minor children of plaintiff and defendant, or awarding or providing for the custody, care, or control of the said two minor children.

The motion was based upon the claim that the court had no jurisdiction over the subject matter of this action in so far as it relates to the matters, subjects, and things hereinbefore specified, and had no jurisdiction, or power, or authority to make any order or judgment in relation to the subject matters and things aforesaid, and had no jurisdiction over the person of the defendant sufficient to enable, authorize, or empower it to make any order, judgment, or provision, in relation to said subject matters and things, and that said defendant was, at the time of the commencement of this action, and ever since has been, and now is, without the jurisdiction of the said court and without the territorial limits of the state of California, and has never been served with process herein personally, and no service of process has been had herein to enable the court to make any order, judgment, or provision in regard to the subjects, matters, and things aforesaid, and that said infant children of plaintiff and defendant were not, at the time of the commencement of ¹⁰⁸ this action, and never since have been, and are not now, within the state of California.

In support of the motion various affidavits were read, showing the above facts and others.

Appellant here bases his claim for reversal upon three grounds: 1. That the proof of publication shows that constructive service has never been had according to the statutes of this state, and that, therefore, the judgment is wholly void; 2. The defendant and children were, at the time of the attempted service of summons, domiciled in France, and, therefore, the court had no jurisdiction to award the custody of the children to plaintiff, or to provide for alimony; and 3. That the mere fact that the defendant and children were without the territorial limits of California when the action was commenced deprives the court of jurisdiction, even admitting that defendant and the children are domiciled in California, and the constructive service of summons was in all respects regular.

Respondent admits the facts in regard to the departure of defendant from the state with the children, but claims that, as matter of law and fact, it appears that the domicile of the defendant and children is, and has always been, in California, and

she contends that, such being the case, the court acquired jurisdiction, not only to grant the divorce to her, but to enter a judgment in personam against the defendant, valid at least in California. She also contends that the judgment awarding to plaintiff the custody of the children is in rem, that it is valid because it is a mere incident to the divorce, and that upon a dissolution of the marriage it was necessary to provide for the children. Furthermore, she insists that there is no judgment for alimony or for an allowance of any kind.

Conceding that the defendant and the children are all domiciled in California, although in fact absent from the state at the time of the commencement of the action and since, and that the constructive service of summons ¹⁰⁹ was sufficient to give the court jurisdiction to grant the divorce, did the court have the power to award to plaintiff the exclusive custody of the children, and to allow alimony? I have concluded that it had no such power.

Some cases are cited which seem to hold that a personal judgment obtained by constructive service of the summons is valid within the state, although the defendant may have been in fact absent from the state at the time of such service. As to most of these cases, it may be said that such statements are entirely obiter, the question before the court being as to the extraterritorial effect of such judgment. In such cases, the argument is, in general, that, conceding the validity of the judgment within the state where rendered, another state will not recognize its validity, because it will not permit the process of another state to be served within its territory so as to compel one resident there, or in fact being there, to answer a writ issued by the courts of such foreign state. It is a sort of an invasion of a state to serve a foreign writ there at all. The logic would require the court to go farther and hold that such judgment is wholly void.

Constructive service upon a party who is within the state does not raise the question. The question there is, simply whether a defendant had such reasonable opportunity to be heard as will constitute due process.

The leading case upon subjects of this character is Pennoyer v. Neff, 95 U. S. 714. Counsel for respondent contends that it is not there held that jurisdiction to enter a personal judgment cannot be obtained over one domiciled in the state by constructive service, when such defendant is absent from the state at the time of the attempted service; but only that such service is not good against a defendant who is not only without

the state, but is actually domiciled elsewhere. Domicile has never, so far as I am aware, been made the test of jurisdiction to render a personal judgment. The question there is always whether there has been due process; whether the defendant has had a reasonable opportunity ¹¹⁰ to be heard. Substituted service may be valid upon those within the state when the same service would be void as to those without the state. As to those within the state, the question would be whether it has afforded a defendant a reasonable opportunity to be heard. But the process cannot go beyond the state and compel any person in another state to resort to the state where the action is pending, there to make his defense. No service will be recognized made there, whether actual or constructive. It is as much an invasion of a foreign jurisdiction to serve a citizen of the state in which the action was brought temporarily resident there, as it would be to summon from its borders a citizen of such foreign state. If such things could be done, who would determine where the domicile of a particular person really was? Domicile often depends upon secret intention. It would be a most unsatisfactory test.

I am aware that it is often said by courts and law writers that domicile is the test of jurisdiction in divorce. This doctrine was built up mainly, if not entirely, to prevent parties really residing in a state from going to another for the purpose of getting a divorce. So far its effect has been beneficent, but it is obvious after all that what in these cases is called domicile is not domicile. As between states it would be no test at all, unless it is domicile as defined in international law. To concede that each state may give a different definition, or to speak of domicile for the purposes of divorce, as is often done, is to concede that the test is not domicile. These writers and the courts say the test is "actual bona fide domicile." Since every person always has a domicile, and can have but one, how does actual and bona fide domicile differ from domicile?

It is meant, I presume, that domicile and actual residence must coincide. Where, then, is the jurisdiction in those cases where they do not? One may be domiciled in California who never was within the state and never had thought of going there. Or he may be domiciled therein years after he has left without the intention ¹¹¹ of returning. Persons have in California exercised for years all the rights of citizens, and even held high office, who, according to Phillimore, Jacobs, Dicey, and other writers on the law of domicile, never had a domicile here, because they at all times had a fixed and definite intention of

returning to their domicile of origin. Had the wife of such a person obtained a divorce while he was here exercising the rights of a citizen of the state, would the courts of any state declare such a decree void upon proof of the existence of such intention? If not, then domicile is not the test of jurisdiction even as to the status of the litigants, and certainly not in personal actions.

Jurisdiction is derived from the constitution and laws creating the court, and I know of no limitation in the constitution of the United States upon the power of a state to give to its courts jurisdiction over all persons found within its borders. Certainly it has not imposed any such limitation as the test of domicile.

Domicile is the test of personal rights in regard to inheritance, but, unless made so by local law, is not important as affecting the relation of the individual to the government. The relation of the individual to the government depends upon actual presence within the territorial limits of a country, and upon citizenship or allegiance.

But I cannot understand *Pennoyer v. Neff*, 95 U. S. 714, as counsel do. It is true that, in the case in which the judgment there under consideration was rendered, the defendant was said to have been a nonresident, and, presumably, was domiciled abroad, but that circumstance seems to have been treated as one immaterial in the discussion.

The judgment there was personal, and jurisdiction was obtained, if at all, by constructive service of summons. I use the term "constructive service" for convenience, although it does not constitute service at all when the defendant is without the state. No property had been attached. The conclusion is based upon a ¹¹² proposition of international law laid down at the outset. "No state can exercise direct jurisdiction and authority over persons or property without its territory: Story on Conflict of Laws, c. 2; Wheaton on International Law, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject persons or property to its decisions."

The idea seems to be that the state has no jurisdiction over either persons or property not within its territory, and that to allow it to summon one from another state is an encroachment upon the independence of such state.

The judge then cites the case of *Cooper v. Reynolds*, 10 Wall. 308. In that case, Justice Miller was considering a judgment obtained by W. G. Brownlow against Reynolds and others for false imprisonment. Brownlow made affidavit to the effect that the defendants had fled from the state, or so absconded or concealed themselves that the ordinary process of law could not reach them. Thereupon, under the statutes of Tennessee, the plaintiff caused an attachment to be issued and due publication to be made. Default was entered, and a judgment, personal in form, against defendants. The land attached was sold, and the case before the court was ejectment, brought by the original owner against the purchaser under the judgment who had taken possession. The question was as to the validity and effect of the judgment.

The court proceeded to state that the proceeding, in case the defendant did not appear, was strictly in rem; that if he appeared it then became in personam. It was there said: "That such is the nature of this proceeding in this latter class of cases is clearly evinced by ¹¹³ two well-established propositions: 1. The judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in the suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit."

After making a quotation, which includes the above, Judge Field proceeds: "The fact that the defendants in that case had fled from the state, or had concealed themselves so as not to be reached by the ordinary process of the court, and were nonresidents, was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the court; and the grounds of the extent of its authority over persons and property thus situated were considered, when they were not brought within its jurisdiction by personal service or voluntary appearance." The judge then proceeds to add that, to the doctrine stated in the citation, all the judges of the court agree.

I understand this to be a deliberate statement to the effect that domicile and residence, or both, are immaterial; as indeed they must be, if, as appears all through the opinion, the basis of the doctrine is, that process cannot run beyond the limits of the

state. I might make further quotations from this opinion, but it is too familiar to the profession to require it. An impartial consideration of the opinion will, I think, convince anyone that it holds that process cannot be served upon anyone without the state, and the same doctrine is announced in *Galpin v. Page*, 18 Wall. 350, where it is said: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, ¹¹⁴ without the territorial limits of the court, and thus beyond the reach of its process, that he never appeared in the action, the presumption of jurisdiction over his person ceases." From this, and other like expressions in other cases, it is manifest that domicile, or even residence, in a state, cuts no figure at all.

The idea that domicile determines jurisdiction in divorce rests upon the assumption that status depends upon domicile, and is of interest there only. Judge Field could not have had this in mind in *Pennoyer v. Neff*, 95 U. S. 714, and therefore, when he speaks of "absent defendants," he cannot mean those not domiciled within the state, but must have meant simply those physically absent, and upon whom, therefore, personal service of process could not be made.

But it is claimed that the doctrine of *Pennoyer v. Neff*, 95 U. S. 714, was explained in *Grover etc. Co. v. Radcliffe*, 137 U. S. 287, in accordance with the views of respondent. I cannot find anything in that case upon the subject. The judgment there under consideration was a judgment by confession entered by a prothonotary in a court of Pennsylvania in pursuance, as it was claimed, of a bond and warrant of attorney executed by John Bengé, who was then a resident and citizen of Maryland. The warrant of attorney authorized any attorney of any court of record to confess judgment against him. The statute of Pennsylvania authorized the prothonotary of any court of record in the state to enter judgment upon such an instrument.

An attempt was made to execute this judgment in Maryland. It was claimed that the judgment was void, not being entered in pursuance of the power, and that defendant not having been served with process, and not having appeared, the judgment was without jurisdiction and void.

The numerous cases cited by the chief justice were used to show that such a judgment would be held invalid without the state where rendered, and not to show that it should be held valid within the state, and I think the ¹¹⁵ question whether

such a judgment would be valid within the state where rendered was not before the court in any of the cited cases. But, in discussing the question as to whether the judgment would be valid in another state, it was assumed that it might be valid within the state where rendered.

That was the very question in *Pennoyer v. Neff*, 95 U. S. 714. A personal judgment upon constructive service had been rendered against a nonresident, and property in Oregon sold under execution to satisfy it. The question was as to the validity of the judgment within the state where rendered.

It is contended also by the respondent that the decree is valid as to children and alimony, although the service was constructive, and the court could not render a personal judgment because these are incidents to the divorce. Conceding that they are incidents to the cause of action for a divorce the result would not follow. In proceedings in rem where there is no jurisdiction of the person, no such result has ever been recognized.

In *Cooper v. Reynolds*, 10 Wall. 308, it was said that costs cannot be recovered from any other property of the defendant. There is in reality no defendant save the res. So here it cannot properly be said there was a defendant. In the proceeding the court had before it only the status of the plaintiff. The summons was not really a writ to bring the defendant into court, but merely a notice prescribed by the statute in the interests of fairness, and to rebut the idea that the proceeding was secret: 2 Bishop on Marriage and Divorce, sec. 159. It brought the res into court, and not the defendant. The adjudication must be confined to that status. It is said that the relation of the parents to the children, and their relation to each other in regard to the children, is a status. If so, it would not help the respondent, for no such status was before the court. But the very meaning of the word "status," both derivative and as defined in legal proceedings, forbids that it should be applied to a mere relation. Status implies relations undoubtedly, ¹¹⁶ but it is not a mere relation. But the authorities are all one way on this subject.

If the children are within the jurisdiction, and the defendant is personally served with summons, and perhaps if he is not, the court may award the custody of the children to one of them. It is a mode of appointing a guardian, which is always a matter of local control, regardless of the legal domicile of the children, if domicile and residence do not coincide. It seems to have been held that, when the defendant appears and makes issue upon the point, the court may determine that one spouse is a suitable

person to have the custody and control of the children, and that the other is not: *People v. Allen*, 40 Hun, 611. An appeal was taken from the order made in that case, which was a proceeding in habeas corpus to the court of appeals. There the appeal was discharged, because it appeared that the lower court, "in view of all the existing facts relating to the welfare and interests of the infants, exercised its discretion in awarding to the mother the custody of the children, and, in so doing, it gave to the Illinois decree, not the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised without dictating or controlling it." This seems to hold that without the state such a finding would have no binding force. But where, as in this case, no personal judgment could be entered, there can be no question: *Van Fleet on Collateral Attack*, secs. 389, 391, and authorities cited.

And Judge Cooley, in his *Constitutional Limitations*, sixth edition, page 499, says: "The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the status of the complaining party, and thereby terminating the marriage; and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, if they were then within its ¹¹⁷ jurisdiction. But a decree on this subject would only be absolutely binding on the parties while the children remained within the jurisdiction; if they acquire a domicile in another state or country, the judicial tribunals of that state or country would have authority to determine the question of their guardianship there.

"But, in divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally. It must follow, in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. . . . The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incident benefits springing therefrom, and to an order for the custody of the children, if within the state": See, also, *Freeman on Judgments*, secs. 584, 585; *Brown on Jurisdiction*, secs. 6, 8, 78, 79.

The doctrine is very clearly stated in *Woodworth v. Spring*, 4 Allen, 321: "Every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to inter-

vene to affect the personal rights or privileges even of their own citizens, while they are residing on the territory, and within the jurisdiction, of an independent government."

Respondent contends that there is no judgment for alimony; if so, it is not apparent how plaintiff would be injured by striking from the decree the clause complained of. I think the decree, if valid, settles the right of plaintiff to alimony for her support during life, and, as the court had no jurisdiction to provide for alimony, that part of the decree should be stricken out.

Respondent contends that a motion to vacate the judgment in this case could only be maintained under section 473 of the Code of Civil Procedure. The point of the contention, as I understand it, is, that defendant should come in and submit himself to the jurisdiction ¹¹⁸ of the court, show a meritorious defense, and ask leave to have his defense considered. It is obvious, of course, that defendant cannot do this, for he cannot show that the judgment was taken against him by his inadvertence, mistake, or excusable neglect. The argument, therefore, is, that no such motion will lie. No authority for such a proposition is cited, unless *Jacks v. Baldez*, 97 Cal. 91, may be claimed to have that effect. In that case, however, the motion was to vacate a judgment rendered because a demurrer was sustained to a complaint, and the plaintiff failed to amend within the time allowed. The motion was made eleven months after the entry of judgment. Plaintiff was not notified, as the code requires, of the order sustaining the demurrer.

If this case is not put upon the ground that the failure to give the notice was not jurisdictional, I think it was overruled by *Norton v. Atchison etc. Co.*, 97 Cal. 388; 33 Am. St. Rep. 198. It was, however, but a default, and the parties were in court. A plaintiff who for six months should fail to know what had become of a demurrer which had been submitted for decision would be guilty of great negligence. The remedy offered by section 473 was ample. The case of *Norton v. Atchison etc. Co.*, 97 Cal. 388; 33 Am. St. Rep. 198, seems in point here.

It is also claimed that no appeal lies to this court from an order refusing to set aside the judgment because the judgment was appealable. To this proposition many decisions of this court are cited. I do not care to review these cases. No doubt it has been held, and I think correctly, that when a motion is made to vacate an order under such circumstances that it merely calls upon the court to repeat or overrule the former ruling on the same facts, the last order is not appealable, not because the last order

is not within the terms of section 963 of the code allowing appeals, for it may be; but because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing contrary to the intent ¹¹⁹ of the statute. Nor will such practice be allowed merely to permit a litigant to take an exception, or get a bill of exceptions, which he has neglected to do at the proper time. But I see no reason why this appeal should not be entertained. It is plainly within the terms of the statute allowing appeals, and no other method is suggested in which the right of the appellant to the relief sought could be considered here. An appeal upon the judgment-roll would not present all the facts upon which the motion is based—even if one may have a bill of exceptions when he has not been in court, and has taken no exceptions. Besides, it is a case in which it was eminently proper, if not necessary, that relief should first be asked from the trial court. Its action could not have been asked in any other mode. The defendant was not in court, and had no opportunity to be heard.

The order is reversed, and the cause remanded, with directions to the court to grant appellant's motion.

Harrison, J., Garoutte, J., and Henshaw, J., concurred.

Chief Justice Beatty and Justices Van Fleet and McFarland joined in a dissenting opinion written by the latter. This opinion declared that the facts of the case were, that both the respondent and the appellant were born in, and were citizens of, the state of California, where they were married, and where their children were born, and where they had continuously resided until the appellant by force and fraud took the children away from the custody of the respondent and clandestinely left the state, taking the children with him; that he in January, 1894, made application to the authorities of France for permission to be domiciled there, and that such permission was granted, but that the purpose of applying therefor was to prevent the wife from serving summons in the suit for divorce, and also to keep her from getting possession of her children, and that the sojourn on the part of the appellant in France was temporary only and for the purposes thus disclosed, and that after those purposes were accomplished, his intention was to return to the state of California. The court then proceeded to consider the case of *Pennoyer v. Neff*, 95 U. S. 714, relied upon by the appellant, and declared that a close examination of that case would show that the main proposition decided by it was, that a judgment in personam rendered against a nonresident upon substituted service of process cannot be enforced even in the state where it was rendered; that the case at bar presented a different state of facts, namely, a case in which it was not shown that the defendant was a bona fide nonresident; that this decision did not conflict with the general rule maintained by the text-writers that the laws of a country are binding upon its citizens

domiciled within its borders, whether temporarily absent or not, and that each state has authority to provide the means by which its own citizens may be brought before its courts, and that the courts of other states have no authority to disregard the means thus provided; and finally "that every judgment or decree obtained in a state against some of its citizens by virtue of a lawful, though constructive, service of process, should be obligatory upon such citizens in every other state whence it is taken."

With respect to the contention of the respondent that the order appealed from should be affirmed upon the ground that the parts of the judgment relating to alimony and the custody of the children were mere incidents of the suit for divorce, and that jurisdiction to grant the divorce includes jurisdiction of these incidents, and furthermore that the relation of children to parents is a status like that of marriage, and therefore, that an action to determine the custody of children is, like a suit for divorce, in the nature of a proceeding in rem. The dissenting judges further said: "We may say, however, that so far as the custody of the children is concerned, this second contention of respondent seems to be correct. The judgment merely determines generally the custody of the children, and whether it could be enforced in another state or country is not here involved. It is settled law that a decree of divorce operates upon the relation, the status, and that, therefore, such a decree, founded upon constructive service by publication is valid, even as against one resident and domiciled beyond the state: *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 273, 274, and note. 'A judgment for divorce is quasi, at least, in rem. Judgments in rem, it is well known, are not, as the name implies, confined to adjudications against things. They are rendered, in many instances, where the prior proceedings are entirely in personam, as in cases establishing or dissolving marriages': *Freeman on Judgments*, sec. 606. In *Pennoyer v. Neff*, 95 U. S. 714, it is said: 'The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants, involves authority to prescribe the conditions on which proceedings affecting them may be commenced, and carried on within its territory.' Now, is not the relation between parent and child a 'civil status'? It is so assumed to be in *Cooley's Constitutional Limitations*, sixth edition, page 499. In *Bishop on Marriage, Divorce, and Separation*, section 1189, it is said that 'the relation of parent and child is a status . . . like marriage.' And in *Estate of Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, the court said: 'So far as the action of *Maldonado v. Maldonado* affected the status of the parties and the custody of the child, it was a proceeding in rem, and service by publication in such action is good': See, also, *Wakefield v. Ives*, 35 Iowa, 238; *People v. Allen*, 40 Hun, 611. In *Brenot v. Brenot*, 102 Cal. 294, it was held that, in an action for divorce, the custody of the children was an incident in the main relief sought—the divorce: See, also, *Younger v. Younger*, 106 Cal. 377. Upon these authorities, and upon principle, we think that, in an action brought for both divorce and the custody of the children, the latter is an incident of the former, and that the court has jurisdiction over the status founded on the relation of parent and child, as well as of the status founded on the relation of husband and wife, even as against a bona fide nonres-

dent domiciled elsewhere. And, in such a case, the actual physical presence of the children is no more necessary for jurisdiction over the status in the one instance, than is the presence of the husband necessary in the other. It is not necessary to determine whether or not jurisdiction to decree alimony would follow as an incident to the divorce. It is doubtful if the judgment in this case really awards any alimony; but if it does, its validity in that respect has sufficient basis in the proposition first discussed in this opinion."

In another action between the same parties as in the principal case an order was made on May 8, 1894, appointing Francis E. Spencer guardian ad litem for the infant defendants. A decree was entered in this action May 15, 1894, formally adjudging that, as the defendants were citizens of the state, and domiciled therein, that the removal by the appellant of the children from the state was without right and in fraud and violation of the rights of the plaintiff, that the exclusive custody of the children be awarded to plaintiff, and that the defendant be required to forthwith bring them into the state, and to deliver them to the plaintiff. In September, 1894, the appellant moved for an order vacating and setting aside the decree on the ground that the court had no jurisdiction to make it. The facts relating to jurisdiction were the same as in the principal case, and the court determined that the motion to vacate the decree ought to have been granted, saying: "Jurisdiction to appoint a guardian for infants under the American system is entirely local. I do not doubt that the mere presence of infants within a jurisdiction is sufficient to confer jurisdiction, although they may be residents of another state. But as such jurisdiction is always exercised for the good of the child, the courts would never allow the power to be used for the purposes of oppression, or to prevent an infant temporarily within its jurisdiction from being taken away, when its best interests required it, to its more permanent residence. The jurisdiction is never used except when necessary for the good of the child. Counsel claim here, also, as in the other case, that domicile, and not actual residence, is the test of jurisdiction to appoint a guardian of the person of infants. The case apparently most relied upon is *In re Willoughby*, L. R. 30 Ch. Div. 324. But that case, if authority at all upon the subject, is the other way. Counsel stated in his argument that England was the domicile, at least by choice, of the infant's father. Nothing in the case warrants that assertion. The case does not show that either parent of the infant was ever in England, or ever expected to be, or had a domicile there of any kind. On the contrary, it is expressly stated that the infant was domiciled in France, and the whole point of the opinions in the case is to show that domicile is not the test of jurisdiction, but that allegiance is. Judge Lindley in his opinion on appeal states the facts very curtly, as is the manner in the English courts: 'This is a curious case. The infant is English by nationality and French by domicile. Her father is dead, and her mother is by the French law under the Code Civil the guardian of the infant. The infant is not resident here, and has no property here.' The infant was simply a grandchild of an Englishman, and therefore by the law of England declared to be an English subject, and the broad doctrine is announced that the court had the power to appoint a

guardian for an infant subject of Great Britain wherever the infant might be, and although domiciled in a foreign country. By the same rule, it would have jurisdiction to appoint a guardian for any infant in the United States whose grandfather was a natural born subject of Great Britain, though its parents were natural born citizens of the United States, and neither infant nor its parents had ever been domiciled in England. It is easy to see that the case proves nothing for respondent."

Jurisdiction Over Absent Citizens.

In the note to *Alley v. Caspari*, 6 Am. St. Rep. 179, 190, we considered the question of the jurisdiction of courts of one state or country over citizens of another, and included in the treatment of this topic the general subject of such jurisdiction over nonresidents and their property; and we do not here propose to again enter upon the same general field of inquiry. The term "nonresidents," in the sense in which we there employed it, was confined to persons who were neither within the country, nor did they owe personal obedience to its laws or allegiance to its government. It may be true, as determined by the court in the principal case, that there is no material difference, so far as the jurisdiction of a state or country is concerned as to persons actually beyond its boundaries, whether they were ever within them or not, and that he who was born within, and has always been a citizen of, a state, the moment he enters another state or country becomes subject exclusively to the jurisdiction of the courts of the latter to the extent that no other court can render a valid judgment in personam against him unless supported by process served upon him in the state wherein the judgment was entered. The question is practically a new one in this country, and the decision in the principal case, made by an almost equally divided court, cannot be accepted as settling it.

We think that the judge writing the dissenting opinion in the principal case properly designated *Pennoyer v. Neff*, 95 U. S. 714, as a decision which had established what is "called the modern doctrine in regard to the jurisdiction of state courts over persons not personally served with process within the state," and we believe that prior to that decision a majority of all persons giving attention to the law understood that every state or country had power to provide the mode in which the process of its courts might be served, and further that each had authority, irrespective of the place of residence of the defendant, to assume jurisdiction after such service of process had been made as prescribed by its laws, and to render a judgment which should be entitled to respect within the jurisdiction wherein it was rendered, though beyond that jurisdiction it might be deemed a nullity.

As to the *Mode of Serving Process*, the state in which the action is pending is still admitted to have control over that, and probably no case can be found in which a judgment has been declared void because the service was constructive as distinguished from actual, and we assume that the mode is immaterial, provided it be authorized by law, unless, perhaps, when it clearly appears to be adopted in bad faith, and to sanction judicial proceedings under such circumstances as will probably result in the defendant's being ignorant

of their pendency. The rule upon the subject was thus stated in *Matter of Empire City Bank*, 18 N. Y. 200, 215: "The provision for giving notice was relied upon by counsel for the stockholders as evidence that the proceeding was not due process of law. The notice of hearing before the referee is to be personal, or by service at the residence of the party, as to the stockholders who live in the county where the bank was located, and by advertisement in the state paper and in newspapers in the county as to all other stockholders. It may therefore happen that some of the persons who are made liable will not have received actual notice, and the question is, whether personal service of process, or actual notice to the party, is essential to constitute due process of law. We have not been referred to any adjudications holding that no man's right to property can be affected by a judicial proceeding unless he have personal notice. It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon a purely *ex parte* proceeding, without a pretense of notice or any provision for defending, would be in violation of the constitution, and be void; but where the legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceeding illegal." Each state may doubtless provide the mode in which the process of its courts may be served: *Scott v. Coleman*, 5 Litt. 349; 15 Am. Dec. 71; *Flint River etc. Co. v. Foster*, 5 Ga. 194; 48 Am. Dec. 248; *Biesenthal v. Williams*, 1 Duvall, 329; 85 Am. Dec. 629; *Welch v. Sykes*, 3 Gilm. 197; 44 Am. Dec. 689; *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652; *Hood v. Hood*, 11 Allen, 196; 87 Am. Dec. 709; provided the parties against whom the issues are not deprived of an opportunity to be heard respecting the justice of the judgment sought. Therefore citizens and residents of a state may, if the laws so provide, be served with process by the publication thereof, or by leaving it at their usual place of abode, or in such other mode as the legislature deems proper under the circumstances of the case, if it appears probable that it will advise them of the proceedings against them, and afford them an opportunity to defend: *Otis v. Dargan*, 53 Ala. 178; *Hurlburt v. Thomas*, 55 Conn. 181; 3 Am. St. Rep. 43; *Beard v. Beard*, 21 Ind. 321; *Burnam v. Commonwealth*, 1 Duvall, 210; *Henderson v. Stanford*, 105 Mass. 504; 7 Am. Rep. 551; *Rockwell v. Nearing*, 35 N. Y. 302; *Happy v. Mosher*, 48 N. Y. 313; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Arndt v. Griggs*, 134 U. S. 316, 320. It may be that as to persons actually within a state the legislature is not authorized to sanction any other than a personal service of process upon them in those cases in which there is no suggestion that they have concealed themselves or cannot be found, and in which the proceedings are of such a nature as to indicate no reason for resorting to constructive, rather than to personal, service. In one case, it has been held that a statute authorizing service by the publication of summons in proceedings to foreclose a mortgage, where no personal judgment was asked, did not provide for due process of the law as against residents with respect to whom there was no impediment to personal, and no reason for

resort to constructive, service: *Bardwell v. Collins*, 44 Minn. 97; 20 Am. St. Rep. 547.

As to Proceedings In Rem, Suits to Enforce Liens, or to Determine conflicting Claims of Title, or to Recover Possession of Property, whether real or personal, or to obtain judgment enforceable against property which has been seized under attachment or other mesne process, there is no doubt of the power of every state or country to provide methods of serving process which will affect all persons, whether residents or not: Note to Alley v. Caspari, 6 Am. St. Rep. 179-190; Arndt v. Griggs, 134 U. S. 316; Wehrman v. Conklin, 155 U. S. 314.

With Respect to Judgments in Personam the rule is unquestionably different. Each state has authority to provide for judicial tribunals, and to invest them with jurisdiction to determine the title to property within its borders, to enforce liens thereon, to conduct proceedings in rem, which may include proceedings establishing the status of particular persons, and to authorize such courts, after the service of process in some manner, to proceed in the exercise of their jurisdiction, though the persons affected thereby are not, and never have been, residents of the state. But no state or country can rightfully assert authority over the citizens of another, except as to property situated within the jurisdiction of the former, and hence no court can compel a citizen of another state or country remaining therein to come before it, nor to submit to its decision a mere claim upon him for a money demand, and therefore it is not material what is the form, contents, or mode of service of the process issued against him, and by which it attempted to compel him to submit to its jurisdiction: *Freeman on Judgments*, sec. 564; *Penny v. Neff*, 95 U. S. 714; *Wilson v. St. Louis etc. Co.*, 108 Mo. 588; 32 Am. St. Rep. 624; *Renier v. Hurlbut*, 81 Wis. 24; 29 Am. St. Rep. 850.

Persons Temporarily in a State.—The question involved in the principal case was, What is the situation in respect to jurisdiction of a citizen of a state or country who has departed therefrom temporarily and for the express purpose of avoiding the action of its courts in any attempt they may make to redress the wrongs of his wife, who was also a citizen, and remained within the state? The question we shall consider is somewhat broader. It is, What courts have jurisdiction of a person temporarily absent from the state or country in which he retains his citizenship, and to which he expects to return? In the first place, it seems clear that the courts of every state or nation into which he may come thereby acquire jurisdiction over him to the extent that he may be brought before them by process served in conformity with its laws while he remains therein, whether the cause of action arose therein or not, and irrespective of the citizenship or residence of his adversary: *Molyneux v. Seymour*, 30 Ga. 440; 76 Am. Dec. 662; *Fisher v. Fielding*, 67 Conn. 91; 52 Am. St. Rep. 270; *Alley v. Caspari*, 80 Me. 234; 6 Am. St. Rep. 178; *Roberts v. Knights*, 7 Allen, 443; *Hale v. Laurence*, 21 N. J. L. 714; 47 Am. Dec. 190; *Mitchell v. Bunch*, 2 Paige, 606; 22 Am. Dec. 669; *Carlisle v. United States*, 16 Wall. 147; *Sirdar Gurdavel Singh v. Rajah of Faridkote* (1894), L. R. App. Cas. 670, 683; and the service of process may be made on the defendant while he remains upon the vessel of the

country of his domicile and before he has otherwise entered the state where the service is thus made: *Peabody v. Hamilton*, 106 Mass. 217.

Corporations Doing Business Within a State Other than that of Their Residence subject themselves to this rule, and its courts have jurisdiction over them to the extent of compelling them to submit to their jurisdiction any controversy arising out of the business so done: *Fireman's Ins. Co. v. Thompson*, 155 Ill. 204; 46 Am. St. Rep. 335; *State v. Northwestern etc. Assn.*, 62 Wis. 174; *State v. United States etc. Assn.*, 67 Wis. 624; note to *Hampson v. Weare*, 66 Am. Dec. 121.

An exception to the rule that courts of a state or country in which a person happens to be, though temporarily, have jurisdiction over him arises when he is caused to go there through some fraud practiced upon him by or on behalf of his adversary for the purpose of compelling him to appear in a court to whose jurisdiction he was not subject: *Duringer v. Moschino*, 93 Ind. 495; *Dunlap v. Cody*, 31 Iowa, 260; 7 Am. Rep. 129; *Toof v. Foley*, 87 Iowa, 8; *Townsend v. Smith*, 47 Wis. 623; 32 Am. Rep. 793.

One Leaving a State or Country, Intending not to Return, ceases from that moment to be subject to the jurisdiction of its courts in the sense that they cannot render any valid judgment in personam against him based upon process served on him in an action or proceeding commenced after his departure: *Freeman on Judgments*, sec. 570; *Mastin v. Gray*, 19 Kan. 458; 27 Am. Rep. 149; *Amsbaugh v. Exchange Bank*, 33 Kan. 100. Whether the courts of a country entitled to exercise jurisdiction over a party when the action therein was begun can retain that jurisdiction only by serving process before he has departed therefrom is a question which, so far as we are aware, has escaped judicial consideration.

A Decree of Divorce is regarded as a judgment in rem rather than in personam, and hence may be operative against a defendant though rendered in a state or country in which he has never been and by a court to whose jurisdiction he did not voluntarily submit himself. The courts of the different states and countries do not entirely agree respecting the circumstances in which it is so operative. All, we think, concur in affirming that in no case can the plaintiff in a suit for divorce obtain a valid decree against a non-resident defendant who had not voluntarily appeared in the action, unless such plaintiff is a bona fide resident of the state or country in which the suit was brought and that a collusive or temporary change of domicile for the purpose of conferring jurisdiction upon a court is unavailing: *Freeman on Judgments*, secs. 580-585; note to *Tolen v. Tolen*, 25 Am. Dec. 747-752; *Hood v. State*, 56 Ind. 263; 28 Am. Rep. 21; *Neff v. Beauchamp*, 74 Iowa, 92; *Shannon v. Shannon*, 4 Allen, 134; *Sewall v. Sewall*, 122 Mass. 162; 23 Am. Rep. 299; *Leith v. Leith*, 39 N. H. 20; *Hoffman v. Hoffman*, 46 N. Y. 30; 7 Am. Rep. 299; *Pitt v. Pitt*, 4 Macq. H. L. Cas. 627; though both the parties consent thereto: *Bonaparte v. Bonaparte* (1892), L. R. Prob. Div. 402. If neither spouse is a resident of the state or country, the judgment of its courts attempting to divorce them is void in the state or country of their actual residence: *Watkins v. Watkins*, 125 Ind. 163; 21 Am. St. Rep. 217; *People v. Dawell*, 25 Mich. 247; 12 Am. Rep. 260; *St. Sure v. Lindsfeldt*, 82 Wis. 346; 33 Am. St. Rep. 50; *Hood v. State*, 56 Ind.

263; 26 Am. Rep. 321; Van Fossen v. State, 37 Ohio St. 317; 41 Am. Rep. 507. This statement may be subject to the qualification that one of the consenting parties is often estopped, in proceedings respecting property rights from avoiding the effect of the decree by urging his own fraud in procuring it, and as to such rights may be compelled to concede its validity: Ellis' Appeal, 55 Minn. 401; 43 Am. St. Rep. 514; Kinnear v. Kinnear, 45 N. Y. 535; 6 Am. Rep. 132. In fact, as a general rule, one who has acted upon a decree of divorce, treating it as valid, or doing acts which are criminal, unless it is effectual to destroy the pre-existing marital relation, is estopped, in controversies respecting property, from insisting that it was entered by a court having no jurisdiction, and is therefore invalid: Marvin v. Foster, 61 Minn. 156; 52 Am. St. Rep. 586.

On the other hand, a bona fide resident of a state may there prosecute a suit for divorce against a nonresident spouse, and obtain a decree which will dissolve the marriage tie, though the defendant does not appear in the proceeding, and the service of process is constructive, or is made outside of the state: Dunham v. Dunham, 162 Ill. 589; Smith v. Smith, 43 La. Ann. 1140; Franklin v. Franklin, 154 Mass. 515; 26 Am. St. Rep. 266; Loker v. Gerald, 157 Mass. 42; 34 Am. St. Rep. 252; Jones v. Jones, 67 Miss. 195; 19 Am. St. Rep. 299. This view does not meet with the concurrence of all the courts. Some of them deny the power of the courts of any state or country to call before them any married person not a resident thereof for the purpose of answering a bill for divorce, though brought by a resident of the state in which it is pending, and declare that a judgment rendered therein, unless based upon a voluntary appearance of the defendant is void as against him: People v. Baker, 76 N. Y. 78; 32 Am. Rep. 274; Jones v. Jones, 108 N. Y. 415; 2 Am. St. Rep. 447; Williams v. Williams, 130 N. Y. 193; 27 Am. St. Rep. 517; Harris v. Harris, 115 N. C. 587; 44 Am. St. Rep. 471; Green v. Green (1893), L. R. Prob. Div. 89; especially if the cause of divorce is not recognized by the laws of the state in which he lives or in which the marriage was contracted: McCreery v. Davis, 44 S. C. 195; 51 Am. St. Rep. 794. The position of the courts of New York upon this subject is somewhat difficult to understand, and for this reason, instead of undertaking to summarize it, we shall make the following quotation from one of their recent decisions: "A suit for divorce, though not strictly a proceeding in rem (Cole v. Cunningham, 133 U. S. 107, 116; Mankin v. Chandler, 2 Brock. 127; 2 Bishop on Marriage, Divorce, and Separation, sec. 20; Drake on Attachment, sec. 5), is of the nature of such a proceeding, or quasi in rem, in so far as it affects the marital status of the parties; but as to alimony and costs it is a proceeding in personam: People v. Baker, 76 N. Y. 78; 32 Am. Rep. 274; 2 Bishop on Marriage, Divorce, and Separation, sec. 23; 2 Black on Judgments, secs. 925, 933. The courts of the United States and those of most of the several states, including New York and New Jersey, hold a divorce to be valid, so far as it affects the marital status of the plaintiff, which is granted by the courts of a state pursuant to its statutes to one of its resident citizens in an action brought by such citizen against a resident citizen of another state, though the defendant neither appears in the action nor is served with process in the state wherein the divorce is granted: Cheever v.

Wilson, 9 Wall. 108; Pennoyer v. Neff, 95 U. S. 714; People v. Baker, 76 N. Y. 78; 32 Am. Rep. 274; Doughty v. Doughty, 28 N. J. Eq. 581; Cooley's Constitutional Limitations, 400; 2 Bishop on Marriage, Divorce, and Separation, secs. 150, et seq. But the courts of this and some of the states hold that the marital status of such nonresident defendant is not changed by a judgment so recovered, he or she remaining a married person: People v. Baker, 76 N. Y. 78; 32 Am. Rep. 274; O'Dea v. O'Dea, 101 N. Y. 23; Jones v. Jones, 108 N. Y. 415; 2 Am. St. Rep. 447; Cross v. Cross, 108 N. Y. 628; Cook v. Cook, 56 Wis. 195; 43 Am. Rep. 706; Doughty v. Doughty, 28 N. J. Eq. 581; Flower v. Flower, 42 N. J. Eq. 152; 2 Bishop on Marriage, Divorce, and Separation, secs. 153, et seq.; 2 Black on Judgments, sec. 926. In case a defendant is a resident of the state in which the action is brought, and amenable to its substantive laws and its laws of procedure, his marital relation may be changed by an ex parte judgment of divorce, if constructive service of process be duly made: Hunt v. Hunt, 72 N. Y. 217; 28 Am. Rep. 129; Hood v. Hood, 11 Allen, 196; 87 Am. Dec. 709; Rigney v. Rigney, 127 N. Y. 408; 24 Am. St. Rep. 462.

But even in those states and countries in which suits for divorce are treated as proceedings in rem, it is conceded that the relief granted therein may be of a personal character, and that in so far as it is such, the defendant cannot be bound, unless he was either subject to the jurisdiction of the court or voluntarily submitted himself thereto. In so far as costs may be awarded against him, or he may be directed to pay a sum of money as alimony, the judgment is personal, and cannot be upheld where the circumstances would render it invalid if the cause of action were an ordinary money demand: Freeman on Judgments, sec. 586; Townsend v. Griffin, 4 Harr. 440; Bear v. Beard, 21 Ind. 321; Crane v. Meginnis, 1 Gill & J. 463; 19 Am. Dec. 237; Gould v. Crow, 57 Mo. 200; Rigney v. Rigney, 127 N. Y. 408; 24 Am. St. Rep. 462. It has been said that such a decree cannot affect the property rights of the defendant existing in the state of which he remains a resident: Doerr v. Forsythe, 50 Ohio St. 726; 40 Am. St. Rep. 703. This statement must, we think, be subject to much qualification, for if the decree of divorce be valid, it must necessarily affect those property rights growing out of the status of marriage, and therefore ought to deprive either party of any interest in the estate or property of the other which is dependent upon the fact of their being husband and wife. It must also necessarily destroy the right of either to demand that the other make provision for his or her support, and therefore it is generally a sufficient defense to an action by a wife to recover alimony that a judgment of divorce has been rendered against her in another state, of which her husband was at the time a bona fide resident, though she had never been therein: Roe v. Roe, 52 Kan. 724; 39 Am. St. Rep. 367. Courts having jurisdiction of suits for divorce may also, doubtless, make division of property situate within their jurisdiction, in which the spouses have an interest, and may sometimes award the use, or even the title thereof, to the party aggrieved when so authorized by the local laws, and this, we apprehend, is true though the service of process is constructive.

Children remaining in the custody of a nonresident defendant are

not within the jurisdiction of the court, and any provision in its decree undertaking to award their custody to the plaintiff is inoperative in the state of their residence: *Kline v. Kline*, 57 Iowa, 386; 42 Am. Rep. 49; *Woodworth v. Spring*, 4 Allen, 321. The plaintiff procuring a divorce may, however, be a bona fide resident of the state in which the suit was brought, and have residing with him or her the children of the marriage, and part of the relief sought by the complaint may relate to their custody, and in that event a question somewhat different from that arising when the children are nonresidents is presented for consideration, and the few cases in which it has been involved have resulted in decisions respecting and enforcing judgments awarding the custody to the person with whom they reside, though the defendant was proceeded against by constructive service of process, and was not within the jurisdiction of the state in which the judgment was rendered: *Wakefield v. Ives*, 35 Iowa, 238; *People v. Allen*, 40 Hun, 611.

A judgment in a suit for divorce, though defendant is a nonresident, is not, we submit, necessarily confined to the mere dissolution of the marital relations. The parties may have both children and property within the territorial jurisdiction of the court, and the circumstances may be such as to show that the complainant ought to have the custody of the one and either all or some share in the other, and it is unreasonable to hold that no redress whatever can be had because one of the parties is a fugitive from justice, or is, at all events, beyond the state. If the court, in case the defendant were present in the state, had jurisdiction to decree any relief in favor of the plaintiff, other than that of a judgment for moneys, enforceable by execution, such jurisdiction should extend to granting like relief, though the service of process is constructive and the defendant beyond the state. Hence, if the court has jurisdiction to divide the property acquired during the marriage, or to set aside either that or other property for the use of the aggrieved spouse, that jurisdiction should not be deemed divested by the circumstance that the defendant is not within the state, and therefore that part of the decree awarding lands within the state and alimony ought to be respected and enforceable, though the defendant was a nonresident: *Wesner v. O'Brien*, 56 Kan. 724.

As to *Minors, the Jurisdiction to Appoint Guardians* of their persons is, as a general rule, vested exclusively in the courts of the state or country in which they are domiciled, while guardians of their estate may be appointed in any jurisdiction in which they have property: *Grier v. McLendon*, 7 Ga. 362; *Davis v. Hudson*, 29 Minn. 27; *West Duluth Land Co. v. Kurtz*, 45 Minn. 380; *Neal v. Bartleson*, 65 Tex. 478. In England, however, an inquiry will be made as to whether they are, in contemplation of law, subjects, and if they are, jurisdiction over them will be exercised by the courts of that country, whether such minors are within it or not: *In re Willoughby*, 30 Ch. Div. 324; *Hope v. Hope*, 4 De Gex, M. & G. 328. This rule is based upon what appears to be a very just principle, namely, that every subject is entitled to the aid and protection of the courts of his sovereign, whether he happens to be within the country or not.

We have used the word "nonresidents" in this note to designate persons who are not only beyond the confines of the state or country, but were not citizens of it, and did not owe allegiance to its government or any duty to obey its laws or submit to the jurisdiction of its courts, except with respect to their claims to property situate within their territorial jurisdiction; and this is the sense in which we think it has been generally, if not universally, employed by judges and text-writers in asserting, as they all undoubtedly do, that the courts of one state or country cannot exercise jurisdiction over residents of another. In other words, until the decision was pronounced in the principal case, we did not understand that the courts of any state or nation were without jurisdiction over citizens thereof the moment any of them, for any purpose, went beyond its limits. In England, such is not the case. The courts of that country will not refuse to give effect to a foreign judgment on the ground that the defendant was not personally within the jurisdiction of the court, and was not served with process within the country. They will ascertain whether he owed allegiance to the nation whose courts proceeded against him in his absence, and, if so, will give effect to a judgment rendered against him, based upon process served in the mode exacted by the laws of the country: *Bacquet v. MacCarthy*, 2 Barn. & Adol. 951; *Douglas v. Forest*, 4 Bing. 686; *Cowan v. Braidwood*, 9 Dowl. Pr. 27; *Gauthier v. Blight*, 5 U. C. C. P. 122; *Vallee v. Dumerque*, 4 Ex. 290. Notwithstanding the decision in *Pennyroy v. Neff*, 95 U. S. 714, we still, as we have already indicated, understand this to be the law in this country, for there is nothing in the facts of that case or in the opinion of the court showing that it was considering the law applicable to a judgment pronounced in a state upon constructive service of process, but against one who was still a citizen thereof, and domiciled therein. We believe, however, that the principal case is the only one in a court of last resort in this country in which the question to which we refer was necessarily presented and decided after a thorough discussion, and that other expressions of opinion upon the subject may either be characterized as dicta, or as being opinions of inferior appellate tribunals, or as being pronounced without any apparent conception of the novelty and gravity of the question determined. They are, nevertheless, worthy of attention, and we shall therefore proceed to refer to some of them.

The case of *Burnam v. Commonwealth*, 1 Duvall, 210, was one presenting for judicial construction a statute of the state of Kentucky authorizing proceedings against the governor, members of council, and other officers of the provisional government for the recovery of public revenue seized by them. The proceedings were conducted in the mode prescribed by the act and without either actual service or appearance, and a judgment was rendered against the defendants jointly. This judgment was reversed for various errors in the proceeding, but the court said respecting the statute, which was undoubtedly one authorizing a personal judgment against defendants in their absence, that: "We cannot adjudge any provision in the act to be unconstitutional. As in other cases when actual notice cannot be given to absent defendants, there must either be no remedy, or constructive notice must be substituted as

sufficient, and what constructive notice shall be given is a question of legislative discretion rather than of power. We see no abuse of sound discretion in the mode of service prescribed in this statute." In the case of *De Meli v. De Meli*, 120 N. Y. 485, 17 Am. St. Rep. 652, which was an action by a wife against her husband for separation on the ground of his cruel and inhuman treatment of her, the defendant by his answer denied that he was a resident of New York at the commencement of the action, and alleged that the court was without jurisdiction over him and of the subject matter of the action, for the reason that he and the plaintiff were residents of Dresden in the kingdom of Saxony. The trial court, however, found that at the time of the marriage, which took place in Dresden, and ever thereafter both the parties were, and continued to be, citizens of the state of New York. As against this finding, the defendant contended that although his continued purpose while absent from New York may have been to return thereto, he was nevertheless a resident of Dresden, and not of the state of New York, and that his place of residence was not to be determined by his domicile. The court, however, held that it had jurisdiction over the defendant, because the question before it related to the legal residence of the parties, "and, within the meaning of the statute providing for actions of this character, the place of which the parties are residents is that of their permanent abode, which may be distinguished from their place of temporary residence. The defendant was not without his domicile, and unless another was acquired by him elsewhere, he retained the domicile of his origin. And to effect a change of it, the fact and the intent must concur." The case of *Cobb v. Rice*, 130 Mass. 231, presented for consideration the validity of proceedings in bankruptcy against one Winslow while not a resident of the county, and therefore not within the jurisdiction of its bankruptcy court. To this objection the court responded: "A sufficient answer to this is, that there is nothing in the case to show that Winslow had lost his domicile in Massachusetts. His domicile, being here, continues here until he acquired one elsewhere. The evidence clearly shows that, at the time of the adjudication and assignment, he was merely a fugitive from justice, who had gained no domicile elsewhere, and therefore he remained a resident with the jurisdiction of the district court of this district, and liable to be proceeded against in bankruptcy." The case of *Ayer v. Weeks*, 65 N. H. 248, 23 Am. St. Rep. 37, also involved the validity of proceedings in bankruptcy, which were assailed on the ground that the insolvent did not, at the time such proceedings were prosecuted, have a legal residence within the jurisdiction of the court conducting them. The court said: "Although the words 'residence' and 'domicile' are not always convertible terms, and have not always precisely the same meaning, we are of the opinion that the residence upon which jurisdiction depends, under the insolvency statute, is a legal residence equivalent to domicile. And whatsoever rule may be adopted in cases involving questions of pauper settlement, voting, and taxation, the principle is well settled that for purposes of jurisdiction and judicial administration a person must have a domicile somewhere, and that he can have but one, and therefore a domicile once existing continues until another is acquired elsewhere. The case

shows that Weeks' domicile was in Somersworth, and the fact is found that he had not acquired a domicile or residence elsewhere. The fact that he left Somersworth with the intention never to return did not destroy his domicile there. Until he had gained a domicile elsewhere, he remained a resident within the jurisdiction of the insolvency court, and liable to be proceeded against in insolvency." In *Henderson v. Staniford*, 105 Mass. 504, 7 Am. Rep. 551, which was an action upon a promissory note, the defense was interposed that this note had been merged in a judgment rendered thereon in the state of California, and whether this defense was maintainable necessarily depended upon the further question of whether such alleged judgment was valid. It was recovered in an action in which the process was served by publication while the defendant was not within the limits of the state of California. The court, however, said: "But he had been for a long time before that a citizen of California; the contract was made there; and that continued to be his legal domicile when the judgment was rendered. He was, therefore, upon principles of international right, subject to the laws and to the jurisdiction of the courts of that state." The plea of the defendant was sustained. The further reason, however, was announced in support of this conclusion, that as long as the defendant asserted the validity of the judgment, its invalidity could not be claimed by the plaintiff. As the opinion of the court is thus placed upon two grounds, it may be said that either of them is sufficient to sustain it, and therefore that it is not necessarily an authority for the proposition that the courts of a state have jurisdiction over a citizen while he is temporarily absent therefrom.

It remains for us to call attention to the only two cases which we have been able to discover in which the question decided in the principal case was necessarily involved. In *Huntley v. Baker*, 33 Hun, 579, an action in New York upon a judgment rendered in one of the courts of Wisconsin, it appeared that the defendant, Baker, had been a resident of the latter state for several years prior to January, 1881, in which month he obtained employment in the city of Buffalo in the state of New York, and went there for the purpose of accepting it. In May of the same year, he determined to remove his family to New York, and to make that state his place of residence, and in the following month went to his home in Wisconsin, but returned without his family, owing to the condition of his wife's health, and the family remained residents of Wisconsin, and there kept house until November 20th, when they removed to Buffalo. On November 10th, summons was issued in an action commenced in Wisconsin, and was there served upon the defendant by leaving a copy with a member of his family at their place of residence, that mode of serving process being authorized by the laws of the state. A week later judgment by default was entered, the defendant having no actual knowledge of the action against him nor of the judgment rendered therein until December, 1881, in which month an action was commenced against him thereon in the state of New York. The judge delivering the opinion of the supreme court sustaining the action said: "It may be assumed that by reason of the relations between the state and its citizen which affords protection to him and his property, and imposes upon him duties as such,

he may be charged by a judgment in personam, binding on him everywhere, as a result of legal proceedings instituted and carried on in conformity to the statute of the state prescribing a method of service which is not personal, and which, in fact, may not become actual notice to him. And this may be accomplished in his lawful absence from the state. It therefore becomes important to inquire whether the state of Wisconsin was not the domicile of the defendant at the time of constructive service of the summons so made there, because it is upon domicile that his civil status depends." The court then proceeded to consider the question of domicile, and, having as a result of its investigations decided that the domicile of the defendant had not been changed from the state of Wisconsin to that of New York before the service of process upon him, enforced the judgment entered in the former state. The case of *Fernandez v. Casey*, 77 Tex. 452, is also directly in point. Fernandez and Ackerman had been engaged in business as partners, and, shortly after the dissolution of the firm, an action was begun against them in a justice's court, in which judgment was procured based on service of process by publication, both then being absent from the state. Fernandez afterward returned to the state, and, finding that an execution had been issued upon the judgment, and levied upon real property belonging to him, brought a suit to enjoin the sale, claiming that the judgment was void. In denying the injunction, the supreme court of the state said: "The fact, we think, clearly was that Fernandez was a resident citizen of the state of Texas, and that, though he was temporarily absent from the state, he had never acquired a domicile elsewhere. Under these circumstances, we think that service by publication of process against him, according to the provisions of our statute, conferred upon the justice's court the jurisdiction that it exercised in rendering judgment against him."

In the principal case, it was apparent that the defendant's absence from the state of his domicile was not only temporary, but was also for the express purpose of avoiding the jurisdiction of its courts in a controversy existing between him and his wife involving, among other questions, that of the custody of their children, born within the state, and constituting the issues of a marriage there contracted and solemnized between citizens thereof. It is certainly true that resorting to a state or country for the purpose of giving jurisdiction to courts in cases dependent upon the residence of the parties is unavailing. It is an attempt to practice a fraud upon the law, and the courts will not permit it to be successful: *Morris v. Gilmer*, 129 U. S. 315; *Butler v. Farnsworth*, 4 Wash. C. C. 101. For like reasons, it ought to be declared that the fleeing from a state for the purpose of escaping the justice which its tribunals are authorized to administer is a fraud which cannot deprive the courts of their power to afford appropriate relief.

Voluntary Appearance.—In all cases where no fraud is contemplated, a voluntary appearance of a nonresident in the courts of another state or country, whether he has ever been therein or not, is binding upon him, and he cannot, if unsuccessful, avoid the effect of the judgment or other decision by urging that he was a nonresident, and that the court pronouncing judgment against him had

no jurisdiction over him. There may be cases in which it is difficult to determine whether there has been an appearance, and, if so, whether it was voluntary. Questions of this character do not fall within the purview of this note. If a foreign court has property within its possession, and its owner appears solely for the purpose of protecting it, it may be that such appearance does not confer jurisdiction over his person. If, however, he appears for the purpose of protecting other property, or of litigating an issue between him and his adversary on its merits, the court undoubtedly has jurisdiction to render personal judgment against him: *Grubb v. Starkey*, 90 Va. 831; *Hilton v. Guyot*, 159 U. S. 113; *De Cosse Brissac v. Rathbone*, 6 Hurl. & N. 301; *Schllsby v. Westenholz*, L. R. 6 Q. B. 162; *Vlonet v. Barrett*, 1 Cal. & S. 554. Perhaps his appearance must be regarded as voluntary in every case in which he does not appear solely to protect property already within the custody of the court, or for the express purpose of urging the want of jurisdiction over him. He cannot seek any relief whatever involving the merits of the controversy or the redress to be granted to the party found to be in fault, and afterward escape from the balance of the judgment on the ground that the court had no jurisdiction over his person: *Hausman v. Burnham*, 59 Conn. 117; 21 Am. St. Rep. 74; *Macon etc. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135; *German Bank v. American etc. Co.*, 83 Iowa, 491; 32 Am. St. Rep. 316; *Ferguson v. Oliver*, 99 Mich. 161; 41 Am. St. Rep. 593; *Fairchild v. Fairchild*, 53 N. J. Eq. 678; 51 Am. St. Rep. 650; *Laing v. Rigney*, 160 U. S. 531. If a defendant appear in the case for the express purpose of objecting to the jurisdiction of the court, and his objection is overruled, and he takes no further steps in the case, there is no doubt that his qualified appearance does not confer jurisdiction over his person, where it did not otherwise exist: *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447; *Walling v. Beers*, 120 Mass. 548; *Harkness v. Hyde*, 98 U. S. 476. Whether, after his objection is overruled, his filing an answer and further appearing in the case is a waiver of the objection, and a submission to the jurisdiction of the court is a question still involved in grave doubt. In a case in which a state court denied a right of removal, and the party thereafter appeared and litigated the case, it was said that he was not bound to desert his cause, and to leave the opposite party to take judgment by default, and that he "was at liberty, his right to removal being ignored by the state court, to make defense in that tribunal in every mode recognized by the laws of the state without forfeiting or impairing, in the slightest degree, his right to a trial in the court to which the action had been transferred, or without affecting to any extent the authority of the latter court to proceed": *Steamship Co. v. Tugman*, 106 U. S. 118, 122. The laws of the state in which the action is pending may prescribe what shall be the effect of filing an answer therein, and, where such is the case, it has been held that the effect so prescribed applies to nonresidents as well as to residents, and therefore that though objection to the jurisdiction of the court was properly made, this objection was waived by filing an answer and litigating the case on the merits after the overruling of the objection, the statute of the state applicable to proceedings against nonresidents having ex-

pressly declared that "the filing of an answer shall constitute an appearance of the defendant so as to dispense with the answer and the service of citation upon him": *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447.

In many of the states the practice prevails at the time of the execution of contracts for the payment of money of giving a warrant therewith authorizing any attorney to appear for the debtor, and to confess judgment against him for the amount of his obligation, and we apprehend, where the language of the warrant is sufficiently comprehensive, it may authorize such appearance and entry of judgment in a state of which the debtor is not, and never has been, a resident, but, if so, it will not authorize the entry of a personal judgment against him in a mode or by a person not designated in the warrant. Thus it appeared in one case that by the bond in question the debtor had authorized "any attorney of any court of record in the state of New York or any other state to confess judgment for the said sum with release of errors, etc." A judgment was entered in another state by a prothonotary, he being authorized by the laws of such state to enter such a judgment. It was held that a citizen of a state in which this statute was not in force cannot be held presumptively to have knowledge of it, or to authorize proceedings taken under it, and that, as the particular judgment in question was not authorized by the defendant, nor by any attorney of a court of record of any state, it was invalid as against the nonresident defendant: *Grover etc. Co. v. Redcliffe*, 137 U. S. 287, 297.

MCBEAN v. FRESNO.

[112 CALIFORNIA, 159.]

MUNICIPAL CORPORATIONS, IMPROVEMENTS MADE BEYOND MUNICIPAL LIMITS.—A city having authority to establish, construct, and maintain sewers may contract for the taking care and disposing of sewage after it reaches a point beyond the city limits. The disposition of the outfall is an essential part of the maintenance of a sewer system.

MUNICIPAL INDEBTEDNESS, WHEN AGAINST PROHIBITION.—Under a law forbidding a municipality to incur any liability for any purpose exceeding in any year the income and revenue thereof, and declaring that the trustees shall not audit any liability in excess of the available money in the treasury that may be legally appropriated for such purpose, a contract running over a number of years, and which, in the aggregate, requires the payment of more money than will be in the municipal treasury during any one year, but under which the annual payments do not exceed the income in any year, is valid and enforceable. Under such a law the municipality can never be liable for but one year's obligations incurred under the contract, and if they exceed the moneys in the treasury applicable to their payment, the balance is not a claim against the city, and is lost to the creditor. Therefore, at no time can its obligations under the contract exceed the revenue of any year applicable to their satisfaction.

MUNICIPAL CORPORATIONS, CONTRACTS EXTENDING BEYOND OFFICIAL TERMS OF THE OFFICERS AUTHORIZING THEM.—A contract may be made by a municipal corporation

running for a period of years, and extending beyond the official term of the officers who authorized it, if, at the time of its execution, it was fair, just, and reasonable, and prompted by the necessities of the situation, or was in its nature advantageous to the municipality. Therefore a contract providing for the disposition of the sewage of a municipality for a period of five years is enforceable.

E. D. Edwards and W. C. Graves, for the appellant.

L. W. Moultrie, for the respondents.

¹⁶¹ HENSHAW, J. The city of Fresno duly and regularly, so far as form and procedure are concerned, entered into a contract with plaintiff, by which plaintiff agreed to take care and dispose of the sewage of the city for the period of five years for the sum of four thousand nine hundred dollars per annum, payable quarterly. Plaintiff was required to give, and did give, a bond in the sum of ten thousand dollars, to which extent he agreed to reimburse the corporation for any liability or loss it ¹⁶² might incur or suffer by reason of a faulty performance of his contract. No natural means were available to Fresno for the disposition of its sewage. It had provided sewers, but had made no provision for the care of their contents. These were to be discharged beyond the city limits. But, before the sewers could be used, a sewer farm was necessary for the reception and treatment of the waste matter. The city had secured no such farm. Under these circumstances, the contract with McBean was entered into. He made the necessary expenditures, and year by year performed his contract according to its letter and spirit. Each year in turn the city levied, collected, and apportioned to the sewer fund a tax to cover the yearly amount due McBean, and duly audited and paid his demands on the fund. This continued for three years. During the fiscal year ending May 31, 1894, plaintiff performed his contract, but the city refused payment, upon the ground that the contract was void. McBean then instituted this action, charging in the first count for the value of labor and services furnished at defendant's request, and in the second, pleading at length and standing upon the contract in question. He also averred that there was in the sewer fund not otherwise appropriated and available for the payment of his demand, more than three thousand dollars, and such is the undisputed fact.

Indeed, none of these facts is disputed. Upon the trial, most of them were admitted under stipulation, and others proved without conflict. The court sustained a general demurrer to the second cause of action. At the close of plaintiff's case, a mo-

tion for a nonsuit upon the cause of action in assumpsit was made and granted. These two rulings are the errors complained of.

Against the validity of the contract the first objection urged is, that the city had no power to enter into this contract for the care and disposition of its sewage, because "it has no reference whatever to the sewage within the city, but provides for the care and disposal of the sewage from the outfall of the sewers some distance from ¹⁶³ the city." We see no force in this objection. Proper sewers are in this day so essential to the hygiene and sanitation of a municipality, that a court would not look to see whether a power to construct and maintain them had been granted by the charter, but rather only to see whether by possibility the power had been expressly denied. In the case of the city of Fresno, a city of the fifth class, the power is, however, expressly conferred. "The board of trustees shall have power to establish, construct, and maintain drains and sewers": Municipal Corporation Bill, sec. 764, subd. 5. Disposition of the outfall is an essential part of the maintenance of a sewer system, and it must often be necessary for inland cities to arrange for that disposition without their corporate limits: *Coldwater v. Tucker*, 36 Mich. 474; 24 Am. Rep. 601.

But the controlling questions presented by this contract for determination are: 1. Does it violate the constitution or the charter of the city of Fresno? 2. Does it operate as a surrender or suspension of the legislative powers of the trustees of the city?

The constitution provides, article 11, section 18: "No city shall incur indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for it for such year, without," etc. "Any indebtedness or liability incurred contrary to this provision shall be void."

The charter of the city of Fresno provides, in terms harmonious with those of the constitution: "The trustees shall not create, audit, allow, or permit to accrue, any debt or liability in excess of the available money in the treasury that may be legally apportioned and appropriated for such purposes," etc.: Stats. 1883, p. 255.

The charter of the city of Fresno authorizes the levying and collecting of a tax not exceeding ten cents on each one hundred dollars for the sewer fund: Municipal Corporation Bill, sec. 763, subd. 3. No question is here presented but that the tax which may thus be ¹⁶⁴ collected is ample for the payment of the sums due or to become due to plaintiff under his contract, and the

question of the validity of the contract is free from any embarrassment from this consideration.

In the constitutional provision under consideration, the framers had in mind the great and ever growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into succeeding years increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers. It was to prevent this abuse that the constitutional provision was enacted. In *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641, and in *Shaw v. Statler*, 74 Cal. 258, the question is discussed, and the interpretation of the constitutional provision laid down, and the reasons for it given. Each year's income and revenue must pay each year's indebtedness and liability, and no indebtedness or liability incurred in one year shall be paid out of the income or revenue of any future year. The taxpayers of municipalities are thus protected against the improvident creation of inordinate debts, which may be charged against them and their property in ever increasing volume from year to year.

Upon the other hand, the correlative rights of a creditor of the city under these circumstances, and under this law, have been recently set forth with exactness and clearness by Mr. Justice Harrison in *Weaver v. San Francisco*, 111 Cal. 319: "Whoever deals with a municipality does so with notice of the limitation of its powers, and with notice also that he can receive compensation for his labor and materials only from the revenues and income previously provided for the fiscal year during which his labor and materials are furnished; and with the knowledge, too, that all other persons dealing with the municipality have the same rights to compensation, and are subject to the same limitations, as he is. Even though at the time of making his contract there are ¹⁶⁵ funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city, and if others whose claims have accrued subsequent to his are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. He acquires no claim in the nature of a lien upon these funds for the amount of his demand, nor is there any legal obligation upon the municipality any more than upon any other

debtor, to pay the claims against it in the order in which they are incurred, unless they are presented in that order, and in such condition and with such formalities as entitle the claimant to immediate payment. In dealing with the municipality, he must rely upon the integrity of its officers that they will not incur any liabilities during the year in excess of the income and revenues provided for that year, and, as a prudent man, he will ascertain, not only the amount of that income, but also the amount of the claims already existing, and of those that are likely to be incurred."

In the case of contracts extending over a period longer than one year, it may be readily seen that the municipality is abundantly protected, and that it is the contractor therewith who subjects himself to peril and risk of loss. If there are not revenues for any given year sufficient and available for the payment of his claims for that year, those claims become waste paper, and are not carried over as a charge against the income and revenue of a succeeding year.

This construction of the law in our state removes a potent objection found by the supreme court of Michigan to sustaining a contract under a law similar to our own, where the life of the contract was for several years. Says the court: "There can be no doubt, in our opinion, that this whole contract obligation is a liability to the full extent of the thirty years' rental, and it is equally clear that all unpaid sums will be aggregated until ¹⁶⁶paid": *Niles Water Works v. Mayor etc. of Niles*, 59 Mich. 312. In this state, such a rule would not obtain, and the contract under consideration is left with its validity to be determined primarily as the question is answered, Does it or does it not create a debt or liability for a given year exceeding the revenues of that year?

And upon this it may be said at the outset that there is a contrariety of opinion in the courts of the states which have been called upon to interpret constitutional or charter provisions similar to or identical with our own. The state of Michigan, as will be observed from the case last cited, holds such contracts to be void, for the reason above quoted. Ohio, New Jersey, Montana, and Oregon have reached the same conclusion, and perhaps other states: *State v. Medbery*, 7 Ohio St. 526; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Salem Water Co. v. Salem*, 5 Or. 29; *Atlantic City Water Works Co. v. Read*, 50 N. J. L. 665. Upon the other hand, in Illinois, Pennsylvania, Massachusetts, New York, Iowa, Indiana, and Oklahoma (and it may be in

others which have not come beneath our notice), it is uniformly held that contracts such as these are not violative of the constitutional inhibition: *East St. Louis v. East St. Louis Gas Light etc. Co.*, 98 Ill. 415; 38 Am. Rep. 97; *Appeal of Erie*, 91 Pa. St. 398; *Smith v. Inhabitants of Dedham*, 144 Mass. 177; *Weston v. Syracuse*, 17 N. Y. 110; *Grant v. Davenport*, 36 Iowa, 396; *Valparaiso v. Gardiner*, 97 Ind. 1; 49 Am. Rep. 416; *Indianapolis v. Indianapolis Gas Light etc. Co.*, 66 Ind. 396; *Territory v. Oklahoma*, 2 Oklahoma, 158.

In a certain very restricted sense it may be said that a liability is created by a contract such as this, but to call it a present liability for the aggregate amount of the payments in the contract contemplated thereafter to be made is not legally permissible. A liability to the city would arise upon breach of contract, but the constitution never meant to protect the city from the consequences of its own willful and tortious acts. A liability might arise against the city for the negligence of its ¹⁶⁷ officers, and the damages due to an individual who had suffered therefrom might be great, but such liability for a municipal wrong the constitution never meant to protect against. When it is come to consider the contractual relations between the city and appellant, it is at once seen that the city cannot be liable in any one year for more than four thousand nine hundred dollars, an amount far within the revenue derived to the sewer fund; and, futher, that it cannot become liable for this amount at all until faithful service rendered by the contractor each year. If the city in any one year should fail to collect into its sewer fund moneys sufficient to pay the just claims of the contractor, then, as above said, it would be the contractor's loss, the city would be chargeable with no financial responsibility therefor, and the result at the most, so far as it was concerned, would be a failure upon the part of its officers to observe good faith in their dealings.

There need be here no struggles with the niceties of definitions to be given to debt or liability. An able discussion of those questions will be found in the case of *Valparaiso v. Gardiner*, 97 Ind. 1; 49 Am. Rep. 416. We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed.

These views find abundant support in the adjudicated cases in this state. Article 8 of the former constitution of California

provided that the legislature shall not create any debts or liabilities in any manner which shall exceed the sum of three hundred thousand dollars, except under certain specified contingencies. The state made a contract for the care of its prison, for convict labor, etc., for the period of five years, agreeing to pay therefor the sum of ten thousand dollars per month. The act came before this court for review in *State v. McCauley*, 15 Cal. 429, where the question was elaborately ¹⁶⁸ argued, and fully considered by the court. Chief Justice Field, in delivering the opinion of the court, spoke as follows: "The unconstitutionality of the act is asserted on two grounds: 1. That it appropriated the sum of six hundred thousand dollars, and thus created a debt or liability against the people of the state exceeding the limit prescribed by the eighth article of the constitution. . . . The contract provides for the payment of ten thousand dollars a month, and the act appropriates this sum per month. The appropriations are to take effect, and the services are to be rendered, in future. Until the services are rendered there can be no debt on the part of the state. The lessee could not have claimed, at any time after the making of the contract, the aggregate of all the monthly installments, because the state never owed him that amount. The state only became indebted as the services were each month performed. . . . The eighth article was intended to prevent the state from running into debt, and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury. The appropriation of the moneys when received meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. The appropriation accompanying the services operates, in fact, in the nature of a cash payment." This interpretation, after further consideration and argument, was reaffirmed in *McCauley v. Brooks*, 16 Cal. 11, and again in *Koppikus v. State Capitol Commrs.*, 16 Cal. 248. In *People v. Arguello*, 37 Cal. 524, it is said: "A sum payable upon a contingency is not a debt, or does not become a debt until the contingency has happened."

These decisions being before the framers of the present constitution, under familiar rules of interpretation it will be held that their enactment of similar provisions was made in the light of them.

Wallace v. Mayor of San Jose, 29 Cal. 181, is not in ¹⁶⁹ conflict with these decisions. The contract there contemplated a pay-

ment which might become a debt in the year in which the contract was executed, as well as in some future year. Under the peculiar language of the charter, which forbade the creation of any debt unless the money was actually in the treasury to meet it, it was declared that the council had no authority to provide for the creation of a debt to arise in the future, any more than to create one directly and in praesenti.

Upon the second proposition, namely, whether or not the contract operates as a surrender or suspension of the legislative powers of the trustees of the city, it is to be observed that there is in this state no inhibition against the making of a contract by a municipal board which shall extend for more than one year, or even beyond the term of office of the board which makes it. If the legislature desired to restrict municipalities in this particular, it could easily do so by the passage of a law such as exists in some other states declaring void any contract upon the part of a municipality which is to extend beyond the current fiscal year, or beyond the term of office of the authorities which enter into it. But, even in the absence of such provisions, courts look with disfavor upon contracts by municipalities involving the payment of moneys which extend over a long period of time: 1. Because such contracts in their nature tend to create a monopoly in favor of the other party thereto for supplying the city with the article contracted for; 2. Because they may involve an undue restraint upon the legislative powers of the successors of the board, and prevent those successors from availing themselves of a change in the times, of opposition, of reduced rates, or of other causes operating legitimately to decrease the price of the commodity, of which decrease in price the city by reason of its contract cannot avail itself.

There is thus by law and reason a well-defined limit set to such contracts. In the absence of any other objection to them, they will not be upheld without a clear showing of a reasonable necessity for their execution. ¹⁷⁰ But if, on the other hand, it be made to appear that at the time of its execution the contract was fair and just and reasonable, and prompted by the necessities of the situation, or was in its nature advantageous to the municipality at the time it was entered into, then such a contract will not be construed as an unreasonable restraint upon the powers of succeeding boards.

In *San Francisco Gaslight Co. v. Dunn*, 62 Cal. 585, this court says: "In the absence of express limitation as to the period of time for which a contract may be made, we would hold, per-

haps, that the contract with the plaintiff for five years was not beyond the power of the supervisors." In *Riehl v. San Jose*, 101 Cal. 442, an action was brought to set aside a contract for five years, made by the city with an electric company for the lighting of its streets. The complaint sounded in fraud, and further declared that the contract was against public policy, illegal and void. The contract was upheld, it being found that there was no fraud, and "that the members of the common council acted as honest men, and exercised their honest discretion for the best interests of the city."

We have here, then, a contract made for a purpose expressly authorized by the charter, a contract which looked to supply the city with an absolute need, a contract which pertained to the ordinary expenses of the city, and, together with other like expenses, was well within the limit of the current revenues authorized by its charter annually to be provided for this specific purpose. The term of the contract was fair indeed, in view of the considerable expense which the evidence showed plaintiff was obliged to undergo to fulfill his undertaking. Under these circumstances, we hold the contract to be valid, operative, and binding upon the city.

The judgment and order are reversed and the cause remanded, with directions to the trial court to overrule defendant's demurrer.

McFarland, J., and Garoutte, J., concurred.

THE PRINCIPAL CASE was followed and cited in *Smilie v. County of Fresno*, 112 Cal. 311. In that case, it appeared that a contract had been entered into with the county of Fresno to build additions to the county courthouse, and to complete them within fifteen months after the date of the contract, and the county agreed to pay for such improvements ninety-nine thousand three hundred and eighty-seven dollars in gold coin or county warrants, seventy-five per cent in monthly installments according to the stage of the advancement of the work, and the remainder within thirty-five days after the completion of the structure. The contract was entered into in December, 1891, and completed in 1893, and after such completion a balance of six thousand dollars and upward remained unpaid, for the recovery of which the action was instituted. A demurrer was interposed to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and was sustained by the trial court, probably upon the ground that the total indebtedness incurred on the part of the county on account of the contract was in excess of the revenue and income of the county for each of the years 1892 and 1893, and was, therefore, void by reason of the prohibitions contained in the constitution of the state against any county incurring any indebtedness or liability, in any manner or for any purpose, exceeding in any year the income and revenue provided for such year. The court held, upon the authority of the principal case, that the contract did not at the time

of the entering therein create a liability, but that the sole debt or liability created was one that arose from year to year in separate amounts, as the work was performed, and that, as the complaint alleged, the income and revenue of the county provided for each of the years 1892 and 1893 was sufficient to meet the payments falling due under the terms of the contract in those years, as well as to discharge the current obligations of the county, therefore the constitutional inhibition had not been violated.

The principal case was also cited in *Bradford v. San Francisco*, 112 Cal. 537, 547. That was an action brought to enjoin the defendants, as officers of the city and county of San Francisco, from incurring any indebtedness or expenses during the months of May and June, 1895, whereby there should arise any deficiency in the income or revenue of said city and county provided for the fiscal year of 1894-95, and from ordering any supplies or materials for said city and county for its maintenance, or any department thereof, whereby there shall be created an indebtedness in excess of the income and revenue provided for said city and county government for said fiscal year 1894-95, and that the board of supervisors should be perpetually enjoined from levying any tax or making any provision for raising any money for the payment of such deficiency out of the public funds provided for the fiscal year 1895-96. The question was whether, when the revenue for a given year had been determined and had been collected and expended before the expiration of such year, the city officials, for the purpose of providing for the pressing wants of the municipality, might, during the residue of the year, incur debts and liabilities to be met and discharged from the revenues of a subsequent year. It was held that this question must be answered in the negative, and therefore that the complaint stated a cause of action, and the judgment sustaining the demurrer there-to should be reversed.

MUNICIPAL CORPORATIONS—INDEBTEDNESS.—A constitutional provision that "no city or county shall incur any indebtedness or liability exceeding in any year the income and revenue provided for it for such year" means that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year: *Smith v. Broderick*, 107 Cal. 644; 48 Am. St. Rep. 167. If a city is prohibited from making any contract whereby liability is incurred exceeding the revenues for any fiscal year, a contract made by it for the lighting of its streets for a term of years is void, unless the revenue on hand at the time the contract is made is sufficient to cover all the liability incurred under the contract and payable during such years, together with the current expenses and existing liabilities for the year in which the contract is made: *Kitchell v. Minnesota Brush etc. Co.*, 58 Minn. 418; 49 Am. St. Rep. 523. This subject is fully treated in the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229-243.

SIMPSON v. FERGUSON.

[112 CALIFORNIA, 180.]

MORTGAGOR AND MORTGAGEE—GROWING CROPS.—

While a mortgagor remains in possession, he is entitled to reserve to his own use the income and profits of the mortgaged estate, and therefore the crops growing thereon. This right terminates only when the mortgagor's right of possession ends upon the sale of the property or the appointment of a receiver authorized to collect its rents and profits.

A MORTGAGE UPON A GROWING CROP must, as against a subsequent mortgagee in good faith, be executed with the formalities required by the Civil Code.

MORTGAGE OF REAL PROPERTY AND OF CROPS GROWING THEREON, CONFLICTS BETWEEN.—If a mortgage purporting to include certain real property and the rents, issues, and profits thereof is executed in the mode prescribed for a mortgage of real property, but not in that required for a mortgage of growing crops, and subsequently the mortgagor mortgages the growing crops in the mode prescribed by law, the latter mortgagee is entitled to such crops in preference to the holder of the former mortgage.

The defendant Shaw executed to plaintiff a mortgage which purported to embrace certain real property and the rents, issues, and profits thereof. Afterward, the mortgagor executed another mortgage upon the same property in favor of the defendant Ferguson and also a chattel mortgage upon the crop of oranges growing, or to be produced thereon, during the years 1893 and 1894. Section 2955 of the Civil Code of California authorizes mortgages to be made upon growing crops and upon other property specified in the section. Section 2957 of the same code declares that a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless it is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors, and is acknowledged or proved, certified, and recorded in like manner as grants of real property. The mortgage made to plaintiff did not comply with this section, but did conform to the law respecting the execution of mortgages upon real property. In a suit brought by plaintiff to foreclose his mortgage, judgment was rendered in his favor directing a sale of the mortgaged premises, and the application of the proceeds of the sale to the payment of the amount due plaintiff. In the description of the property to be sold was included the real property described in the mortgage, "together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof." The

defendant Ferguson, after the entry of such judgment, moved to amend it so as to provide that the growing crop of oranges be sold separately, and their proceeds applied to the satisfaction of the debt secured by his mortgage. An order having been entered, and the trial court denying the motion, the defendant Ferguson appealed from the judgment.

G. A. Skinner and Rolfe & Rolfe, for the appellant.

E. B. Mering, *amicus curiae*.

R. Clark, *amicus curiae*.

E. B. Stanton, for the respondent.

W. S. Goodfellow, *amicus curiae*.

¹⁸³ VAN FLEET, J. Upon consideration of this cause in Bank, after a more full and thorough presentation ¹⁸⁴ thereof than was had in Department, we are satisfied that the conclusion reached by the department was correct and should be adhered to.

It is urged that sections 2955 and following of the Civil Code, providing for the manner of mortgaging growing crops, do not establish an exclusive method; that, as this class of property may, under some conditions, be regarded as realty, and under other conditions, as personalty, it must follow that, under corresponding conditions, the property may be the subject of a real estate mortgage or a chattel mortgage, according to the circumstances, and that plaintiff having a valid mortgage upon the land, with its rents, issues, and profits, this gives him a valid lien upon the growing crops, as effectually, to the same extent for all purposes, as if executed with the formalities required in the case of a crop mortgage. We are unable to coincide in this view.

In the first place, we think it quite manifest from the provisions of the code in question that the legislature intended thereby to provide an exclusive mode for the mortgaging of growing crops, and intended to declare that for such purpose this species of property shall be regarded as chattels. There is nothing in the statute to indicate that it was not intended to cover every case of a mortgage given upon that class of property. In the second place, while it is perfectly true that growing crops may be either personal or real property, according to circumstances, and while, as suggested by respondent, a mortgage of the land gives a lien upon everything that would pass by a grant of the land, which includes crops growing thereon, it is, nevertheless, well established that such lien, so far as the growing crops are concerned, is limited in its effect to the crops growing upon and

unsevered from the land at the time of foreclosure. It does not vest the mortgagee with a right to the crops grown intermediate the giving of the mortgage and the foreclosure thereof. Until the latter event, where, as in this state, the mortgage creates no estate in the mortgagee, but confers only a lien upon ¹⁸⁵ the property, the mortgagor is entitled to such crops, with the same absolute right and dominion over them as if the mortgage did not exist. This doctrine is thoroughly well settled, with no considerable diversity upon the subject among text-writers or the courts.

The general rule is well stated in Mr. Jones' work on Mortgages, fifth edition, section 670, where it is said: "So long as the mortgagor is allowed to remain in possession, he is entitled to receive and apply to his own use the income and profits of the mortgaged estate. His contract is to pay interest and not rent. Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise this right he cannot claim the profits. Upon a bill in equity to obtain foreclosure and sale, he may, in proper cases, apply for the appointment of a receiver to take for his benefit the earnings of the property. He is then confined to the rents and profits accruing during the pendency of the suit. If he neglects to apply for a receiver, the final decree, if silent upon this subject, does not affect the mortgagor's possession or right to the earnings in the meantime. It is only after sale under the decree, except where statutes provide otherwise, that the mortgagor is wholly divested of title, and consequently of right to possession. Unless restrained by the terms of the mortgage, the mortgagor in possession may work mines or quarries upon the mortgaged property, and whatever he severs from the realty becomes unencumbered personalty, and his own property. Even if the rents and profits of the mortgaged property are expressly pledged for the security of the mortgage debt, with the right in the mortgagee to take possession upon default, the mortgagee is not entitled to the rents and profits until he takes actual possession, or until possession is taken in his behalf by a receiver."

In *Teal v. Walker*, 111 U. S. 242, the authorities upon this subject are exhaustively reviewed, and it is there held (quoting from the syllabus): "A conveyance to a trustee absolute on its face, but with an instrument of ¹⁸⁶ defeasance showing that it is to secure payment of a debt due to a third party, is a mortgage, and is subject to the rule that a mortgagee is not entitled to the rents and profits until he acquires actual possession. The rule that

the mortgagee is not entitled to the rents and profits before actual possession applies even when the mortgagor covenants in the mortgage to surrender the mortgaged property on default in payment of the debt, and nevertheless refuses to deliver it after default, and drives the trustee to his action to enforce the trust." In that case, the court, stating the doctrine as laid down in *Gilman v. Illinois etc. Tel. Co.*, 91 U. S. 603, say: "It was declared by this court that where a railroad company executed a mortgage to trustees on its property and franchise, 'together with the tolls, rents, and profits to be had, gained, or levied thereupon,' to secure the payment of bonds issued by it, the trustees in behalf of the creditors were not entitled to the tolls and profits of the road, even after condition broken and the filing of a bill to foreclose the mortgage, they not having taken possession or had a receiver appointed."

Chancellor Kent states the rule thus: "The mortgagor has a right to lease, sell, and in every respect to deal with the mortgaged premises as owner, so long as he is permitted to remain in possession, and so long as it is understood and held that every person taking under him takes subject to all the rights of the mortgagee, unimpaired and unaffected. Nor is he liable for rents, and the mortgagee must recover possession by regular entry by suit, before he can treat the mortgagor, or the person holding under him, as a trespasser": 4 Kent's Commentaries, 157.

In the case of *Sexton v. Breese*, 135 N. Y. 387, where the mortgagor of the land, subsequent to the giving of the mortgage, but before it was due, sold a growing crop of wheat raised on the land, and subsequently to such sale delivered possession of the land to the mortgagee thereof, it was held that the vendee of the crop was entitled to the same as against the mortgagee, and ¹⁸⁷ it is said: "If we assume that the plaintiff was in possession of the land as by an actual surrender from the mortgagor, his rights in its use were subject to the previous disposition made of the growing crop of grain by the owner of the land. He had planted the crop, and it was perfectly competent for him to dispose of it while he held the title to the land. Though in a sense a growing crop of grain is a part of the real estate, it nevertheless possesses the characteristics of a chattel, and is salable and transferable as other personal property is, and may be taken upon execution and sold in discharge of a judgment debt."

In *West v. Conant*, 100 Cal. 231, where the mortgagor remained in possession of the mortgaged land after the foreclosure sale, and received all the rents, issues, and profits therefrom, it was held

that he was entitled to hold such premises until the expiration of the period of redemption, and that the purchaser at the sale was not entitled to a receiver to take possession of crops of hay and grain growing upon the land, intermediate the sale and the expiration of the equity of redemption.

In the recent case of *Freeman v. Campbell*, 109 Cal. 360, decided by this court, where the conveyance from Anderson, plaintiff's intestate, to defendant was held to be a mortgage, and where defendant had taken possession of the land and received the rents thereof, it was held that the administrator of Anderson, the mortgagor, was entitled to recover the amount of the rents received by Campbell as money had and received belonging to the estate, and it is there said: "The claim that the mortgage included the rents, as well as the land, does not aid the appellant, as, under section 2927 of the Civil Code, he had no right to the possession of the mortgaged security. His right to the rents was no greater than that to the land. A mortgage is a contract by which specific property is hypothecated (Civ. Code, sec. 2920), but such contract is independent of the fact of possession, and does not, of itself, confer the right of possession. If a receiver had been appointed to take ¹⁸⁸ possession of the mortgaged premises, the authority of that officer would have included the right to take possession of the rents, as well as the land, and the rents would then have been in the custody of the court, and subject to its direction; but, in the absence of some intervention by the court, the mortgagor has the right to these rents, even though they are included in the instrument of mortgage, and the mortgagee's right to them is limited to their disposition by the court in the judgment, or subsequent thereto."

From the principles here declared it follows that, the mortgagor being in possession of the land, and entitled as of right to the crops grown thereon, it was competent for him to sell or mortgage, or otherwise dispose of them, and convey good title thereto, as against the mortgagee of the land or his assigns, at any time prior to the foreclosure of the latter's mortgage.

It is claimed by respondent that the cases of *Montgomery v. Merrill*, 65 Cal. 432, and *Treat v. Dorman*, 100 Cal. 623, are in conflict with the doctrine that growing crops can only be mortgaged with the formalities prescribed for the execution of chattel mortgages. But we do not so regard them. In *Montgomery v. Merrill*, 65 Cal. 432, no question, as between a mortgagee or vendee of the crop and the mortgagee of the land, arose. In the foreclosure proceedings a receiver was appointed, who took posses-

sion of the mortgaged premises and the growing crops thereon. Upon a sale of the land, it brought less than the amount of the mortgage, and it was held that the mortgage was a lien upon the crop then growing upon the premises, and that the proceeds of its sale should be applied to the payment of the deficiency. There is nothing in this inconsistent with what has been said above. The rights of the mortgagor and mortgagee of the land alone were involved. The crop, being in the hands of the receiver, and not having been prior thereto sold or disposed of by the owner of the land, the case falls strictly within the limitation of the rule as above stated.

¹⁸⁹ In *Treat v. Dorman*, 100 Cal. 623, the mortgagee of the crop was made a defendant in an action to foreclose a prior mortgage on the land. In its answer it made no claim of priority over the mortgage on the land, but prayed in terms that if any surplus remained from a sale of the crop "after payment of any deficiency due the plaintiff" (the mortgagee of the land), that such surplus be applied in satisfaction of its chattel mortgage—thus conceding the priority of the real estate mortgage. The decree gave appellant everything it asked, and the disposition of the case in this court would seem to have been largely influenced by that consideration, the court remarking: "It is not often that a party appeals from a judgment granting him all that he asks, and yet in this case just that thing has happened." The party's subsequent claim on the appeal to a priority of lien on the crop, and to a right to a different judgment, does not appear to have received very favorable or careful consideration, but apparently the case went off largely upon the theory that appellant had received all it asked in the court below. In what is said as to the respective rights of the two mortgagees, the court does not seem to have had in mind the provisions of the Civil Code here invoked, since no mention is made of them; and while there are some expressions by the learned commissioner looking in favor of the contention now advanced by respondent, we do not regard them, in view of the record upon which the court was passing, as essential to the conclusion reached or as binding authority.

For these reasons, and what is said in the opinion of the Department, we think the judgment should be reversed, and the court below directed to modify it in accordance with the motion of appellant.

It is so ordered.

Garoutte, J., McFarland, J., Harrison, J., Temple, J., and Henshaw, J., concurred.

MORTGAGES—GROWING CROPS.—As between the mortgagee of land, who purchases at the foreclosure sale and execution creditors of the mortgagor, in possession, the former is entitled to the growing crops: *Crews v. Pendleton*, 1 Leigh, 297; 19 Am. Dec. 750, and extended note. A mortgagor's lessee is not entitled to crops growing on the premises as against the mortgagee, under a lease subsequent to the mortgage: *Lane v. King*, 8 Wend. 584; 24 Am. Dec. 105, and note; but in connection with this case, see *Monday v. O'Neill*, 44 Neb. 724; 48 Am. St. Rep. 760, and note. The purchaser of mortgaged lands at foreclosure sale is not entitled to the ungathered crops, as against a purchaser thereof from the mortgagor before foreclosure: *Willis v. Moore*, 59 Tex. 628; 46 Am. Rep. 284, and note. The sale by a mortgagor prior to a foreclosure sale of the mortgaged land of a ripened crop standing thereon, passes the title to the crop to the vendee of the mortgagor as against the mortgagee or the purchaser at such foreclosure sale: *First Nat. Bank v. Beegle*, 52 Kan. 709; 39 Am. St. Rep. 365, and note.

SHOOBERT v. DE MOTTA.

[112 CALIFORNIA, 215.]

A MORTGAGE OF ANIMALS DOES NOT EXTEND TO THEIR SUBSEQUENTLY BEGOTTEN INCREASE, where, as in California, such mortgage is a lien only, and is not a conveyance of the legal title.

Dixon L. Phillips and Robert Harrison, for the appellants.

Bradley & Farnsworth, for the respondent.

²¹⁶ HARRISON, J. June 22, 1893, one Cascalia executed a mortgage to the plaintiff's assignor upon a band of sheep which were then in Kings county, consisting of seventeen hundred ewes and one thousand and fifty lambs. The sheep were afterward removed to Tulare county, ²¹⁷ and in August, 1893, while they were in Tulare county, bucks were put in with the ewes, and during the months of January and February, 1894, there were born, as the offspring of the ewes, thirteen hundred lambs. The court finds that the period of gestation in the case of sheep is about five months. April 18, 1894, Cascalia, in consideration of an indebtedness from him to the defendant, executed to the defendant a bill of sale of these thirteen hundred lambs, and on the 21st of April the lambs were delivered to the defendant, and taken away by him. The plaintiffs brought the present action to recover the possession of the lambs or their value. Judgment was rendered in favor of the defendant, and the plaintiffs have appealed.

It has been held in some states that the lien of a mortgagor of domestic animals extends to the increase of the animals during

the life of the mortgage, whether the terms of the mortgage include such increase or not, and, following these decisions, such a rule is stated in text-books upon chattel mortgages. It will be found, however, upon examination of these cases, that the decisions therein are based upon the principle of the common law, which was in force in those states, that by the mortgage the mortgagee is vested with the title to the mortgaged property, and becomes the owner thereof; and that in the case of domestic animals, applying another rule of both the common and the civil law, that "the brood belongs to the owner of the dam or mother—*partus sequitur ventrem*" (2 Blackstone's Commentaries, 390), he thereby becomes the owner of such increase, and, being the owner, his title in any action at law must prevail. The earliest application of this rule was in the case of a mortgage of a female slave (*Hughes v. Graves*, 1 Litt. 317), which was decided in Kentucky in 1822, and was afterward followed in Maryland in 1836, in the case of *Evans v. Merriken*, 8 Gill. & J. 39, which also involved the offspring of a female slave which had been mortgaged; and these cases are cited as the authority upon which cases involving the same question ²¹⁸ have been decided in other states—in some instances referring also to the principle upon which the rule rests, and in others merely referring to the cases as an authority: *Cahoon v. Miers*, 67 Md. 573; *Gundy v. Biteler*, 6 Ill. App. 510; *Ellis v. Reaves*, 94 Tenn. 210. The rule has also been stated in many other cases in which the question was neither involved nor decided: *Kellogg v. Lovely*, 46 Mich. 131; 41 Am. Rep. 151; *McCarty v. Blevins*, 5 Yerg. 195; 26 Am. Dec. 262; *Gans v. Williams*, 62 Ala. 41; and there is still another line of decisions in which it has been sought to uphold the propriety of the rule by holding that the increase which was in gestation at the execution of the mortgage was inferentially included therein, as a part of the mortgaged property: *Funk v. Paul*, 64 Wis. 35; 54 Am. Rep. 576; *Rogers v. Highland*, 69 Iowa, 504; 58 Am. Rep. 230; *Edmonston v. Wilson*, 49 Mo. App. 491. Another line of decisions limits this application of the rule, by holding that the increase is subject to the lien of the mortgage only for so long a time as the young are in a state of nurture from the mother: *Rogers v. Gage*, 59 Mo. App. 107; *Darling v. Wilson*, 60 N. H. 59; 49 Am. Rep. 305; *Forman v. Proctor*, 9 B. Mon. 124. The want of logical sequence in this limitation has been felt by the courts, and some of them have sought to place their decision upon the fact that, while the young were following the mother, a purchaser from the mortgagor had notice by that fact that it

was her offspring, and subject to the mortgage, and was thus prevented from claiming to be a purchaser in good faith. Placing the decision on this ground is, however, necessarily a repudiation of the principle upon which all the above cases rest, for, if the mortgagee is in fact the owner of the increase, the question of good faith in a purchase from the mortgagor is immaterial.

Prior to 1873 the giving of a chattel mortgage in this state vested the mortgagee with the title to the property mortgaged (*Heyland v. Badger*, 35 Cal. 404), and while this rule of law prevailed, the foregoing decisions would ²¹⁹ have been applicable. The Civil Code, however, went into effect at the beginning of that year, and under its provisions the mortgagor is not, by the execution of the chattel mortgage, divested of his title to the property, but still remains its owner, while the mortgagee has only a lien thereon: Civ. Code, sec. 2888; *Bank of Ukiah v. Moore*, 106 Cal. 673. Consequently, the foregoing decisions cannot be regarded as having authoritative force, but the rights of the parties must be determined upon the general principles controlling the relations between a mortgagor and mortgagee. In the absence of any express agreement upon the subject, the lien created by a mortgage is limited to the property which is described in the mortgage, and does not include other property of the same character which the mortgagor may have afterward acquired and placed with the mortgaged property: *Jones on Chattel Mortgages*, secs. 138, 154. If the mortgagor retains the possession of the mortgaged property, he is at liberty to deal with and use it as its owner, and whatever income or profit may be derived from such use belongs to him, and not to the mortgagee: See *Simpson v. Ferguson*, 112 Cal. 180, ante, p. 201. If, in the case of sheep, the use to which he puts the ewes is for breeding lambs, there can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee, any more than the wool which is sheared from their backs. We are aware that the supreme court of Texas, in *First Nat. Bank v. Western Mortgage etc. Co.*, 86 Tex. 636, held that, although by the laws of that state the mortgagor of personal property remains the owner thereof after the execution of the mortgage, the foregoing decisions control the right of the mortgagee to the increase of domestic animals; but the opinion in which the decision is given merely states the proposition without presenting any reasoning in its support, and does not meet with our approval.

We are not called upon to determine in the present case

whether, if the lambs in question had been in gestation ²²⁰ at the date of the mortgage, they would have been included as a part of the property mortgaged, but we hold that, inasmuch as they were begotten upon the ewes after the mortgage was executed, the mortgagee has no lien upon them, or right to their possession.

The conclusion thus reached renders it unnecessary to consider the rulings of the court upon the offer of the plaintiffs to show that the defendant had knowledge of the mortgage at the time he purchased the lambs.

The judgment and order are affirmed.

Van Fleet, J., and Garoutte, J., concurred.

A MORTGAGE OF DOMESTIC ANIMALS WILL COVER THEIR INCREASE: Extended note to *Moody v. Wright*, 46 Am. Dec. 715. A mortgage of a mare covers her colts subsequently foaled until they are weaned: *Rogers v. Highland*, 69 Iowa, 504; 58 Am. Rep. 230; *Darling v. Wilson*, 60 N. H. 59; 49 Am. Rep. 305. A purchase money mortgage on a pregnant mare covers the colt, unless it is weaned before the maturity of the mortgage: *Kellogg v. Lovely*, 46 Mich. 131; 41 Am. Rep. 151. The increase of domestic animals mortgaged during gestation is not covered by the mortgage, as against a bona fide encumbrancer thereof acquiring his lien without notice of the facts and after the period of nurture, but one who takes a mortgage thereof merely to secure a pre-existing debt is not a bona fide encumbrancer: *Funk v. Paul*, 64 Wis. 35; 54 Am. Rep. 378.

STOCKTON SAVINGS & LOAN SOCIETY v. PURVIS.

[112 CALIFORNIA, 236.]

A CONTRACT IS TO BE CONSTRUED AS A WHOLE and according to its general effect, and not by the name which the parties give it, and the purpose declared in one clause cannot overcome or alter the whole contract or change its manifest purpose apparent from all the parts taken together.

LANDLORD AND TENANT—LEASE ATTEMPTING TO RESERVE TITLE TO CROPS TO SECURE THE PAYMENT OF RENT.—If land is let under an agreement that a cash rent shall be paid, that the title of the crops raised shall remain in the lessor, in whose name they shall be placed in a warehouse by the lessee, that they shall then be sold, and the rent paid out of the proceeds, and the residue, if any, shall go to the lessee, and that no part of the crop shall at any time be subject to his disposal, the contract is an attempt to create a secret lien on the growing crop to secure the payment of the rent, and, when not executed in the manner prescribed for chattel mortgages, cannot accomplish that purpose, and the crops raised are subject to attachment against the lessee.

H. G. W. Dinkelspiel and Stonesifer & Needham, for the appellant.

Nicol & Orr, for the respondent.

237 GAROUTTE, J. Plaintiff, as the owner of a certain tract of land, entered in a contract with one Dallas, whereby it let the said land to Dallas for the term of one year, upon the oral understanding and agreement that Dallas should, during said year, farm the same at an annual cash rental of two thousand one hundred and forty dollars; and it was understood and agreed between the parties that the title to said crops raised thereon during said term was to remain in said plaintiff, it being further understood and agreed that the said crop was to be hauled to the nearest warehouse and stored **238** in the name of plaintiff, and that from the sale of said crops plaintiff was to receive, as rent aforesaid, the sum of two thousand one hundred and forty dollars cash, and the overplus, if any, was to go to and be the property of said Dallas, and that no part of such crop should be in any way subject to the disposal of said Dallas. Under the aforesaid contract, Dallas entered into the possession of the land, and planted a crop of wheat thereon. While said wheat was growing, and prior to the harvesting thereof, Eppinger & Co., a creditor, attached the growing crop as the property of Dallas; and this action is brought by the plaintiff, the lessor, against the attaching officer, the sheriff, for the conversion of the property, plaintiff claiming, under the aforesaid contract, to be the owner of the entire crop.

The legal soundness of plaintiff's claims is wholly dependent upon the true construction of this contract of lease, and the general rules of law for the interpretation of contracts are applicable here. The fact that it is a contract between a lessor and a lessee of land, for the farming thereof, in nowise proves it an exception to the application of the general rules of interpretation; and the first and controlling rule for such interpretation is, What was the intention of the parties at the time of the making of the contract? Another rule of interpretation, equally controlling and binding, is that such intention must be gathered from the contract taken as a whole, considering all its provisions together, and not from any one clause considered as standing alone. Plaintiff insists that the title to this growing crop was in it, and points to the clause of the contract to support its contention which provides: "It is understood and agreed between plaintiff herein and Robert Dallas that the title to said crops raised thereon during such term is to remain in said plaintiff." Testing this contract

by this clause alone, plaintiff's position is impregnable. Closing our eyes to all other provisions, we would be bound to hold the title to be in plaintiff. But this court is not authorized by the rules of law to measure the intentions of ²³⁹ these contracting parties in any such manner. No clause in a contract in terms locating the title to the property forming the subject matter of the contract in one of the parties is controlling upon a court, as against the provisions of the contract, taken as a whole, locating the title in the other party. There is nothing in the name given an instrument which will be in any way binding or controlling upon the court. Calling a contract a lease or a sale will not make it a lease or a sale. The agreement, whatever it may be, when coming before a court, will be named according to its provisions, and any technical christening of it by the parties cannot control its true interpretation. As was said in *Park etc. Co. v. White River etc. Co.*, 101 Cal. 39, referring to a certain written instrument: "This paper was not a lease. Calling it a lease did not establish the fact. This is peculiarly a case where there is nothing in a name, for the contents of the paper determine its true character." Again, in *Heryford v. Davis*, 102 U. S. 235, in speaking as to the true construction of a contract, the court said: "The answer to this question is not to be found in any name which the parties may have given to the instrument, not alone in any particular provision it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." In *Putman v. Wise*, 1 Hill, 246, 37 Am. Dec. 309, the court quotes from Woodfall's *Landlord and Tenant*, where the author says: "The most proper and authentic form of words may be overcome by a contrary intent appearing in the deed of demise."

Keeping the foregoing principles in view, let us weigh and measure this contract by considering all its parts together. Plaintiff leased this land for a cash rent of two thousand one hundred and forty dollars. There was an express promise to pay this amount of money, and its payment was in no way dependent upon the ²⁴⁰ raising of any crop. There was an independent personal liability. The crops may have proved a total failure, and still the money called for by the contract was a present, binding liability. There is not even a provision in the contract that the title to the crops should return to the lessee upon the payment of the rent money. Under plaintiff's contention,

this money may have been paid within a few days after the execution of the lease, and still the crops would have remained the lessor's property. According to plaintiff's construction of the contract, it owned both the money demand for the rent and the growing crop. It could have sold the demand for full value, and, at the same time, have mortgaged the crop, or even sold it, giving perfect title to both demand and crop. Plaintiff may have transferred or collected its claim, and still the crop of growing grain might have been sold under an attachment and execution issued at the hands of its creditors. All these things could have happened if plaintiff's contention be true. We think that such was not the intention of the parties, certainly not the intention of the lessee. Where a person pays cash rent for the exclusive use of a tract of farming land, with the intention and for the express purpose of raising crops of grain thereon, it would seem that such crops would belong to the lessee. Certainly, that should be the construction of the contract, unless reasons for a different construction stand out in bold relief upon its face, and they do not present themselves here.

It further appears that the grain was to be hauled to a certain warehouse when harvested, and thereupon sold by plaintiff, and the proceeds applied, first, to the payment of its cash rent of two thousand one hundred and forty dollars, and the balance, if any, to go to the lessee. It would be a peculiar construction of this contract, and even an absurd one, to hold that plaintiff was to sell his own crop of grain, and apply the proceeds to the payment of a claim owned and held by it against its lessee. This clause of the contract plainly indicates an attempt ²⁴¹ by the lessor to hold the crop, when harvested, as security for the rent. Taking the whole contract together, it clearly indicates the purpose of these parties was to create a lien upon the growing crop to secure the payment of the cash rent; and any direct statement in the contract itself that such was not the purpose, or that the title to the crop was to remain in the lessor, must go down as against the plain intention of the parties, as evidenced by the entire contract when held before us by its four corners for consideration.

In the examination of the question here presented we are not at all loth to arrive at the conclusion reached. Under the law of this state, there is no reason why a transaction of the character here presented should ever have been entered into. It was secret in every respect. It was not even in writing. As indicated by the amount of rent to be paid, the lessee was farming a large tract of plaintiff's land. It undoubtedly appeared to the public

that he had an interest, at least, in the crops which he was cultivating. Under this contract of lease, as plaintiff asks to have it construed, the dealer who furnished the sacks to sack the grain, and the man who furnished the labor and machinery to harvest it, could not attach it for the labor and materials furnished. The public should not be dealt with in this way, and the law is not favorable to any such secret transactions. Again, there was no honest excuse for it, for the plaintiff could well have taken a chattel mortgage upon the growing crop to secure his rent, and thus the world would have had notice of the financial standing of the lessee, and could have dealt with him in the light of day with open eyes.

By reason of the opportunities for fraud presented by this character of contract, courts are inclined to scrutinize them closely, and, as we have stated, will not be concluded from such scrutiny by any name given the instrument, or by any single provision contained therein. It is the legal effect of the contract as an entirety that points our judgment. The language of this court in ²⁴² *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. Rep. 60, is full of meaning, and sheds a flood of light upon this question of construction. It is there said: "But, in applying this rule, it must be remembered in general that the policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or encumbrancers for value, and, in particular, that mortgages of personal property are permitted only in certain specified cases, and then only upon the observance of certain formalities, designed to secure good faith and to give notice to the world of the character of the transaction. These provisions as to mortgages cannot be evaded by any mere shuffling of words. When it is clear from the whole transaction that, for all practical purposes, the ownership of property was intended to be transferred, and that the seller only intended to reserve a security for the price, any characterization of the transaction by the parties, or any denial of its legal effect, will not be regarded. The question, it is true, is one of intention; but the intention must be collected from the whole transaction, and not from any particular feature of it": See, also, *Walls v. Preston*, 25 Cal. 63. For the foregoing reasons, we conclude this contract was an attempt to obtain the advantages of a chattel mortgage without complying with the provisions of the statute upon that subject.

As a condition precedent to the beginning of this action, plaintiff made a demand upon the attaching officer for the return of the property attached. It is now claimed by defendant that the

demand was materially defective; but, without passing upon that question, we are able to say the written demand is pregnant with meaning, as showing the interest claimed by plaintiff in this grain. In that demand, it is clearly shown what plaintiff considered the status of this property to be, and also the construction put upon this contract by it. In its demand upon the sheriff, plaintiff did not even claim to be the owner of the property, but simply asserted a lien thereon. The demand asserts that said crops "were, ²⁴³ and are now, subject to the lien of the Stockton Savings and Loan Society for rent reserved, to the amount of two thousand one hundred and forty dollars." Above everyone else, the plaintiff should know what its own intentions were in entering into this contract.

There are some cases which would seem to be opposed to the views here expressed, notably *Smith v. Atkins*, 18 Vt. 461, *Esdon v. Colburn*, 28 Vt. 631, 67 Am. Dec. 730, and *Andrew v. Newcomb*, 32 N. Y. 417. With those cases we will not here deal. Possibly, to a large degree, those decisions were made from necessity, by reason of the absence of any chattel mortgage act, but we pass them by, and come to a consideration of the cases found in our own reports upon this question. The first and principal case in this state, and which at first glance seemingly looks the other way from the views we have expressed, is *Howell v. Foster*, 65 Cal. 169. The conclusion there arrived at is based upon the decisions we have cited from other states; but, whatever the court might do if another case with identical facts to those there shown was presented before it, it is unnecessary to say, for this case is different in material respects from *Howell v. Foster*, 65 Cal. 169. That was not a case of cash rent. Indeed, there is no agreement to pay any rent whatever. The word "rent," or its equivalent, is not found at any place in the contract. It is practically a contract for hiring, the wages of the man performing the labor and cultivating the land to be paid by three-fourths of the grain raised upon the land, delivered to him by the owner, after deducting certain moneys for advances previously made. *Wentworth v. Miller*, 53 Cal. 9, *Sunol v. Molloy*, 63 Cal. 369, and *Blum v. McHugh*, 92 Cal. 497, which are cited in respondent's brief, are not in point upon the question here involved.

For the foregoing reasons, the judgment is reversed and the cause remanded.

Harrison, J., Van Fleet, J., McFarland, J., Temple, J., and Henshaw, J., concurred.

CONTRACTS—CONSTRUCTION.—In construing a written contract, the whole should be considered: *Watson v. Blaine*, 12 Serg. & R. 131; 14 Am. Dec. 669; to the same effect see *Kentzler v. American etc. Acc. Assn.*, 88 Wis. 589; 43 Am. St. Rep. 934.

LANDLORD AND TENANT.—The right of a landlord to reserve title to a lien on the crops to be raised by his tenant is discussed in the monographic note to *De Vaughn v. Howell*, 14 Am. St. Rep. 166-168.

STEVENS v. HOLMAN.

[112 CALIFORNIA, 345.]

HOMESTEAD, REFORMATION OF MORTGAGE UPON.—If a husband and wife agreed to mortgage their homestead, and executed a mortgage which they knew did not include the whole thereof, but which they knew was accepted by the mortgagee in the belief that it included all such homestead, such mortgage may be reformed in equity so as to include all the land which was agreed to be mortgaged.

MARRIED WOMAN, REFORMATION OF INSTRUMENTS EXECUTED BY.—If a married woman executes in the manner prescribed by law a conveyance or other writing, she bears the same relation to it and to the rights and remedies under it as any other contractor, including the right of the other contracting party to have it reformed under the same circumstances which would entitle him to such reformation had the writing been executed only by a man or by an unmarried woman.

Bowen & Holloway, Joseph M. Kinley, and George H. Smith, for the appellants.

Albert M. Stephens, for the respondent.

348 *McFARLAND, J.* This is an action for the reformation of a mortgage executed to plaintiff by the defendants, Holman and wife, and to foreclose the same. Judgment went for plaintiff, and defendants appeal from the judgment—bringing up the judgment-roll alone.

Respondent had a former note and mortgage from appellants; and appellants, desiring further time, agreed to give a new note and a mortgage to secure it covering certain described land. Respondent consented; whereupon the old note and mortgage were canceled, and the note and mortgage now in suit were given. But the description in the new mortgage did not include all the **349** land which appellants had agreed to mortgage. Respondent supposed that the description did include all such land, and accepted the mortgage under the mistaken notion that he was thereby getting a lien upon all the land which appellants had promised to mortgage. Appellants knew that the description did not embrace all said land; but they, and each of them, “knew

that plaintiff believed that the mortgage, as executed by them to him, did include all the land they, and each of them, had agreed to mortgage as aforesaid, and that plaintiff was deceived in so believing, and took and accepted said mortgage with the mistaken belief that the same did embrace all the land said defendants had agreed to mortgage to him."

If the appellants were both men, and there were no question of homestead rights involved, there would be no plausible objection to the judgment. But the land constituted the homestead of the appellants; and their counsel contend that, as a homestead can be conveyed or encumbered only by an instrument signed and acknowledged by both husband and wife, the acknowledgment of the latter to be in the form provided for the acknowledgment of married women, therefore there could be no reformation of the mortgage by the court, because such reformation would not have the sanction of the wife's acknowledgment.

But the provisions of the statute invoked merely prescribe the things which are requisite to the due execution of a written instrument by a married woman. It may be readily conceded that she is not bound by any instrument not executed by her in the manner prescribed by the statute. When, however, she has duly executed a contract, there is no reason why she does not bear the same relation to it, and to rights and remedies under it, as any other contractor: See *Hamar v. Medsker*, 60 Ind. 413; *Savings etc. Soc. v. Meeks*, 66 Cal. 371. And in the case at bar the contract—the mortgage—was duly executed by the appellants, the wife having signed and acknowledged it with all the formalities prescribed by the ³⁵⁰ code. If, therefore, the mortgage could have been rightfully reformed as decreed by the court, in case neither of the mortgagors had been a married woman, the decree was right as against the appellants. The fact that the land was a homestead cuts no figure; parties can contract as to their homestead as fully as to any other land, provided their contract be executed in the manner prescribed by statute. These views are sustained by the decision and opinion in *Savings etc. Soc. v. Meeks*, 66 Cal. 371. There the lower court had reformed a mortgage upon land which was the separate property of the wife, so as to make it describe the land intended to be mortgaged; and we see no difference in principle between that case and the one at bar. It was there contended that "the court erred in reforming the mortgage, because the mortgage as reformed was not the act and deed of the wife, as it was not acknowledged by her as required by law." But the court said "It is merely carrying into effect the

intention of the parties. No new right was conferred. The instrument was reformed so as to express truly the intention of the parties: *Hayford v. Kocher*, 65 Cal. 389. If such mistakes could not be corrected, gross wrong and injustice would result. By the reformation of the instrument, and the correction of the mistakes, the object and policy of the law as to the conveyance of the separate property of a married woman are not controverted or thwarted." In *Hayford v. Kocher*, 65 Cal. 389, Flavel Hayford had made a conveyance to Kocher in which certain premises were "intended to be, but by mutual mistake were not, included." Kocher afterward, in an action against Flavel, had the conveyance reformed so as to include said premises. But before the reformation Flavel's wife, Lydia Hayford, selected said premises as a statutory homestead. The two Hayfords then brought an action in ejectment to recover said premises, upon the theory that there could be no judicial reformation of a conveyance affecting a homestead; they were defeated in the lower court, and the judgment was affirmed here. But if the homestead ³⁵¹ had existed at the time of the conveyance, and the wife had duly executed the conveyance in the manner as prescribed by the statute, must not the judgments in the suit for reformation and in the action of ejectment have been, upon principle, the same?

Counsel for appellants cite *Barrett v. Tewksbury*, 9 Cal. 14; *Leonis v. Lazzarovich*, 55 Cal. 52. The former case is not at all in point; for there it was merely held that the consent of a married woman to execute an instrument must be perfectly free; and that "it is not in the province of a court of equity to compel a married woman to correct an insufficient acknowledgment." *Leonis v. Lazzarovich*, 55 Cal. 52, lends some support to appellants' contention; but that case, in the character of the action and the substance of the judgment, is different from the case at bar; and the form of the judgment was evidently the thing most prominent in the mind of the court when the opinion was delivered; that action was evidently not for the reformation of a conveyance which had been already properly executed by a married woman, but for a decree compelling her to execute another conveyance. The court, in its opinion, says: "Was it within the equitable powers and jurisdiction of the court below to decree, as it did, that the defendant should, within a certain time fixed by the decree, execute to the plaintiff her deed conveying lands not described in any deed or other written instrument, and, in case she made default, that such deed should be executed by the clerk of the court? That is what the court did by its decree; and it is

the correctness of such proceeding that we are now called upon to review." It is true that in the opinion there are some statements about the reformation of a married woman's deed which are inconsistent with *Savings etc. Soc. v. Meeks*, 66 Cal. 371, but they are mainly dicta, and if any of them can be considered as forming a part of the decision they must be held as overruled by the case last above mentioned: See, also, *Banbury v. Arnold*, 91 Cal. 610. When a conveyance, mortgage, or other contract of a married woman has been duly ³⁵² executed by her as provided by statute, it is subject to reformation in like manner as the contract of any other person. In such a case, she has no special license to insist upon a wrong caused by fraud or mistake.

Most of the adjudged cases upon the subject deal with mutual mistakes; but the code provides expressly for the kind of mistake involved in this action. By section 3399 of the Civil Code it is enacted as follows: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written instrument does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it may be done without prejudice to rights acquired by third parties in good faith."

There is no difference between a description which does not include all the property intended to be included, and a description which is defective in any other respect. In either instance an action for a reformation lies. *Hayford v. Kocher*, 65 Cal. 389, is an instance of the one kind: *Savings etc. Soc. v. Meeks*, 66 Cal. 371, is an instance of the other.

We see nothing in the point that there is no averment in the complaint that the mortgage as mistakenly made is not sufficient security. Respondent was entitled to all the security for which he contracted.

The judgment is affirmed.

Garoutte, J., Van Fleet, J., Harrison, J., and Henshaw, J., concurred.

JUSTICE TEMPLE dissented. He referred to the fact that the statute in force at the time of the execution of the mortgage required it to be executed in a special mode, included in which was the acknowledgment thereof by the wife after it had been explained to her; that any acknowledgment which she made in the present case must have been made after it had been explained to her that such mortgage did not convey the entire homestead; and he claimed that in the present case, on a finding that her husband practiced a fraud upon the plaintiff, "the court is asked to hold that she did

execute such mortgage, and acknowledged that she did so freely and voluntarily, and that after being made acquainted with its contents, she did not wish to retract the execution of the same. To my mind, the mere statement has the force of a demonstration, but the identical question was settled by this court in *Leonis v. Lazzarovich*, 55 Cal. 52. This decision has been frequently affirmed by this court. The finding that the defendants promised and agreed to mortgage to plaintiff the entire homestead is not supported by the evidence. No such agreement could be made except by an instrument signed and acknowledged by both husband and wife. The action is really to enforce specific performance of a parol contract to give a mortgage upon the homestead. To so decree is, in my opinion, to violate the law."

MARRIED WOMEN—REFORMATION OF INSTRUMENTS EXECUTED BY.—A homestead mortgage executed by a husband and wife in conformity with the Alabama statute may be reformed in equity for a mistake in describing one of the subdivisions of land, if the quantity of land conveyed is not thereby increased: *Witherington v. Mason*, 86 Ala. 345; 11 Am. St. Rep. 41, and note. Married women may, in Illinois, be compelled to correct a mistake which has occurred in the execution of a conveyance, and such conveyance, if duly executed, may be reformed in equity by correcting a mistake in the description of property therein, so as to make the conveyance express what the parties intended it should: *Snell v. Snell*, 123 Ill. 403; 5 Am. St. Rep. 526, and note. A mortgage will not be reformed so as to include the homestead of the mortgagors, though such homestead was intended to be embraced in it, if the statute of the state declares that no mortgage of a homestead by a married man shall be of any effect without the signature of the wife to the same, though before suit the husband had died and the widow by her answer assented to such reformation: *O'Malley v. Ruddy*, 79 Wis. 147; 24 Am. St. Rep. 702, and note. Equity has no power to reform a conveyance executed by a married woman: *Moulton v. Hurd*, 20 Ill. 137; 71 Am. Dec. 257, and note. See, also, the note to *Bowden v. Bland*, 22 Am. St. Rep. 182.

EPPINGER v. SCOTT.

[112 CALIFORNIA, 369.]

EVIDENCE.—A TELEGRAM IS PRESUMED TO HAVE BEEN DELIVERED in the regular course of business to the person to whom it was directed. The fact that the telegram was sent is therefore admissible in evidence, and tends to prove that it was received.

EVIDENCE TO PROVE DELIVERY OF TELEGRAM.—From the testimony of a witness that he wrote and sent a telegram it will be presumed that he sent it in the ordinary manner, to wit, by delivering it to a telegraph company for transmission.

EVIDENCE—FRAUDULENT TRANSFER—RES GESTAE.—Statements made by a vendor before the sale had become complete by delivery and while delivery was in process are admissible for the purpose of throwing light upon the character of the sale by enabling the jury to determine whether it was bona fide or with intent to defraud creditors.

Terry & Williams and H. G. W. Dinkelspiel, for the appellants.
George E. Church, for the respondent.

369 HARRISON, J. Action of claim and delivery to recover the possession of certain trays and sweat boxes.

370 The plaintiffs claim the property by virtue of a bill of sale made to them by Napoleon Vieu; and the defendant, who is the sheriff of Fresno county, claims the same by virtue of a levy under a writ of execution upon a judgment issued against said Vieu in behalf of one Fon Kee. The controverted issues at the trial were whether there had been a sufficient change of possession to satisfy the statute of frauds, and whether the sale to the plaintiffs had been made with the express purpose, on the part of Vieu, to hinder and defraud his creditors, and particularly the plaintiff, in the execution. The case was tried by a jury, who rendered a verdict in favor of the defendant. From the judgment thereon and an order denying a new trial the plaintiffs have appealed.

Upon the foregoing issues, the evidence in behalf of the respective parties was decidedly conflicting, and the verdict of the jury thereon cannot be disturbed.

For the purpose of sustaining the defendant's claim that the sale by Vieu to the plaintiffs was with the intent to defraud his creditors, evidence was introduced tending to show that the sale was made in consequence of an effort by Fon Kee to collect the amount of his claim; and a telegram, dated April 5, 1893, and directed to Vieu at Dixon, which Mr. Spencer, a witness on behalf of the defendant, testified that he wrote and sent for Fon Kee, was offered in evidence. This telegram is as follows:

"April 5, 1893.

"N. Vieu, Dixon, Cal.: Your note is past due. You no pay me I commence suit.

FON KEE."

The plaintiffs objected to the introduction of this telegram, on the ground that it was irrelevant, immaterial, and incompetent, and could in no way bind them. Their objection was overruled and the telegram admitted in evidence, and this ruling is now assigned as error. It has already been shown that Vieu made the bill of sale to the plaintiffs on the sixth day of April; that Ettlinger, one of the plaintiffs, who resided at San Francisco, met Vieu at the ranch in Fresno on that day by previous **371** appointment, and received the bill of sale, and commenced moving the property in the afternoon; that it was moved by persons who up to that time had been in the employ of Vieu; that they worked in moving the property during the whole of that

night; that when they commenced to move it, Vieu was asked to send the Chinamen to help them, and he replied that he did not want to let the Chinamen know anything about it. During the previous month Vieu had given his note to Fon Kee, and the judgment in favor of Fon Kee had been offered in evidence. Under this state of the testimony, it was competent for the defendant to show that the sale by Vieu was with the intent to defraud Fon Kee, and the telegram was both relevant and material for that purpose. If, upon the receipt of the telegram, Vieu immediately went to Fresno and clandestinely executed the bill of sale, and aided in removing the property, the jury would be justified in inferring that these acts were done in consequence of the telegram, and for the purpose of defeating the suit threatened therein by Fon Kee.

In the specifications of errors of law, the plaintiffs assign the admission of this telegram in evidence "for the reasons assigned at the time, and for the reason it is not shown that plaintiffs had any knowledge whatever of any such action, or that said telegram was ever received by Napoleon Vieu." These latter objections were not made at the time it was offered, and, although the defendant stated to the court that he intended to show that the telegram had been received by Vieu, it was not necessary that any direct evidence of its receipt should be given. The rule has long been settled and is made statutory in this state (Code Civ. Proc., sec. 1963, subd. 24), "that a letter duly directed and mailed was received in the regular course of the mail." The same rule has been extended to telegrams: Wharton on Evidence, sec. 1329; Greenleaf on Evidence, sec. 40; Gray on Telegraphs, sec. 136; Commonwealth v. Jeffries, 7 Allen, 548; 83 Am. Dec. 712; Oregon S. S. Co. v. Otis, ³⁷² 100 N. Y. 447; 53 Am. Rep. 221. The presumption is one of fact, and is entitled to more or less weight, according to the circumstances under which the telegram or letter was sent, and its receipt may be disproved; but the fact that it was sent is admissible evidence, and tends to show that it was received. The suggestion that it was not shown that the telegram was delivered to the telegraph company for transmission, or the rates therefor prepaid, in the absence of any objection of this nature at the time of its offer, or of any attempt to show these facts upon cross-examination of the witness, is not entitled to consideration. As was said upon a similar suggestion in Oregon S. S. Co. v. Otis, 100 N. Y. 447; 53 Am. Rep. 221: "Norris swears that he sent the three letters written by him to Otis. In the absence of any proof to the contrary,

or any inquiry as to the mode, we must understand this to mean that they were mailed in the usual manner. If there was doubt about that, the attention of Norris should have been drawn to it and the manner of transmission challenged. It would be extremely critical to deny to the form of expression used by the witness its ordinary and usual interpretation, because it might have been more precise and explicit."

The testimony given by Ah Loo, of statements made by Vieu of his object in moving the trays, was properly received. Burton had testified that Vieu was present during the moving of the trays; and Pourtett had testified that Vieu had directed him to move them, or help to move them, and these statements of Vieu were made before the sale had become complete by delivery, and while the trays were being moved. They were, therefore, a part of the transaction, and were admissible for the purpose of throwing light upon its character, and enabling the jury to determine whether the sale was bona fide, or with the express intent to defraud his creditors.

The testimony of the witness Schleyer that she had made a statement at Vieu's request for Fon Kee, even if immaterial, could not have prejudiced the plaintiffs.

The judgment and order are affirmed.

EVIDENCE—PRESUMPTION AS TO DELIVERY OF TELEGRAM.—The presumption is, that letters properly directed and mailed were received, and the same is true of telegrams given to a telegraph company for transmission, and properly addressed, and the presumption becomes conclusive when not denied: *Oregon S. S. Co. v. Otis*, 100 N. Y. 446; 53 Am. Rep. 221, and note.

FRAUDULENT CONVEYANCES—EVIDENCE—STATEMENTS BY VENDOR.—Where a conveyance is claimed to have been made in fraud of creditors, the declarations of the grantor prior to the conveyance, with respect to his financial embarrassments, are admissible as evidence of a fraudulent intent on his part: *Bridge v. Eggleston*, 14 Mass. 245; 7 Am. Dec. 209. Fraud in the conveyance of land may be established by the grantor's declarations about the time of the conveyance, concerning other property claimed by the grantee: *Covanhovan v. Hart*, 21 Pa. St. 495; 60 Am. Dec. 57. The declarations of a vendor after a sale, though not in the presence of the vendee, are admissible in evidence to show fraud in the former: *Martin v. Reeves*, 3 Mart., N. S., 22; 15 Am. Dec. 154, and note. To show that a sale was without consideration and fraudulent as to creditors, evidence of the declarations of the vendor, while in possession of the property, that he was not much indebted is admissible, when the consideration of the sale was a debt alleged to be owing from the vendor to the vendee: *Satterwhite v. Hicks*, Busb. 105; 57 Am. Dec. 577, and note. See the extended note to *Brown v. Mitchell*, 11 Am. St. Rep. 757.

IN RE WILLIAMS.

[112 CALIFORNIA, 521.]

LEGACIES, WHEN BEAR INTEREST.—Though a will declares that the executor shall not be required to pay certain legacies until such time as it may be practicable to do so, having regard to the beneficial management of the estate, they bear interest commencing one year from the testator's death, if the statute declares that legacies are due and deliverable at the expiration of one year after such decease, and bear interest after they are due and deliverable. The pendency of a contest of the will of the decedent, owing to which no distribution of the estate nor payment of the legacies is possible, does not deprive the legatees of their right to interest.

LEGACY, RESIDUARY, WHAT IS NOT.—A provision for the payment of certain legacies after which certain others shall be paid does not make the latter residuary legacies.

LEGACIES, WHEN PAYABLE.—If a statute declares that legacies are due and deliverable at the expiration of a year after the testator's decease, no order of the probate court is necessary to make them bear interest after such year.

Garrett W. McEnerney and Stanly, Hayes, McEnerney & Bradley, for the appellant.

McKune & George and A. C. Freeman, for the respondents.

523 **TEMPLE, J.** The question involved in this appeal is whether appellant, Mrs. Harvey, is entitled to interest upon a legacy of \$10,000 given her by the will of the deceased.

Williams died May 6, 1891. By his will as first executed he gave in trust for his adopted daughter, Mrs. Auzerais, and her children, \$100,000; to Hannah B. Fuller, \$10,000; Sophia G. Cutter, \$10,000; Mrs. Clinton Hardy, \$10,000; Mary Green, \$10,000; for a monument, \$1,000; Lodge of Masons, \$1,000, and to Mrs. Auzerais, the residue of the estate.

The will contained the following provision: "My said executors shall not be required to pay the legacies herein to said Fuller, Hardy, and Green until such time as it may be practicable to do so, having regard to beneficial management of my said estate. The said bequest of \$100,000 to my said daughter Lucy is not to be reduced or diminished under any circumstances," etc.

By a codicil the testator gave additional legacies, as follows: To Sarah W. Woart, \$20,000 from the residue of his estate; to Hannah B. Fuller, \$10,000 additional; to Sophia G. Cutter, \$10,000 additional; to Mrs. J. Downey Harvey, \$10,000 out of the residue of the estate; to Harriet E. Mowe, \$5,000; to Gee Foo, \$500; to Charlie, \$500, and to Sophia G. Cutter, \$2,500 for a monument.

The will was probated May 29, 1891. The estate was appraised at \$314,645.11. The time for presentation of **524** claims

against the estate expired March 29, 1892. The claims presented aggregated \$1,579.55, and were all paid prior to May 6, 1892.

It is provided by section 1368 of the Civil Code that legacies are due and deliverable at the expiration of one year after the testator's decease, by section 1369 that they bear interest from the time they are due and payable, and by section 1370 that these provisions are in all cases to be controlled by the testator's express intentions.

The judgment of the probate court refusing interest is defended on various grounds.

1. It is contended that the above direction that the executors need not pay certain named legatees their legacies until it is practicable, having regard to the beneficial management of his estate, is an express declaration that the legacies were not due and payable until the executors shall deem, or the court shall find, that such payment is practicable, having regard to the beneficial management of the estate.

The first answer to this is obviously that the legacy due appellant is not one of those mentioned, and which it may be claimed may be withheld for the advantage of the estate. To prevent the application of the statutory rule the intention of the testator must be expressed in the will.

But I think that it would not matter if it were admitted that this provision of the will includes all legacies. The code rule is the common-law rule, which was induced partly by reason of public policy. A pecuniary legacy is a debt due from the estate—not a claim against the testator which must be proved and paid in due course of administration—but a claim against the estate imposed by the will. One year is allowed to the estate, during which time the executors ought to be able to collect and realize the assets, and be in readiness to discharge the obligations imposed upon the estate by the will. It would be difficult and impracticable to determine in every case when it would be convenient ⁵²⁵ to pay the legacies, and so a general rule has been adopted which cuts the knot by doing what in general cases is convenient, though in particular cases both convenience and justice would be disappointed: *Sitwell v. Bernard*, 6 Ves. 520.

So, too, it is presumed that the money is earning something for the estate, which the residuary legatee ought not to be able to get at the expense of the special legatee. To allow this would often involve delay in the administration of estates in the interest of the residuary.

It is therefore held, in the face of such provisions, that it will be practicable or convenient to pay at the end of one year. This is held even where administration was prevented by contests of the will or in regard to right to administer: *Powell v. Drake*, 19 D. C. 334; *Kent v. Dunham*, 106 Mass. 586; *Welch v. Adams*, 152 Mass. 86; *In re McGowan*, 124 N. Y. 526.

In *Vernet v. Williams*, 3 Demarest, 349, the matter is discussed at length, and numerous authorities cited and commented upon. The conclusion is, that such words in a will do not affect the rule. The court will conclude that it is practicable and convenient to pay at the end of the year, and not before. In fact, the words may be held to refer to the rule, for it has been uniformly held that "as soon as possible," or when practicable, means at the end of the year: *Rogers v. Rogers*, 2 Redf. 27.

In *Ingraham v. Postell*, 1 McCord Eq. 94, it was said: "It seems to be settled, as a general rule, that the legacy shall carry interest after a year from the date of the death of the testator, even though it appears that it could not by any diligence be collected within that time, because, in contemplation of law, it might have been done." I conclude, upon this branch of the case, that the legacy of appellant is not within the qualification in the will, and, if it were, still it would bear interest. The rule prevailing in courts of chancery and adopted in the code declares that it is convenient and practicable to pay the same at the end of the year.

⁵²⁶ 2. It is contended that the legacy to Mrs. Harvey is a residuary legacy, and therefore cannot be paid until the residuum is ascertained. If the legacy is really residuary, we need inquire no further. The suggestion of interest upon a residuary legacy is an absurdity, for there can be no fund from which the interest could be paid. Interest allowed on particular legacies always comes from the residuum, and, when the money is retained by the estate, its use is presumably to the advantage of the residuary.

But nothing can be more certain than that the legacy is not residuary. "A residuary legacy embraces only that which remains after all the (other) bequests of the will are discharged": Civ. Code, sec. 1357. There can be but one such residuum, and, in the codicil containing the legacy to appellant, the testator mentions the gift of such residuum to Mrs. Auzerais after all the gifts in the will are fulfilled. This is the residuary legacy, and the only one provided for in the will.

The provision that the legacy should be paid out of the residuo

did not make the legacy residuary. The intent was doubtless that the bequests not so qualified should be first paid, and not be held liable for contribution until the qualified legacies were exhausted. In that sense, all the bequests are residuary as to the first in trust for Mrs. Auzerais. And all might have been expressly made so. Suppose, for instance, a will should provide for a legacy to A of \$10,000, and out of the residue to B a legacy of \$10,000, and after the payment of the legacy to B, the residue to C. If there was anything in the estate for C, he would be the only residuary legatee. No other would come within the language of the statute. And no other would come within the reason of the rule as to interest, for, presumably, the retention of the money by the executor has increased his legacy and diminished that of the other legatees. It is shown and admitted that Mrs. Auzerais received \$150,000 as residuary legatee.

3. It is contended that a legacy is not due and payable ⁵²⁷ until it has been ordered paid by the probate court. The existence of sections 1368 and 1369 of the Civil Code is a sufficient answer to this contention. No special statute would be required to inform us that a legacy would be payable at least when it has been ordered paid by the probate court. Section 1646 of the Code of Civil Procedure, referred to, authorizes the executor to retain money in certain cases without paying debts or legacies. Yet the debts are undoubtedly due. Indeed, the purpose of the provision is to authorize the executor to refuse payment of debts and legacies when due, and it is because they were due that it was necessary so to provide.

There was no attempt to show that it was in fact impracticable, having regard to the beneficial management of the estate, to pay the legacy to appellant at the end of the year. On the contrary, it plainly appeared that it was practicable, for, June 6, 1892, Mrs. Auzerais filed her petition asking the payment to her out of the residuum of \$75,000. She showed that there were plenty of assets in the estate to warrant the payment of that large sum to her as residuary legatee. The executor answered, admitting the allegation, and the court made the order authorizing it, and that sum was paid. Of course, the claims of the particular legatees were prior to hers.

The court below is directed to modify the decree appealed from by allowing interest on the legacy of appellant as claimed by her.

Henshaw, J., and McFarland, J., concurred.

LEGACIES—INTEREST ON.—After legacies become due and payable, they are matured obligations against the estate and bear interest at the legal rate: Sloan's Appeal, 168 Pa. St. 422; 47 Am. St. Rep. 889, and note with the cases collected.

A RESIDUARY LEGACY embraces only that which remains after all the bequests of the will are discharged: Extended note to Brill v. Wright, 8 Am. St. Rep. 721.

ANDERSON v. PACIFIC BANK.

[112 CALIFORNIA, 598.]

BANKS AND BANKING.—IN THE CASE OF A SPECIAL DEPOSIT with a bank the title does not pass to it, but remains with the pledgor.

PLEDGE, WHAT IS.—Under the civil code of California every contract by which the possession of personal property is transferred as security only is a pledge.

A BANK RECEIVING MONEYS AS A PLEDGE OR SPECIAL DEPOSIT cannot change its relation as pledgee by wrongfully converting and using the pledged moneys in its own business. The pledgor may, as such, maintain an action against the bank upon its failure to surrender the pledge, upon demand, after the purpose for which it was made has been accomplished.

PLEDGE, FACTS CREATING.—If moneys are deposited in a bank under an agreement that it will furnish bail for certain persons against whom a criminal charge is pending and that the deposit is to protect from loss the bank and the sureties on the bail bond, the transaction is a pledge or special deposit, though the bank issues a certificate showing the deposit and declaring that the moneys are payable on the return of the certificate properly indorsed, on release of the bonds.

INTEREST.—IF A SPECIAL DEPOSIT or pledge of moneys is made, the pledgee is not liable for interest until he refuses, after demand, to make restitution of the amount of the pledge.

Sawyer & Burnett, for the appellant.

H. W. Hutton, for the respondent.

⁶⁰⁰ **HENSHAW, J.** Appeal from the judgment given in favor of plaintiff under the following facts: Plaintiff and defendant entered into a contract whereby defendant agreed to furnish bail for Harry Christian and Martin Olsen, who had been held for trial before the superior court. To protect defendant and the sureties it might furnish from liability or loss, plaintiff agreed to deposit with defendant the sum of two thousand dollars in gold coin as a pledge. Plaintiff delivered the money to McDonald, the acting president of the bank, leaving it with him in the president's room. He received from the bank the following acknowledgment:

"Edw. Anderson has deposited in this bank two thousand dollars—\$2,000—(in gold coin) payable to self or order, on return of the certificate properly indorsed. (Payable only on release of bonds.) (Not subject to check.)

R. H. McDONALD, Jr.,
Vice-President.

"W. S. Morse, Teller."

The money afterward, but without the knowledge or ⁶⁰¹ consent of the plaintiff, went into the bank vaults through the regular channels. The bonds were furnished, and neither defendant nor the sureties were subjected to any liability or loss thereunder. Subsequently, the defendants under the criminal charge were surrendered into custody by their bondsmen, and plaintiff thereafter, upon February 26, 1894, made demand upon defendant, which had meanwhile become insolvent, for a return of the money pledged. The bank refused a return, and this action was instituted.

Under this statement, which is taken from the findings, appellant contends that the facts disclose a general, and not a special, deposit with the bank, and that upon the bank's insolvency plaintiff stands in the same position as that occupied by the general creditors of the institution.

It is unquestionably true that one making a general deposit with a bank in the usual course of business parts with title to the moneys deposited. In the case of a special deposit, however, which is a mere bailment, the rule is the same with banking institutions as with individuals. Whether the special deposit be under a contract of bailment for the better protection of the bailor's property, or under a contract of pledge as security for some specific obligation of the pledgor, title does not pass to the bailee or pledgee, but remains in the pledgor. The pledgee acquires no right to make general use of the property: Civ. Code, secs. 1835, 2888.

It would seem, therefore, that in this case the question is completely disposed of by the finding of the court that the money was given and received as a pledge, and by the additional finding that it was afterward carried into the bank's vaults through the regular channels without the knowledge or consent of the pledgor. But, indeed, all of the attendant circumstances substantiate the ultimate finding that the deposit was a special one, while none is inconsistent with it.

Defendant demanded a delivery to it of two thousand dollars,

not for banking purposes, but to protect the bondsmen ⁶⁰² it might procure. There was reason why the plaintiff should make a special deposit of two thousand dollars with the bank as bailee, and none at all why he should make a commercial deposit of that sum. The money was delivered in a manner strictly in accord with a contract of pledge, but quite inconsistent with the notion of an ordinary banking deposit. The so-called certificate of deposit issued by the bank is not a certificate of deposit, but a mere receipt, expressing, though briefly, the contract of pledge. Every contract by which possession of personal property is transferred as security only is to be deemed a pledge: Civ. Code, sec. 2987. Under such a contract, the fact that the bank afterward wrongfully commingled and used the funds, if it did do so, cannot be urged by it in defense as effecting any change in the contractual relations and rights of the parties. It would be but allowing it to plead its own wrongdoing to its own advantage: *Henderson v. O'Connor*, 106 Cal. 385; *Massey v. Fisher*, 62 Fed. Rep. 958; *National Bank v. Insurance Co.*, 104 U. S. 54.

There is nothing in the case of *Mutual etc. Assn. v. Jacobs*, 141 Ill. 261, 33 Am. St. Rep. 302, upon which appellant relies, which can aid his contention here. The plaintiff in that case sued to recover the sum of six thousand dollars, deposited by it with the banking house of Kean & Co., as indemnity on an appeal bond. But, as the court declares, the plaintiff gave its check to Kean & Co., which was cashed by that house, and the funds thus received with the knowledge of plaintiff were mingled and used with the general funds of the bank, and there was nothing in the certificate of deposit issued and received by plaintiff which indicated a special deposit. The court merely finds from a review of the evidence that it was not established that the deposit was special.

In the case at bar, the trial court finds a special deposit, and does not find a commingling and use of the money with plaintiff's knowledge. Indeed, it does not find any such commingling and use at all. It merely ⁶⁰³ finds that after its reception, and without plaintiff's knowledge or consent, the moneys "went into the bank vaults through the regular channel." The bank vaults are the usual and proper places for the reception and keeping of special deposits. The finding strictly means no more than that the money went into the bank vaults as a special deposit in the regular manner.

The court allowed plaintiff as damages legal interest upon the money from the date upon which Christian and Olsen were sur-

rendered by the sureties. But, while plaintiff was entitled to a return of his money immediately after this event, defendant was not in default until its refusal after demand to make restoration of it. Not being in default, it should not be charged with interest as damages. This demand was actually made by plaintiff upon February 26, 1894, from which date plaintiff is entitled to interest as compensation.

The judgment is ordered modified accordingly, each party to bear his respective costs upon this appeal.

McFarland, J., and Temple, J., concurred

BANKS—SPECIAL DEPOSITS—TITLE IN WHOM.—Special deposits do not become the property of the bank, and must be kept safely until drawn out upon the order of the depositor: Note to *Hawes v. Blackwell*, 22 Am. St. Rep. 876.

BANKS—USE OF SPECIAL DEPOSITS BY.—Special deposits cannot be used or appropriated by a bank without a breach of trust: *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168. A special deposit in a bank is at the risk of the depositor, but if money so deposited is converted to the general purposes of the bank by its officers without the depositor's consent, they are personally liable to him: *Matter of the Franklin Bank*, 1 Paige, 249; 19 Am. Dec. 413, and extended note at pages 423, 424.

PLEDGE—WHAT IS.—A pledge is a bailment of personal property as security for the performance of some obligation: *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248; extended note to *Lucketts v. Townsend*, 49 Am. Dec. 730.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

DUKE *v.* TAYLOR.

[37 FLORIDA, 64.]

CORPORATIONS.—DOMICILE OF A CORPORATION belongs exclusively to the state or sovereignty under whose laws it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate and is no longer obligatory, the corporation can have no legal existence.

CORPORATIONS—DOMICILE—POWER TO CONTRACT.—Although the domicile of a corporation is exclusively in the state creating it, this fact creates no insuperable objection to its power of contracting in another state.

CORPORATIONS—POWER TO DO BUSINESS IN SISTER STATES.—A corporation legally created and organized under the laws of one state for the transaction of business there, may, by comity between the states, transact business in another state not in contravention of the laws or public policy of the latter.

CORPORATIONS—MEETINGS.—A corporation created under the laws of one state, cannot hold corporate meetings in another for the purpose of organizing the corporation, electing its officers, or performing any strictly corporate functions.

CORPORATIONS—PROOF OF CREATION.—Courts cannot take judicial knowledge of the laws of another state under which a corporation is claimed to have been created. Proof of such laws must be made in order that the court may see the legal warrant for the creation of the corporation.

CORPORATIONS—ILLEGAL CREATION—LIABILITY OF STOCKHOLDERS AS PARTNERS.—A corporation creditor seeking to enforce the payment of his debt may ignore the existence of the corporation, and proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated has not been complied with.

CORPORATIONS DE FACTO exist when there is a law authorizing such corporation, and when the company has made an effort, though irregular and imperfect, to organize under the law, and is transacting business in a corporate name. The stockholders in such a corporation cannot be held liable as partners, but an association of persons cannot exist as a corporation *de facto* unless they can legally become a corporation *de jure*.

CORPORATIONS—PRESUMPTION AS TO EXISTENCE.—The fact that a note indorsed to its holder before maturity is exe-

cuted by persons as president and secretary of a company, does not create a presumption that it is a legally created corporation.

CORPORATIONS—ESTOPPEL TO DENY EXISTENCE OF. One must contract or deal with a company as a corporation before he can be estopped from denying its corporate existence.

Action against Taylor and fifteen others, as partners doing business under the name of the Florida Orange Hedge Fence Company, upon a note signed by "Florida Orange Hedge Fence Company, by its Pres. Jno. W. Childress. James A. Knox, as secretary and treasurer. Endorsed, Collis Ormsby." This note was indorsed to Duke before maturity. Taylor and others filed pleas alleging that the above-named company was a corporation organized under the laws of Tennessee, and doing business in Florida, and that said company was not then, and never had been, a partnership; that the note in question was given by the corporation for a corporate debt, was accepted as the note of the corporation and not as the note of a partnership, and that plaintiff took the note as a corporate note knowing it to be such. The court sustained the pleas and dismissed the case. The plaintiff appealed.

W. H. Jewell, for the appellant.

Beggs & Palmer, for the appellees.

71 MABRY, C. J. One of the pleas in this case, called a plea in abatement, alleges that the Florida Orange Hedge Fence Company was a corporation organized under the laws of Tennessee, and doing business in this state. According to the recognized American doctrine, the domicile and citizenship of a corporation are regarded as belonging to the state under whose laws the corporation is created. In the case of *Bank of Augusta v. Earle*, 13 Pet. 519, it is said that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places, and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court." And in *St. Louis v. Ferry Co.*, 11 Wall. 423, it is said,

in reference to a corporation, that "it can exercise its franchises extraterritorially only so far as may be ⁷² permitted by the policy or comity of other sovereignties. By the consent, express or implied, of the local government, it may transact there any business not *ultra vires*." In recognition of the doctrine announced in the case first cited, it was held by this court in *Taylor v. Branham*, 35 Fla. 297, 48 Am. St. Rep. 249, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. And where a number of individuals assume to act in a corporate capacity in a state where they have not been clothed with corporate existence and authority, they cannot there be recognized as a legally constituted corporation, though they may have been duly incorporated in another state, and such persons, in the state where they assume corporate capacity, will be treated as, and held to the responsibility of, partners. In the case just cited in this court the record showed that there was an attempt at an organization of a corporation in this state under a supposed charter obtained under the general laws of Tennessee without any organization or user in that state. Where a corporation has been legally created and organized under the laws of a sister state for the transaction of any business there, it may, by comity existing between the states, transact business in this state, provided it be not in contravention of our laws or public policy. Our general incorporating laws recognize the transaction of business by foreign corporations in this state, and, in the absence of express legislative assertion to the contrary, the courts of this ⁷³ state would be bound to recognize the comity existing among the states. While this is true, it is also well settled that a corporation created under the laws of one state cannot hold corporate meetings in another for the purpose of organizing the corporation, electing its officers, or performing any strictly corporate functions in its organization.

A corporate charter was granted by the legislature of Maine, and the corporators met in New York, accepted the charter, elected officers and a board of directors for the corporation, and it was held in *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619, that all votes and proceedings of persons professing to act in the capacity of corporations, when assembled without the bounds of the sovereignty granting the charter, are void. The corporators

in a charter granted by the state of North Carolina met in Baltimore, Maryland, and accepted the charter, and it was held that the acceptance was invalid, and the corporation had no legal existence: *Smith v. Silver Valley Min. Co.*, 64 Md. 85; 54 Am. Rep. 760. After a corporation has been duly organized in the state of its creation, there may be some question as to the legality of meetings of directors, or even stockholders, without the limit of the state, as to which we express no opinion; but there can be no doubt from the authorities that the first meeting to organize the corporation and elect its first officers must be within the state where it is created: 1 Beach on Private Corporations, sec. 286.

In our judgment, there was no sufficient proof before the court to sustain the plea in the case before us, that the Florida Orange Hedge Fence Company was a corporation organized under the laws of Tennessee and doing business in Florida. In the first place, the laws ⁷⁴ of Tennessee, authorizing the formation of such a corporation as the supposed charter purports to create, were not put in evidence, so far as the record shows, and we do not see that we can take judicial knowledge of the laws of another state under which a corporation is claimed to have been created. The authorities indicate that proof of such laws must be made in order that the court may see the legal warrant for the creation of such corporations: *Holloway v. Memphis etc. R. R. Co.*, 23 Tex. 465; 76 Am. Dec. 68; *United States Bank v. Stearns*, 15 Wend. 314; 1 Lawson's Rights, Remedies, and Practice, sec. 344. Conceding that there was legal authority for obtaining the charter in question, the evidence fails to show any organization of the corporation in Tennessee, or any user under the charter in that state; but it does show, in our opinion, an attempted organization in this state under the charter. The first officers were elected here, and the only stock ever issued was in Orlando. The meeting in Tennessee cannot be regarded as resulting in any corporate action to the extent of organizing a corporation under the charter. Taken in connection with what one of the corporators testified, the conclusion is, that they determined to come to Florida to carry out the methods and plans of operating the company, and the testimony shows that they did come to this state and attempted to organize by adopting a seal, electing officers, and issuing stock, and although such action on their part appears to have been in good faith, under the belief that the corporation existed, it was ineffectual to accomplish any organization in law. Under the authorities referred to, there can be no organization

of a corporation in this state under a charter obtained in a foreign jurisdiction to do business ⁷⁵ there. The present case does not come within the principle decided in *Demarest v. Flack*, 128 N. Y. 205, where citizens of that state obtained in West Virginia a charter and organized under it for the purpose of doing business in the state of New York. From the evidence produced in this case, we are of the opinion that the proceedings on the part of appellees and associates in attempting to organize a corporation in this state were void, and no corporation was in fact organized.

It is contended for appellees that the Florida Orange Hedge Fence Company was, under the organization mentioned, a corporation de facto, and that appellant cannot be permitted to question its existence; and further that he is estopped from denying its existence; because both he and his assignor recognized and dealt with the company as a corporation. Cook states, in his book on Stock and Stockholders, third edition, section 233, that "there are many cases to the effect that a corporation creditor seeking to enforce the payment of his debt may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question. For instance, it has been held that where the articles of association were signed, but not filed until some time subsequently, debts contracted in the interim might be collected from the stockholders as partners. So, also, a total failure to file or record the certificate or articles of incorporation has been held to render the members liable as partners; as also an omission of the members to sign and publish the articles of association, or an indefinite statement of what the principal ⁷⁶ place of business of the corporation is to be." And in section 234 he states that "during the past few years, however, the great weight of authority has clearly established the rule that where a supposed corporation is doing business as a de facto corporation, the stockholders cannot be held liable as partners, although there have been irregularities, omissions, or mistakes in incorporating or organizing the company. The corporation is a de facto corporation where there is a law authorizing such corporation, and where the company has made an effort to organize under that law and is transacting business in a corporate name." The two views here expressed by this author indicate the dividing line between the decisions on the subject. The case of *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887, contains a clear statement of the di-

versity of judicial opinion in reference to the matter. The authorities pro and con are cited in note to the case of *Rutherford v. Hill*, 22 Or. 218; 29 Am. St. Rep. 596. Conceding that the rule approved by Cook, in section 234, to be the correct one, we do not perceive how an association of persons can exist as a corporation de facto, unless they can legally become a corporation de jure. It is stated in *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887, that "a corporation de facto exists when, from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purpose and powers assumed, and a user of the rights claimed to be conferred by the law, when there is an organization with color of law," and the exercise of corporate franchises." The cases cited in note to *Rutherford v. Hill*, 22 Or. 218, 29 Am. St. Rep. 596, show that when the organization of a corporation never had any appearance of validity, the participants therein will be held liable as partners. The attempted organization of the corporation in this state under the supposed Tennessee charter was wholly illegal and without any semblance of authority. There is no law in this state, nor in Tennessee, so far as we are advised, to authorize such proceeding, and the claim of the existence of the corporation de facto under it is without support. Neither do we see that the appellant is estopped from proceeding against appellees as partners. The fact that the note, indorsed to him before maturity, is executed by persons as president and secretary of the company does not create a presumption that it was a corporation: *Clark v. Jones*, 87 Ala. 474; *Holloway v. Memphis etc. R. R. Co.*, 23 Tex. 465; 76 Am. Dec. 68. The body of the note indicates an unusual paper for a corporate body to make, and contains no recital that the company in whose name it was executed was a corporation. There is nothing sufficient to overcome the positive testimony of appellant that he did not know the company was a corporation, or claimed to be a corporation, when he received the note, which was before its maturity; nor does it appear that he contracted with or dealt with the company as a corporation, so as to be estopped from gainsaying its existence as a corporation. The facts of the case do not bring it within the principle decided in *Booske v. Gulf Ice Co.*, 24 Fla. 550, and *Jackson Sharp Co. v. Holland*, 14 Fla. 384, to the ef-

fect that one who contracts with ⁷⁸ an association as a corporation and exercising corporate powers is estopped to deny it.

Objections were made to the admission of certain evidence on the part of appellees, but as the trial was before the judge, without a jury, we have not considered the objections.

On all the evidence proper in the case our conclusion is, that the judgment was wrong, and must be reversed. It is so ordered.

CORPORATIONS—DOMICILE.—A foreign corporation has its domicile in the state from which it derives its existence: *Holbrook v. Ford*, 153 Ill. 633; 46 Am. St. Rep. 917, and note. A corporation dwells within the state of its creation and cannot migrate to another, though it may there contract and exercise such other corporate franchise as the laws of that state permit: *Combes v. Keyes*, 89 Wis. 297; 46 Am. St. Rep. 839, and note. A corporation dwells only in the state of its creation: Note to *Young v. South Tredegar Iron Co.*, 4 Am. St. Rep. 760.

CORPORATIONS—POWER TO DO BUSINESS IN ANOTHER STATE.—Corporations may be formed in one state and do business in another: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784, and note. See, also, the notes to *Taylor v. Branham*, 48 Am. St. Rep. 254; *Dudley v. Collier*, 13 Am. St. Rep. 60; *Young v. South Tredegar Iron Co.*, 4 Am. St. Rep. 760, and *Deringer v. Deringer*, 1 Am. St. Rep. 160, 161.

CORPORATIONS—PLACE OF MEETINGS.—The directors of a corporation may hold meetings and transact business in another state unless the contrary is expressly provided for by the charter, by-laws, or general laws of the state under which the corporation is organized: *Missouri Lead etc. Co. v. Reinhard*, 114 Mo. 218; 35 Am. St. Rep. 746, and note.

CORPORATIONS—PROOF OF CORPORATE EXISTENCE.—If a company is plaintiff in a suit and relies on its corporate capacity, it must, as a general rule, assume the burden of proving it: *Jones v. Aspen Hardware Co.*, 21 Col. 263; 52 Am. St. Rep. 220, and note; *Bank v. Jefferson*, 92 Tenn. 537; 36 Am. St. Rep. 100, and note.

CORPORATIONS DE FACTO—WHEN EXIST.—A body is regarded as a de facto corporation only when there has been an effort to conform to the forms of law in establishing a corporation and some formal defect as to the mode of complying with the law, and the body acts as a corporation: *Allen v. Long*, 80 Tex. 261; 26 Am. St. Rep. 735, and note; *Georgia etc. R. R. Co. v. Mercantile Trust Co.*, 94 Ga. 306; 47 Am. St. Rep. 153, and note; *Finnegan v. Norrenberg*, 52 Minn. 239; 38 Am. St. Rep. 552, and note. See, especially, the extended note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 180.

CORPORATIONS—WHEN PERSONS ACTING ARE LIABLE AS PARTNERS.—If a number of individuals assume to act in a corporate capacity in a state where they have not been clothed with corporate authority, such persons are to be treated as, and held to the responsibility of, partners in the state where they unlawfully claim corporate capacity: *Taylor v. Branham*, 35 Fla. 297; 48 Am. St. Rep. 249. A company intended to be a corporation, but which has failed to comply with the statute requiring it to file its certificate of incorporation and to pay a fee therefor, is simply a voluntary association of individuals in the nature of a partnership: *Jones v. Aspen Hardware Co.*, 21 Col. 263; 52 Am. St. Rep. 220.

SULLIVAN v. McMILLAN.

[37 FLORIDA, 184.]

DAMAGES FOR BREACH OF CONTRACT.—The rule that one damaged by a breach of contract must do all that reasonably lies within his power to protect himself from loss, by seeking another contract of like character, the profits of which are to be applied in mitigation of such damages, has especial reference to contracts for personal services, or for the use of some special instrumentality, either with or without connection with such personal services, but does not apply to a contract to deliver certain logs at a designated place, which might have been performed by the parties with their own teams and personal labor, or by any other means or agency to which they might have resorted, and there is nothing to show that the execution of the contract required all or any great portion of the time or personal attention of the parties, to the exclusion of their engagement in other business and the performance of other contracts at the same time.

DAMAGES FOR BREACH OF CONTRACT.—The rule that one who is injured by breach of contract must do all that is reasonably within his power to mitigate the damages caused thereby, does not prevail to the extent that one who has been injured by a violation of an agreement to do a specific act, not necessarily involving personal services, must seek and perform other contracts for the benefit of one who, by breaking faith with him, has caused the injury.

DAMAGES—INTEREST ON UNLIQUIDATED DEMANDS.—In the allowance of interest the distinction formerly existing between liquidated and unliquidated demands is practically obliterated, and whenever a verdict liquidates a claim and fixes it as of a prior date, interest should be allowed on the claim from that date.

DAMAGES—INTEREST ON.—As soon as it is the legal duty of one to pay a claim, he is liable for interest, and as he must have been in default before an action could be maintained against him, and as his default consisted in withholding money due, he is liable for interest on the claim in suit from the date of the writ thereon.

INTEREST IS NOT THE MERE INCIDENT of a debt, attaching only to contracts, express or implied, for the payment of money, but is compensation for the use of, or for the detention of, money.

DAMAGES—INTEREST ON.—Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for failure to keep a contract, interest attaches as an incident.

R. L. Campbell, for the appellants.

W. A. Blount, for the appellees.

136 LIDDON, J. This is the second appeal in this case. On the first appeal all questions of law presented by the case have been settled, except two matters now controverted between the parties.

The nature of the case will fully appear by reference to the reported opinion, and the statements of fact accompanying the same: *Sullivan v. McMillan*, 26 Fla. 543. The suit was brought by appellees, hereafter called the plaintiffs, against appellants,

hereafter called the defendants, for the breach of a contract, whereby appellees agreed to deliver to the testator of appellants all the logs of certain specified dimensions, and free from certain specified defects, growing upon certain described lands of said testator. The breach alleged to have been made by the defendants after the death of said testator was in refusing to receive the remainder of said logs, after a portion of the same had been delivered. From the evidence it appears that it would have taken appellees two years, or thereabouts, from the time the contract was broken by appellants, to have completed the contract on their part by delivery of the other logs embraced within the provisions of the same. After the appellants broke the contract by refusing to receive any more logs under the same, the appellees, with some of the same teams that had been engaged in the work required for the performance of such contract, engaged in other work of delivering logs under other contracts to other parties. The appellants sought to prove what gains and profits were made by the appellees by their own labor and the use of such teams in such other work and contracts during the time that it would have ¹³⁷ taken them to perform the contract with the appellants' testator, and for the breach of which the suit was brought. The circuit court excluded such evidence. The proof upon the trial did show the value of the use of these teams, and what other teams could have been engaged for, and were taken into consideration in estimating plaintiffs' profits upon which the verdict was based. The appellants claim that such evidence should have been admitted, that they were entitled to prove the amount of such gains and profits, and that such amount should have been deducted by the jury from the amount found to be due the appellees, under the rule for the measure of damages established by this court: *Sullivan v. McMillan*, 26 Fla. 543. The first of the matters controverted, above alluded to, is whether such gains and profits made by the appellees in subsequent contracts should be deducted from the general amount of damages which, under the measure of damages established as stated, could be recovered by them. The second is, whether any interest should be recovered on the damages caused by the breach of the contract for which the action was brought.

It is urged by appellants that the plaintiffs, when they received notice that the defendants would not further comply with or perform the contract, should have done all that reasonably lay within their power to protect themselves from loss, by seeking other contract of like character, and that the plaintiffs having

sought and obtained such a contract immediately after the breach sued upon, the defendants were entitled to have a proportionate amount of the profits applied in mitigation of the damages for which they were liable. Otherwise it is contended that the plaintiffs would ¹³⁸ make two profits for the same time and with the same teams, and that speculation would be substituted for compensation, which is the basis of the law of damages for breaches of contract. These propositions are undoubtedly correct when applied to some class of cases. They have special reference to contracts for personal services, or for the use of some special instrumentality, either with or without connection with such personal services. Thus, in a contract for teaching in a school, which was broken by a refusal to receive the services, it was held to be the plaintiff's duty to make reasonable exertion to obtain other like employment in the same vicinity, and thus mitigate the damages: *Gillis v. Space*, 63 Barb. 177; *Benziger v. Miller*, 50 Ala. 206. The same rule was laid down for a similar breach of a contract with an actress: *Howard v. Daly*, 61 N. Y. 362; 19 Am. Rep. 285. Where the plaintiff, owner of a portable sawmill, agreed to remove it to the farm of the defendant and to saw a stated number of logs, to be furnished by the defendant, during certain seasons of the year 1865, and the defendant, after furnishing a portion, broke his contract by refusing to furnish more of such logs, but, during the time he (plaintiff) would have been engaged in sawing defendant's logs, he was offered other employment of the same kind, so that his mill need not have been idle, it was held that the damages caused by the breach sued upon should have been mitigated: *Heavilon v. Kramer*, 31 Ind. 241. The facts in the case of *Frazier v. Clark*, 88 Ky. 260, a sawmill case, very much resemble those of *Heavilon v. Kramer*, 31 Ind. 241, and the same point was likewise determined. In a case of a breach of a contract to furnish a cargo for a vessel, it was held to be "the duty of the ¹³⁹ master of a chartered vessel, on the failure or refusal of the charterer to furnish the cargo as agreed on, to avail himself of all ordinary means and proper opportunities to obtain another cargo; and if he neglect to perform this duty, the owners cannot hold the charterer liable for the increased damages resulting from such neglect": *Murrell v. Whiting*, 32 Ala. 54. A very similar case, and a very similar holding, is *Shannon v. Comstock*, 21 Wend. 457; 34 Am. Dec. 262. In *Hodges v. Fries*, 34 Fla. 63, a suit for violation of a contract for rent of a store building, by refusing to put plaintiff in possession of same, it was held to be the duty of the plaintiff to miti-

gate the damages by accepting another store in the same vicinity, and equally well suited for her purposes, which was tendered to her.

The contract which was broken in the present case was not one for personal services, nor one which the parties contemplated should be performed with any special means or instrumentality. It was simply a contract for the delivery of certain logs at a certain place, and might have been performed by the plaintiffs with their own teams and personal labor, or by any other means or agency to which they might have seen fit to intrust the performance of the same. There is nothing in the contract to show that the execution of the same required all or any great portion of the time or personal attention of both or either of the plaintiffs; or that it was impracticable for plaintiffs to be engaged in other business and the performance of other contracts contemporaneously with the performance of the contract in controversy. We do not think the rule invoked as to mitigation of damages, by subsequent earnings and profits, applies to this case. A distinction ¹⁴⁰ is recognized between a case of the character of that now before us, and those to which we have alluded: 2 Greenleaf on Evidence, sec. 261; *Watson v. Gray's Harbor Brick Co.*, 3 Wash. 283; 1 Sedgwick on Damages, sec. 208; *Wolf v. Studebaker*, 65 Pa. St. 459; *Crescent Mfg. Co. v. Nelson Mfg. Co.*, 100 Mo. 325; *Nilson v. Morse*, 52 Wis. 240, text 255; *Cameron v. White*, 74 Wis. 425; *Field on Damages*, sec. 339.

There was no legal obligation upon the plaintiffs in this case to enter upon the performance of other contracts for the benefit of the defendants. The supreme court of Wisconsin, in *Cameron v. White*, 74 Wis. 425, where a contention like that of appellants in this case was made, as we think, properly said: "As the plaintiffs could not enhance the damages against the defendant by their neglect to make the best of what they had on their hands, so they are not bound to lessen the damages by making other contracts, and performing them, and giving the benefit of the performance of such contracts to the defendant." A very full exposition of this subject, showing the difference in the rule applicable to contracts for personal service, and those for the doing of a specific act, can be found in *Watson v. Gray's Harbor Brick Co.*, 3 Wash. 283. This discussion is too lengthy to insert entire in this opinion. The gist of the whole matter, the conclusion of the court, citing *Wolf v. Studebaker*, 65 Pa. St. 459, is thus stated: "The duty to seek employment is dependent upon the original contract being one of employment or hire. It is

not applicable to every contract. . . . Ordinary contracts of hire, and contracts for the performance of some specified undertaking, cannot be governed by the ¹⁴¹ same rule. That in one case the party can earn no more than the wages, and if he gets that his loss will be but nominal; whereas, in the other case, the loss of the party is the loss of the benefit of the contract. The damages may be said to be fixed by the law of the contract the moment it is broken, and cannot be altered by collateral circumstances independent of, and totally disconnected from, it, and from the party occasioning it. To plead the doctrine of avoidable consequences to such case, . . . 'would necessarily involve proof of everything, great and small, no matter how various the items done by the plaintiff during the period of the contract might be, and how much he made in the meantime.' . . . If the rule was to be observed that the damages proven must be direct and approximate, the same rule must be invoked in the reduction of damages." In *Crescent Mfg. Co. v. Nelson Mfg. Co.*, 100 Mo. 325, where an attempt was made to offer evidence similar to that excluded in the present case, it was said: "Where a servant is wrongfully discharged during his term, and lays his damages at the contract wages for the balance of the term, it is generally held that evidence may be introduced in mitigation of damages of what he might have earned in the interim by using reasonable efforts to procure other employment. So, in general, where a party has been injured, or damaged, by a breach of a contract, he should do whatever he can to lessen the injury. Many cases asserting these principles of law are cited by the defendant, but they have no application to the case in hand. The plaintiff owned its factory and the machinery, and the contract constituted no such relation as that of master and servant. It had the right to make as few or as many other contracts as ¹⁴² it saw fit whilst executing the contract with defendant, and it is entitled to the profits which it might have made on this particular contract. The evidence offered in mitigation of damages was properly excluded."

From what has been said by us, and quoted with approval from the decisions of other courts, it follows that we are of the opinion that the circuit court did not err in excluding the testimony offered, and that the doctrine that one who has been injured by the breach of a contract must do all that is reasonably within his power to mitigate the damages caused thereby, does not prevail to the extent that one who is injured by a violation of an agreement to do a specific act, not necessarily involving

personal services, must seek and perform other contracts for the benefit of one who, by breaking faith with him, has caused the injury.

The second matter, as already stated, is whether any interest is recoverable upon the amount of damages found by the jury against the defendants. The court instructed the jury that if they found a verdict for the plaintiffs, they should assess the damages, with eight per cent interest, from whatever date the evidence showed the contract would have been completed. The jury in its verdict stated separately the amount of the damages assessed, and the interest thereon, and judgment was entered for the aggregate amount. These proceedings are claimed to be erroneous for the reasons alleged: 1. That no interest can be allowed in a recovery of unliquidated damages; and 2. That the evidence does not show any date from which the jury might calculate the interest. It cannot be doubted that the ancient rule is adverse to the assessment of interest upon ¹⁴³ unliquidated demands. More liberal ideas as to the allowance of interest prevails in modern, especially in American, authorities; and in the allowance of interest the distinction is practically obliterated between liquidated and unliquidated demands. A standard author upon the subject says: "The determination of the question whether interest can or cannot be allowed is by no means free from difficulty. The most general classification of causes of action with reference to interest is into liquidated and unliquidated demands. And it was formerly attempted to lay down the rule that interest could be recovered only on liquidated demands. But it will be perceived that not only is the distinction itself not by any means easy to keep in view, but besides this there is no reason in the nature of things why the fact of a demand being unliquidated should debar the plaintiff from receiving, or exempt the defendant from paying, interest. And, finally, we do not find, as a matter of fact, that the line between cases in which interest is allowed and cases in which it is refused, corresponds with the line between liquidated and unliquidated demands. . . . The objection to this classification lies not only in its difficulty of application, which might perhaps be surmounted; but in the fact of its unfairness. There is no reason why a person injured should have a smaller measure of recovery in one case than the other. . . . On general principles, once admit that interest is the natural fruit of money, it would seem that wherever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date. . . .

There are two tests which are constantly applied by the courts, having been found by them more useful than the attempted division into liquidated and unliquidated demands. ¹⁴⁴ Of these the first is, whether the demand is of such a nature that its exact pecuniary amount was either ascertained, or ascertainable by simple computation, or by reference to generally recognized standards such as market price; second, whether the time from which interest, if allowed, must run—that is, a time of definite default or tortfeasance—can be ascertained”: 1 Sedgwick on Damages, 8th ed., secs. 299, 300. “The subject is without doubt a difficult one, and the decisions, as have been seen, are not harmonious. But by keeping in mind the fundamental principle much of the difficulty may be avoided. As soon as it is the legal duty of the defendant to pay, he is liable for interest. As the defendant must have been in default before the action is brought, if the plaintiff recovers, and as his default consisted in withholding money due, he should, it seems, get interest at least from the date of the writ. There seems to be good reason for going further, and holding him to be in default from a demand by the plaintiff for an accounting (made after a reasonable time) and a refusal to account. From that time the defendant cannot claim any right to withhold whatever balance was in fact due, and would have been found due if he had acceded to the plaintiff’s demand; before that, the plaintiff cannot claim any right to payment. Where interest is refused in actions of contract on the ground that the claim is unliquidated, it is in fact usually allowed from the date of the writ”: 1 Sedgwick on Damages, 8th ed., sec. 315. We think the above quotations state the true rule. Another author, while affirming the proposition that interest is not allowed on unliquidated demands, makes an exception in favor of “demands based upon market values, susceptible of easy proof, thought unliquidated until the particular ¹⁴⁵ subject of the demand has been made definite and certain by agreement or proof”: 1 Sutherland on Damages, 610.

An examination of the authorities show that the principles quoted above are sustained by various decisions. In *State v. Lott*, 69 Ala. 147, it is said: “Interest in this state has long been regarded, not as the mere incident of a debt, attaching only to contracts, express or implied, for the payment of money, but as compensation for the use or for the detention of money. Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compen-

sation for a breach of duty, or for a failure to keep a contract, interest attaches as an incident."

Without lengthening this opinion with further quotations, we simply cite, as having a direct bearing upon the subject, the following cases: *Van Rensselaer v. Jewett*, 2 N. Y. 135; 51 Am. Dec. 275; *Schmidt v. Louisville etc. R. R. Co.*, 95 Ky. 289; *Brackett v. Edgerton*, 14 Minn. 174; 100 Am. Dec. 211; *Boyd v. Gilchrist*, 15 Ala. 849; *Whitworth v. Hart*, 22 Ala. 343; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Selleck v. French*, 1 Conn. 32; 6 Am. Dec. 185. This court has allowed interest on an unliquidated claim of damages in *Jacksonville etc. Ry. Co. v. Peninsular Land etc. Co.*, 27 Fla. 1, text 140, et seq., and expressed its disapproval of *Ancrum v. Slone*, 2 Spears, 594, in which it was held that interest could not be allowed on unliquidated damages.

¹⁴⁶ Without setting forth even a brief summary of the evidence in the case, we think it sufficient to say that it was so exact and definite as to the amount of damage sustained by the plaintiffs, and the elements of the same, that it only required a simple computation by the jury to fix the amount. We think the case falls within the rule stated, that the damages could be readily liquidated and ascertained by the jury by simple computation, and that the plaintiffs were entitled to interest thereon. We do not think the objection well taken, that the evidence shows no date from which the jury could calculate the interest. The evidence shows sufficiently a date within which the plaintiffs could have completed their contract, viz., two years from the time the defendants made a breach of it. This time was long after the action was brought. The amount of interest allowed shows that it was calculated from such date. The court told the jury to allow the interest "from whatever date the evidence shows the contract would have been completed," and we think the proof sufficiently definite as to such a date. There was no reversible error in the instruction, or the finding of the jury. By this holding we do not intend to determine whether the interest could have been calculated only from the date sufficient for the completion of the contract, or whether it should have been estimated from the breach of the same, or from the filing of the writ in the suit. We only determine that there was no prejudicial error to the defendants in the record. If the rule varied at all from the true rule for calculation of interest, such variance was in defendants' favor and lessened the amount of the recovery against them.

Let the judgment of the circuit court be affirmed.

DAMAGES FOR BREACH OF CONTRACT—DUTY TO DIMINISH.—A party suing for breach of contract is required to do what he reasonably can and improve all reasonable opportunity to lessen the injury and reduce the damages caused by the breach: *Sherman Ceter Town Co. v. Leonard*, 46 Kan. 354; 26 Am. St. Rep. 101, and note. Where a party has been damaged by the failure of another to perform his contract, the law does not permit him to so conduct himself as to enhance the damages and recover the damages so enhanced: *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120; 41 Am. St. Rep. 33, and note. See, also, the note to *Wright v. Bank*, 6 Am. St. Rep. 364, 365.

INTEREST SHOULD BE ALLOWED, THOUGH A DEMAND IS UNLIQUIDATED, wherever a debtor is in default in paying money, delivering property, or rendering services pursuant to his contract, if the amount can be ascertained by an inquiry concerning the value: *Van Rensselaer v. Jewett*, 2 N. Y. 135; 51 Am. Dec. 275, and note. See, also, the notes to *Cox v. McLaughlin*, 9 Am. St. Rep. 173, *Lewis v. Rountree*, 28 Am. Rep. 314, 315, and *De Lavallette v. Werdt*, 31 Am. Rep. 498.

DAMAGES—INTEREST.—When one is liable for the destruction of property having a market value easily susceptible of proof, the damages recoverable from him should include not only the market value of the property at the time of its destruction, but interest on the amount of such value to the date of the judgment: *Regan v. New York etc. R. R. Co.*, 60 Conn. 124; 25 Am. St. Rep. 306, and note. See, also, the extended notes to *Fraser v. Little*, 87 Am. Dec. 750; *Lewis v. Rountree*, 28 Am. Rep. 314; *Selleck v. French*, 6 Am. Dec. 193.

SUMMERALLS v. STATE.

[87 FLORIDA, 162.]

CRIMINAL LAW—ABSENCE OF ACCUSED—MISTRIAL.—If a defendant absconds before verdict returned in a trial for felony no legal verdict can be received or rendered during his absence, and a judgment entered subsequently upon a verdict so received, is null and void, and renders the whole proceeding a mistrial.

CRIMINAL LAW—ABSENCE OF ACCUSED—PRACTICE.—If a defendant on trial for a crime absconds before a verdict is rendered, the proper practice is for the court to declare a mistrial and discharge the jury without any verdict, after becoming satisfied that the defendant cannot be produced in court within a reasonable time.

J. W. Brady, for the appellant.

W. B. Lamar, attorney general for the state.

¹⁶³ TAYLOR, J. The plaintiff in error was indicted at the fall term, 1894, of the circuit court for De Soto county, for the larceny of a domestic animal, to wit, one cow, which offense, under our statute, is punishable by imprisonment in the state penitentiary, that constitutes it a felony. At the spring term of said court, 1895, he was arraigned, pleaded not guilty, and put upon his trial. While the jury were out considering their ver-

dict, he fled the court, and could not be found when the jury returned into court with their verdict. After some considerable delay, the court, in the defendant's absence, received from the jury their verdict of "guilty," and had the same recorded in the minutes and discharged the jury. At the succeeding fall term, 1895, the defendant, having been apprehended, was brought into court, and thereupon moved in arrest of judgment upon the ground that the record showed that he was not personally present when the verdict in his cause was received and put on record. This motion the court overruled; whereupon the defendant moved for a new trial upon the same ground, which motion was also overruled, and the defendant was sentenced to one ¹⁶⁴ year's imprisonment in the state penitentiary. From this judgment writ of error is taken.

It is well settled by repeated decisions here, as well as in other states, that in cases of felony the accused must be personally present in court during every stage of his trial from its beginning to and including the final passing of sentence. If it is shown that he was absent during the taking of any essential step in the trial, he cannot be said to have had a trial in due course of law. He has a right to be present in person at the rendition of the verdict in order to exercise the right of polling the jury, and the verdict, in such cases, cannot legally be rendered or received during his absence; and it makes no difference whether his absence be voluntary or involuntary. The proper practice in such cases, when the court finds that the prisoner has absconded, is to have diligent efforts made to apprehend him and bring him into court, and upon being satisfied that he cannot be produced within a reasonable time, to declare a mistrial and discharge the jury without the rendition of any verdict at all. A verdict rendered and received in such a case during the prisoner's absence is a nullity, and no valid sentence can be pronounced thereon. Under the circumstances disclosed by this record, the trial of the defendant at the spring term, 1895, and his subsequent sentence at the ensuing fall term were mere nullities, amounting to nothing more than a mistrial: Rev. Stats., sec. 2906; Lovett v. State, 29 Fla. 356, and Florida cases there cited; State v. Battle, 7 Ala. 259; State v. Hughes, 2 Ala. 102; 36 Am. Dec. 411; People v. Higgins, 59 Cal. 357; State v. Hays, 2 Lea, 156; Sneed v. State, 5 Ark. 431; 41 Am. Dec. 102; 1 Bishop's Criminal Procedure, ¹⁶⁵ 2d ed., secs. 273, 1180, and cases cited; Bishop's New Criminal Law, sec. 998, and cases cited in subdivision 4.

The judgment and sentence of the court below is reversed and a new trial ordered.

CRIMINAL LAW—ABSENCE OF ACCUSED.—The failure of the record to show that a person accused of crime was present in court when the verdict of guilty was rendered against him, or that he was present when sentence was pronounced against him, or immediately before, or that he was asked by the court if he had anything to say why he should not be sentenced, is fatal to the verdict and judgment thereon: *French v. State*, 85 Wis. 400; 39 Am. St. Rep. 855, and note. See, also, the extended notes to *Warren v. State*, 68 Am. Dec. 219, and *Fight v. State*, 28 Am. Dec. 629.

LITTLE v. BARLOW.

[37 FLORIDA, 232.]

RES JUDICATA.—Under plea of the general issue, a former recovery may be shown in evidence.

RES JUDICATA—CONCLUSIVENESS.—A former recovery, when pleaded in bar and proved, is conclusive upon the parties.

RES JUDICATA—EVIDENCE OF UNDER GENERAL ISSUE—CONCLUSIVENESS.—If evidence offered under a plea of the general issue to support a contention of *res judicata* shows that the same subject matter has already been litigated and adjudicated between the parties by the final judgment of a court of competent jurisdiction, it is as conclusive a bar to any further recovery as though it had been urged by special plea in bar.

RES JUDICATA—EVIDENCE.—If the matter in issue in a former suit does not appear upon the record offered, under the plea of the general issue, as evidence of such former adjudication, it may be shown by extrinsic evidence.

RES JUDICATA—EVIDENCE.—To sustain the contention of *res judicata*, the complete record in the former suit, including the judgment therein, and not detached portions thereof, must be offered in evidence.

W. L. Peeler, for the appellants.

233 TAYLOR, J. The appellee, T. H. Barlow, sued the appellants in the circuit court of Orange county in assumpsit for goods sold and delivered, for work and labor done and performed, for money paid by the plaintiff for the use of the defendants, for moneys received by the defendants for the use of the plaintiff, and for moneys found to be due upon an account stated between them. The defendants pleaded the general issue, that they never were indebted as alleged. The cause was tried before a jury, and resulted in a verdict and judgment for the plaintiff in the sum of six hundred and forty-one dollars and twenty-four cents. From this judgment the defendants below appeal.

Several errors are assigned, but we deem it unnecessary to notice any of them, except one upon which the judgment below must be reversed. At the trial, the defendants offered in evidence the record of a judgment in the circuit court of Orange county in a suit in assumpsit between the same parties, wherein Little Brothers were plaintiffs and T. H. Barlow was defendant, and in which they recovered judgment against Barlow for one hundred and seventy-two dollars and ninety cents, and in which the same subject matter was apparently involved that is in controversy in the present suit. To the introduction of the record of said judgment in evidence the plaintiff objected, on the ground that the defendant had not specially pleaded the former judgment. This objection was sustained ²³⁴ by the court, and the proffered evidence excluded, to which exception was duly taken, and it is assigned as error. The court erred in this ruling. It is abundantly well settled that a former recovery may be shown in evidence, under the general issue, as well as pleaded in bar, and that when pleaded it is conclusive upon the parties. But whether it is conclusive when given in evidence is a question upon which the authorities are in conflict: 1 Greenleaf on Evidence, 15th ed, sec. 531, and citations. We are in accord with these authorities that hold that if the evidence offered to support the contention of *res judicata* shows that the same subject matter has already been litigated and adjudicated between the parties by the final judgment of a court of competent jurisdiction, that it is as conclusive a bar to any further recovery as though it had been urged by special plea in bar: *Duchess of Kingston's Case*, 3 Smith's Lead. Cas., 9th ed., 1998; *Perkins v. Walker*, 19 Vt. 144; *Kilheffer v. Herr*, 17 Serg. & R. 319; 17 Am. Dec. 658; *Shafer v. Stonebraker*, 4 Gill & J. 345; *Betts v. Starr*, 5 Conn. 550; 13 Am. Dec. 94; *Chamberlain v. Carlisle*, 26 N. H. 540. It is further held that if the matter in issue in the former suit does not appear upon the record offered as evidence of such further adjudication, it may be shown by extrinsic evidence: *King v. Chase*, 15 N. H. 9; 41 Am. Dec. 675; *Lawrence v. Hunt*, 10 Wend. 80; 25 Am. Dec. 539; *Preston v. Harvey*, 2 Hen. & M. 55; *Estill v. Taul*, 2 Yerg. 466; 24 Am. Dec. 498; *Marsh v. Pier*, 4 Rawle, 273; 26 Am. Dec. 131.

Upon the objection urged to the admissibility of the former judgment between the parties in evidence, the ²³⁵ ruling of the court was erroneous, and as a new trial must result, it will be proper to say that, to prove what the question in issue was in a former suit, the complete record of such suit should be produced,

including the judgment therein, and not detached portions thereof: *Foot v. Glover*, 4 Blackf. 313.

The judgment appealed from is reversed and a new trial ordered.

RES JUDICATA—EVIDENCE OF.—This subject is exhaustively treated in the monographic note to *Fahey v. Easterly Machine Co.* 44 Am. St. Rep. 562-572, where the principles enunciated in the principal case will be found treated.

TATE v. PENSACOLA GULF, LAND & DEVELOPMENT Co.

[37 FLORIDA, 439.]

CONTRACT.—TIME IS NOT REGARDED as of the essence of a contract in equity, unless expressly made so by the contract itself.

SPECIFIC PERFORMANCE—UNREASONABLE DELAY.—Although a court of equity does not regard time as of the essence of a contract, unless it is so expressly stipulated, yet it does require of one who seeks specific performance, that he shall not be guilty of unreasonable delay.

SPECIFIC PERFORMANCE—CONTRACT TO CONVEY LAND.—If a vendee is in possession of premises under an assertion and exercise of right and by permission of the vendor after paying part of the purchase price, the mere lapse of time does not bar the remedy of the vendee for specific performance of the contract to convey.

SPECIFIC PERFORMANCE—CONTRACT TO CONVEY LAND.—If a vendee takes and retains possession of premises with the vendor's consent, under a contract to purchase, his mere delay in bringing suit, or even in paying the price, does not prevent him from compelling a conveyance upon a subsequent payment or tender of the amount due, nor is his right to such relief cut off until the vendor places a limit on the lapse of time by a demand of payment at or before a specified day, and by notice that the agreement is to be rescinded unless the demand is complied with, and the vendee makes default thereon.

SPECIFIC PERFORMANCE—CONTRACTS TO CONVEY LAND.—In a suit for specific performance of a contract to convey land, the vendor, to make the plaintiff's delay available as a defense, must have performed, or been ready and willing to perform, all the terms of the contract stipulated for on his own part.

VENDOR AND VENDEE—CONTRACT TO CONVEY—SUBSEQUENT PURCHASERS.—Persons acquiring title to land with notice of a pre-existing contract of sale made by their vendor are bound thereby to the same extent as such vendor.

VENDOR AND VENDEE—PURCHASER'S DUTY TO INQUIRE INTO TITLE.—If a party other than the grantor is in possession of land, it is the purchaser's duty to inquire into the title thereto, and the presumption of law is, that upon such inquiry he ascertains the true state of the title.

VENDOR AND VENDEE.—ACTUAL POSSESSION is notice to all the world of whatever rights the occupant really has in the premises, and a vendor cannot convey to any other person without

affecting him with such notice. Actual knowledge of such possession on the part of those sought to be charged with such notice is not necessary. Notice in such cases is a legal deduction from the fact of possession.

NOTICE.—POSSESSION TO BE CONSTRUCTIVE NOTICE OF CLAIM OF TITLE must be open, visible, and exclusive, and is shown by any use of the land that indicates an intention to appropriate it for the benefit of the possessor. Such use may be any to which the land is adapted, and is calculated to apprise the world that the property is occupied.

SPECIFIC PERFORMANCE—EVIDENCE OF INCREASE IN VALUE.—In an action to enforce specific performance of a contract for the conveyance of land evidence of an increase in value of the land must be limited to a time at or near the making of the contract and to the value at that time as compared with its value at or near the time that suit is brought. Evidence of the value of the land seven or eight years before such contract was made as compared with its value after suit is brought is too remote to be admissible.

PLEADING.—ALLEGATA AND PROBATA MUST CORRESPOND, and however full and convincing may be the proof as to any essential fact, this alone is insufficient unless the fact is averred.

SPECIFIC PERFORMANCE—NOTICE OF EQUITIES—MARRIED WOMAN'S TITLE.—A vendee of real estate who purchases with notice of the equities of an occupying tenant under a contract to purchase, cannot defeat specific performance of the contract of a former grantor because of the intervention of the title of a married woman between him and such grantor, especially when she has conveyed all of her interest in the land.

Blount & Blount, for the appellant.

P. Egan, for the appellee.

444 LIDDON, J. Several grounds were alleged and sought to be proven by the appellee, the Pensacola, Gulf, Land and Development Company, as sufficient to bar the relief sought by the complainant. Such of these grounds as it seems needful to notice may be briefly summarized as follows: 1. Laches of complainant and those through whom he claimed in performing the contract, and in seeking performance by the defendant; 2. That the Pensacola, Gulf, Land and Development Company is an innocent purchaser for value without notice of complainant's equities; 3. That said defendant derived title through a married woman, and that specific performance could not be had against her, nor against her grantees.

The question of the possession of the complainant and of the Hargises and Bonifay, through whom he claimed, is one of primary importance in the disposition of this case. Whether or not they were in possession of the premises in controversy, and the nature and extent of such possession, are issues that materially affect other questions in the case, and must be first determined. We will not attempt any statement or summary of the evidence upon this subject. It is not entirely free from conflict and con-

tradiction. We state only the conclusion reached by us as to the facts established by the weight and preponderance of the testimony, or the admissions contained in the pleadings. The testimony shows that E. C. Bonifay, at the time of his contract of purchase, paid a part of the purchase money, and, with the full knowledge and consent of Dowd and Stallsworth, a very short time after moved upon the premises in question, and lived ⁴⁴⁵ in a house which was situated thereon until the house was destroyed by fire a short time before he assigned his rights under the contract and his interest in the land to the Hargises, a period of one year or thereabouts. Three or four months after he (Bonifay) entered into possession, he had a surveyor to make a survey of the lot so bought by him, and to indicate the boundaries thereof, except where there were water or shore line boundaries, by setting up posts or stobs, and by blazes and marks upon the trees standing near such boundaries. These boundaries were also plainly indicated by an open space estimated at one and a half to four feet wide, from which the undergrowth and shrubbery had been cut and removed. The evidence does not show that this open space was made for the express purpose of indicating a boundary, but that the smaller growth was cut and removed for the convenience of the surveyor in the use of his instruments and for running the line. One of these openings in the undergrowth was afterward used as a path, and the other remained plainly and distinctly visible at the time the complainant acquired his interest in the property. Bonifay made some small improvements and inclosed about a half acre of the land for a garden; he used the land within the limits marked by the surveyor for firewood, and took care of it and kept trespassers from intruding upon it. R. B. S. Hargis and R. W. Hargis after this entered into possession, built thereupon a large frame building for a private hospital; also built a stable, other outhouses, and a wharf and fences. The hospital building cost between fourteen hundred and fifteen hundred dollars. The building was actually used as a hospital, and it and the whole fifteen acres of land, included in the surveyed boundaries, was kept in ⁴⁴⁶ charge of an employé of the Hargises. This employé was instructed to protect the property from trespassers, and to cut the growth thereon for firewood for use of the hospital and inmates, but not to cut wood beyond the surveyed boundaries. Wood was so cut and used during the entire time of the occupancy of the property by the Hargises, a period of more than three years. The proof shows that the possession of Bonifay, as

well as that of the Hargises, was taken and held under a claim of ownership of right and title to the premises. The greater part of the land not covered by the buildings and improvements was covered by pine saplings, small trees, and undergrowth—the merchantable timber having previously been cut and removed. We think the evidence fully demonstrates the knowledge of this possession by the defendant J. C. Petterson. The complainant entered into possession a short time after obtaining his deed.

Having stated our conclusions as to the possession of complainant and his predecessors, we will proceed to consider the objections above stated urged by the defendant in bar of the relief sought by the complainant. The first objection which the defendant Pensacola, Gulf, Land and Development Company claims precludes the granting of the relief sought is that of delay in performing his contract and seeking his remedy. Upon this point, it is contended that time was of the essence of the contract. Without setting forth the contract in full, it is sufficient to say that it contains no provision to that effect, and, therefore, time was not of its essence, and cannot be so regarded in a court of equity: *Chabot v. Winter Park Co.*, 34 Fla. 258; 43 Am. St. Rep. 192; *Southern Life Ins. etc. Co., v. Cole*, 4 Fla. 359. It is also undoubtedly ⁴⁴⁷ a correct proposition that “while a court of equity does not regard time as of the essence of a contract, unless it is so expressly stipulated, yet it will require of one who seeks specific performance of a contract that he shall not be guilty of unreasonable delay”: *Chabot v. Winter Park Co.*, 34 Fla. 258; 43 Am. St. Rep. 192.

In this case, we have found from the evidence that the predecessors of the complainant, and to whose equities he succeeded, were in the possession of the premises, with permission of the vendor and after payment of a part of the purchase money, under an assertion and exercise of right. In such a case, the lapse of time does not bar the remedy. Upon this subject, it is said by an eminent author: “In determining what amount of mere delay in bringing his suit will defeat the plaintiff’s claim to a specific performance, or, in other words, what lapse of time, after his right of action accrued, will render the demand stale, the rule prevails in equity, as in law, that while the plaintiff is in possession under an assertion and exercise of right, the lapse of time does not prejudice his remedial right. If the vendee, therefore, takes and retains possession of the premises with the vendor’s consent, his mere delay in bringing a suit, or even in paying the price, will not prevent him from compelling a conveyance upon

a subsequent payment or tender of the amount due, nor will his right to the relief be cut off until the vendor places a limit to the lapse of time by a demand of payment at or before a specified day, and by a notice that the agreement will be rescinded unless the demand is complied with, and the vendee's default thereon. The defendant, in order to avail himself of the plaintiff's delay as a defense, must have performed, or been ready and willing to ⁴⁴⁸ perform, all the terms of the contract on his own part. Where the contract is substantially executed, the purchaser has obtained possession, and, of course, is vested with an equitable title, but the legal title is yet held by the vendor, the vendee's delay in bringing a suit to compel a conveyance, however long continued, will not defeat his remedy of a specific performance, unless, perhaps, the situation of the vendor and his relations to the land have been so altered in the meantime that a specific execution of the agreement will be inequitable": Pomeroy on Contracts, sec. 404.

In this case, the vendor or his grantees had never made any demand for payment on or before a specified day, and had never given any notice that the agreement would be rescinded unless the demand was complied with. Not only had the complainant's predecessors been in possession, but they had made valuable improvements upon the land. In such a case, where the delay lasted for thirty years, the court said: "Where the purchaser, under an executory contract, enters on, improves, and continues in the possession of the land, the lapse of time is no defense to his bill for specific execution": *Barbour v. Whitlock*, 4 T. B. Mon. 180. A similar case, where the delay was not so great, and where the point was likewise decided, is *Mason v. Wallace*, 4 McLean, 77. Other cases holding similar views of the law are *Waters v. Travis*, 9 Johns. 450, text 466; *New Barbadoes Toll Bridge Co. v. Vreeland*, 4 N. J. Eq. 157; *Miller v. Bear*, 3 Paige, 466; *Bruce v. Tilson*, 25 N. Y. 194; *Crofton v. Ormsby*, 2 Schoales & L. 583, text 603; *Stretch v. Schenk*, 23 Ind. 77. Applying these principles of law to the facts of the case, the conclusion necessarily follows that the ⁴⁴⁹ complainant was not barred of relief by reason of his delay in seeking it.

There is another reason why the defendant cannot avail itself of complainant's delay in the matter. As we have seen, time was not made of the essence of the contract. While the general rule obtains that a court of equity will specifically enforce a contract for the sale of lands only in cases where the complainant shows

himself prompt and eager to perform the contract on his part (Chabot v. Winter Park Co., 34 Fla. 258; 43 Am. St. Rep. 192), yet, under the facts of this case, the defendant is not in a situation to avail itself of the defense of a want of promptness upon the part of the complainant. The defendant does not claim that it was at all times ready and willing to perform the contract on its part. It claims to have known nothing about the contract whatever, it never offered to perform the same or expressed any willingness so to do, or took any steps whatever for that purpose, but, on the contrary, claimed the land absolutely discharged from any equitable title of complainant, and made its defense to the case chiefly upon that ground. "The defendant, in order to avail himself of the plaintiff's delay as a defense, must have performed, or been ready and willing to perform, all the terms of the contract on his own part": Pomeroy on Contracts, sec. 404, and note 2; Leaird v. Smith, 44 N. Y. 618; Van Campen v. Knight, 63 Barb. 205; 3 Pomeroy's Equity Jurisprudence, sec. 1408, and authorities cited in note 1.

We next examine the question whether the defendant, the Pensacola, Gulf, Land and Development Company, is an innocent purchaser for value without notice of the complainant's equities. The evidence, we ⁴⁵⁰ think, clearly shows a knowledge and notice of these equities on the part of the defendant J. C. Petterson. J. C. Petterson was, at the time of the conveyance by Emma I. Petterson to the Pensacola, Gulf, Land and Development Company, the president of that corporation. He joined with his wife in the deed, and acted in the transaction in her and his own behalf.

It is admitted on both sides that the land involved once belonged to one C. Dowd. It is also admitted, and we think properly, that all persons deriving any interest in the land from or through said Dowd after his contract to sell to Bonifay, and with notice of such contract, are bound to perform the same to the same extent that Dowd would be bound, if he had still retained the legal title in himself: *McRae v. McMinn*, 17 Fla. 876; *Ward v. Spivey*, 18 Fla. 847; Pomeroy on Contracts, sec. 493; 2 Pomeroy's Equity Jurisprudence, sec. 688, and authorities cited in note 4. The question, then, is material whether the defendant corporation, the Pensacola, Gulf, Land and Development Company, when it purchased the land from Mrs. Petterson, had notice of the contract of sale through which arose the equity of the complainant. The complainant claims that the corporation had notice, because the defendant J. C. Petterson had such notice while

he was president of defendant. As, in our opinion, there was sufficient notice of complainant's rights by reason of the actual occupation of the premises by himself and his predecessors in possession, it is useless to determine the effect upon the corporation of the knowledge and notice by J. C. Petterson, its president, of such rights and equities. Whether the corporation was or was not bound by such notice to Petterson the result in this case would be the same.

⁴⁵¹ It is claimed by the complainant that the actual possession and occupancy of the premises by his predecessors is, of itself, sufficient to charge the defendant with notice of his equitable title. The Pensacola, Gulf, Land and Development Company admits in its answer a knowledge that the occupation and use of the hospital, and grounds inclosed about the same, was held by the Hargises, but was informed and understood that such holding was by consent of Emma I. Petterson and subject to her title. It denies all knowledge or notice of the possession or occupation of the remaining portion of the tract involved in the litigation. The case of *McRae v. McMinn*, 17 Fla. 876, was in some of its features like the present. There the vendee knew that another was in possession of the land, but believed she was in possession as a tenant, holding under another. This knowledge, coupled with the fact that the instrument which purported to pass title to his grantor, but which was ineffectual to pass such title, was of record, and contained a description of the topography of the land, was held to be sufficient to lead the vendee to inquiry by which he might have learned the nature of the title and claim of the party in possession, and that a court of equity would deem him connusant of it.

In this case, the rule was laid down that a subsequent purchaser, although without actual notice, will be considered a purchaser of the seller's title subject to the equities of the tenant. It may be conceded that the facts of the case hardly required so broad an enunciation of the rule, as there was some actual notice of the possession. Therefore the court said: "The authorities go beyond the case at bar. We think the general rule is, that where a person, other than the grantor, is ⁴⁵² in possession, it is the purchaser's duty to inquire into the title; and the presumption of law is, that upon such inquiry he ascertains the true state of the title." The broad general rule has often been proclaimed by the courts that, "the actual possession of land is notice to all the world of whatever rights the occupant really has in the premises, and a vendor cannot convey to any other person without

such person being affected with such notice": *Finch v. Beal*, 68 Ga. 594; *Sewell v. Holland*, 61 Ga. 608. In such cases open, visible, actual possession is of itself notice of the rights of those in possession. Actual knowledge of such possession on the part of those sought to be charged with such notice is not necessary. Notice in such cases is a legal deduction from the fact of possession: *Allen v. Cadwell*, 55 Mich. 8; *Woodward v. Clark*, 15 Mich. 104; *Hamilton v. Fowlkes*, 16 Ark. 340, and many authorities cited in text; *Buck v. Holloway*, 2 J. J. Marsh. 163; *School District v. Taylor*, 19 Kan. 287; *Lipp v. Hunt*, 25 Neb. 91; *Moss v. Atkinson*, 44 Cal. 3; *McConnel v. Reed*, 4 Scam. 117; 38 Am. Dec. 124; *Killey v. Wilson*, 33 Cal. 690; *Lipp v. South Omaha Land Syndicate*, 24 Neb. 692; *Bank of Orleans v. Flagg*, 3 Barb. Ch. 316; *Dixon v. Doe ex dem. Lacoste*, 1 Smedes & M. 70; *Strickland v. Kirk*, 51 Miss. 795; *Perkins v. Swank*, 43 Miss. 349; *Doolittle v. Cook*, 75 Ill. 354; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Noyes v. Hall*, 97 U. S. 34.

Under our recording acts, possession has been held to be such constructive notice of ownership as to dispense with the necessity of recording the deed: *Massey v. Hubbard*, 18 Fla. 688.

⁴⁵³ Some objection of appellee is made that the possession of those through whom complainant derived his equitable title was not such open, visible possession, such as is necessary to give constructive notice of the title of the tenant. There can be no question of this kind as to that portion of the property covered by the hospital, garden, and appurtenances. As to these, it is admitted that the possession was notoriously open and visible, and came within the actual knowledge of the defendant. As to other portions of the tract, it seems that the larger trees suitable for timber had been removed. Those remaining were small, and appear to have been useful only for firewood. Such use was made of them, and the property was protected from trespassers. The limit of the possession claimed was plainly marked, and all the use seems to have been made of the land of which it was capable. Possession, in order to be constructive notice of a claim of title, must be open, visible, and exclusive, and is shown by any use of the land that indicates an intention to appropriate it for the benefit of the possessor. Such use may be any to which the land is adapted, and is calculated to apprise the world that the property is occupied: *Truesdale v. Ford*, 37 Ill. 210; *Wickes v. Lake*, 25 Wis. 71. The character of possession proven in this case, if adverse and continued for the statutory period, would give a prescriptive title to the premises under our statute of limi-

tations, as it was based upon a written instrument as being a conveyance of the premises in question: Rev. Stat., sec. 1290, par. 2. We think the actual knowledge of the defendant, the Pensacola, Gulf, Land and Development Company, as to a possession of a portion of the premises was sufficient notice to it of that portion, and that the actual, ⁴⁵⁴ open, visible possession of the remaining portion was sufficient notice as to the remainder, and that the said defendant was not a purchaser without notice of any portion of said land.

The defendant corporation claims that the relief prayed for by the complainant should have been denied because the property had advanced in value. No defense of this kind was made by the answer. The only reference to increase of value that appears in the record is in the testimony of the defendant J. C. Petterson, which was taken after all the complainant's witnesses had testified. The witness was asked to state "the value of the land in this suit when he first became acquainted with it, and its present value (at the time of asking the question), and if the same had increased in value. In reply, the witness stated that when he first became acquainted with the property it was worth one dollar and fifty cents per acre, but at the time of testifying that it was worth about five thousand dollars. This question was objectionable for many reasons, and, if objection had been made in the court below, it and the answer to it should have been excluded from consideration. In the first place, the time inquired about was too remote. The witness had stated that he had been acquainted with the property fourteen or fifteen years. The original contract of purchase was made about six years and a half before the time of giving the testimony. Therefore, he was asked to state the value of the property at a period seven or eight years anterior to the purchase by Bonifay from Dowd, and its value at the time of testifying, which was about eight months after the suit was brought. If the testimony as to increase of value was admissible at all, it should have been limited to some time at or near the time of the ⁴⁵⁵ Bonifay contract and the bringing of suit. For aught that appears in the record, this remarkable increase of value may have all occurred between the time of the witness' first acquaintance with the property and the contract of purchase by Bonifay, or it might have occurred between the bringing of the suit and the time of taking the testimony. But the greatest—the vital—objection to this testimony is, that it is not relevant to any issue in the case, no defense being made upon an increase in value of the property. It is an

established rule of chancery practice, and of pleading and practice generally, that the allegata and probata must correspond. However full and convincing may be the proof as to any essential fact, unless the fact is averred, proof alone is insufficient: *Perdue v. Brooks*, 95 Ala. 611. All evidence offered in a case should correspond with the allegations and be confined to the issues: 1 *Greenleaf on Evidence*, sec. 51. "The requirement that the cause of action or the affirmative defense must be stated as it actually is, and that the proofs must establish it as stated, is involved in the very theory of pleading": 2 *Rice on Evidence*, sec. 292, citing *Pomeroy's Remedies and Remedial Rights*, sec. 554. A litigant has a right to rely upon his adversary's pleading as indicating the case he is to meet. Otherwise, pleadings would serve no useful purpose except to entrap and mislead the adversary: *Southwick v. First Nat. Bank*, 61 How. Pr. 164; *Romeyn v. Sickles*, 108 N. Y. 650. Without committing ourselves upon the point, under the circumstances of this case, whether the question of appreciation in value of the property could be urged as a defense to the relief sought, we are of the opinion that we cannot consider any such ⁴⁵⁶ defense in the state of the pleadings as shown by the record.

It is also contended by appellee, the Pensacola, Gulf, Land and Development Company, that the decree for specific performance should not pass against it, because it holds its title by a grant from a married woman, and the equity sought to be enforced had its origin and partly accrued before the legal title vested in such married woman. The cases of *Lewis v. Yale*, 4 Fla. 418, and *Goss v. Furman*, 21 Fla. 406, are cited to support the contention. It was decided in those cases, especially the last named, that a decree for specific performance could not be rendered against a married woman upon her executory contract for the sale of lands. This decision was but an application of the general principle that a married woman is disabled, by reason of her coverture, to enter into any contract that will bind her, either in law or in equity, so as to authorize a personal judgment against her. In this case, the contract sought to be enforced was not made by a married woman. The only married woman defendant had parted with her title before suit was brought. She was a nominal party to the proceedings, and no relief is prayed against her. Her only connection with the case is, that the title to the property about which the suit was brought was once vested in her, and is held by her grantee. We do not think a vendee of real estate, who purchases with notice of the equities of an oc-

cupying tenant, can defeat specific performance of the contract of a former grantor because of the intervention of the title of a married woman between him and such grantor. Such a rule does not seem reasonable to us upon principle, and no ⁴⁵⁷ precedent in point has been shown us or discovered by us.

The decree of the circuit court is reversed, with directions that a decree be entered granting the relief prayed for in the bill of complaint, upon the payment by the complainant to the defendant, the Pensacola, Gulf, Land and Development Company, of the amount of purchase money due upon the contract of purchase of E. C. Bonifay from C. Dowd and George Stallworth, with interest from October 18, 1884, until January 24, 1889, and all the costs which accrued in this cause in the circuit court up to said last-named date. It is ordered that all other costs in the cause not directed to be paid by the complainant be paid by the defendant; and that appellees pay the cost of this appeal. Whenever the word "complainant" is used in this opinion it means the appellant, and the word "defendant," without naming him, is used it means the appellee, the Pensacola, Gulf, Land and Development Company.

CONTRACTS—TIME AS ESSENCE OF.—In equity, time is not regarded as of the essence of a contract unless expressly stated to be so: *Chabot v. Winter Park Co.*, 34 Fla. 258; 43 Am. St. Rep. 192, and note.

SPECIFIC PERFORMANCE—LACHES.—While equity does not regard time as of the essence of a contract for the sale of lands unless expressly made so by the contract, yet it requires that one who seeks specific performance of such contract shall not be guilty of unreasonable delay and shall seek his redress with reasonable promptness: *Chabot v. Winter Park Co.*, 34 Fla. 258; 43 Am. St. Rep. 192, and note.

SPECIFIC PERFORMANCE—DEFENSES—INCREASE IN VALUE.—The fact that land contracted to be sold for a fair price has since become more valuable, is not such a circumstance as would prevent a decree for specific performance of the contract: *Young v. Wright*, 4 Wis. 144; 65 Am. Dec. 303, and note.

NOTICE.—THE POSSESSION OF REAL PROPERTY by one who has purchased and paid for it, but has not received a conveyance of the legal title, is notice to the world of his right and claim: *Chapman v. Chapman*, 91 Va. 397; 50 Am. St. Rep. 846, and note. Possession of realty gives constructive notice of the title under which the occupant claims: *Note to Wilson v. Phoenix Powder etc. Co.*, 52 Am. St. Rep. 895. The general rule is, that a purchaser of real estate is chargeable with notice of the equities of one in possession thereof: *May v. Sturdivant*, 75 Iowa, 116; 9 Am. St. Rep. 463, and note.

VENDOR AND PURCHASER—DUTY OF PURCHASER TO MAKE INQUIRY WHEN LAND IN POSSESSION OF ANOTHER. It is the duty of an intending purchaser to inquire into the fact of the possession of the property, and he will be affected with notice of whatever right or interest the party in possession may have which such inquiry would have disclosed: *Chapman v. Chapman*, 91 Va.

397; 50 Am. St. Rep. 846; Turman v. Bell, 54 Ark. 273; 26 Am. St. Rep. 35; Rorer Iron Co. v. Trout, 83 Va. 397; 5 Am. St. Rep. 285, and note.

SPECIFIC PERFORMANCE.—A VENDEE OF ONE WHO HAS AGREED TO CONVEY real property may, unless he is a purchaser in good faith and without notice, be compelled to perform the contract of his vendor: Ross v. Parks, 93 Ala. 153; 30 Am. St. Rep. 47, and note.

TAMPA WATER WORKS COMPANY v. CLINE.

[37 FLORIDA, 586.]

WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—A lower proprietor or owner of land bordering on a surface stream of water flowing in a well-defined channel has, in the absence of any modification of relative rights by contract or prescription, no right to throw the water back on him above, and is subject to the burden of receiving it from the proprietor above substantially undiminished in quantity and uncorrupted in quality, and this right arises, not from any supposed grant or from prescription, but *ex jure naturae* and as an incident to the soil.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—The right to the benefit and advantage of the water flowing in a well-defined channel past one owner's land is subject to similar rights of all the proprietors on the bank of the stream to the reasonable enjoyment of the natural bounty, and it is therefore only for an unauthorized and unreasonable use of the common benefit that any one owner has a just cause to complain.

WATERS AND WATERCOURSES.—RIPARIAN RIGHTS of an owner to the ordinary use of water flowing in a well-defined natural channel past his land, extends to the supplying of natural wants, including the use of the water for domestic purposes of home or farm.

WATERS AND WATERCOURSES—RIGHT TO PERCOLATING WATER.—The owner of land through which subsurface water, without any distinct, definite, and known channel, percolates or filters to the land of another, is not prohibited from digging into his land and appropriating the water to any useful purpose of his own, though by so doing the water may be entirely diverted from the land to which it would otherwise naturally pass, but if such subterranean water has assumed the proportions of a well-defined and constant stream, the owner of the land through which it flows is not authorized to divert it, or improperly use it, any more than if the stream ran upon the surface.

WATER AND WATERCOURSES—SURFACE AND SUBTERRANEAN STREAMS.—The only difference in the application of the law to surface and subterranean streams is in ascertaining the character of the streams, and if underground currents of water flow in defined and known channels, the rules of law which govern the use of similar streams flowing upon the surface are applicable to them, but if it does not appear that the waters which come to the surface are supplied by a definite flowing stream, they are presumed to be formed by the ordinary percolations of water in the soil.

WATERS AND WATERCOURSES.—A watercourse consists of water flowing in a certain direction by a regular channel having a well-defined and substantial existence, but the water need not flow continually—the stream may be dry at times.

WATER AND WATERCOURSES—RIGHT OF APPROPRIATION.—The fact that an individual or a corporation has a contract with a city to supply its inhabitants with water, and has expended large sums of money in the erection of a plant, does not confer any additional rights to appropriate water flowing in a natural and well-defined channel through the lands of different owners.

WATER AND WATERCOURSES—RIGHT OF LAND-OWNER—POLLUTION.—An owner has the right to take rock out of, or otherwise use, his own land as he desires, provided that, in so doing he does not divert or pollute a natural stream of water flowing through his land.

WATER AND WATERCOURSES—SUBTERRANEAN STREAMS.—In the absence of affirmative proof that subsurface water is supplied by a definite flowing stream, the presumption is that it comes from ordinary percolations.

Bill to enjoin a landowner from excavating on his land to the alleged injury of a stream of water. Decree dismissing the bill, and complainant appealed.

Sparkman & Sparkman, for the appellant.

W. A. Carter, for the appellee.

593 MABRY, C. J. The questions arising on the present record involve rights of adjoining landowners to water passing through the land not heretofore discussed by this court. The general subject to rights to water passing over or through lands requires some classification in dealing with the different phases of rights that may arise. A very well-considered case decided in Ohio, and hereafter referred to, classifies the subject as follows: 1. In respect to surface streams which flow in a permanent, distinct, and well-defined channel from the lands of one owner to those of another; 2. In respect to surface water—however originating—which, without any distinct or well-defined channel, by attraction, gravitation, or otherwise, are shed and pass **594** from the lands of one proprietor to those of another; 3. Subterranean streams which flow in a permanent, distinct, and well-defined channel from the lands of one to those of another proprietor; 4. Subsurface water which, without any permanent, distinct, or definite channel, percolate in veins or filter from the lands of one owner to the lands of another.

The rights asserted by appellant in the bill filed appertain to the water of a natural spring alleged to be supplied by a well marked and defined subterranean stream flowing some twelve or fifteen feet below the surface across the lands of appellant and appellee, and the case does not call for a discussion of, and what is said has no application to, mere surface water without any distinct and well-defined channel, and which is shed and passes from the land of one owner to that of another. In the Ohio case men-

tioned (*Frazier v. Brown*, 12 Ohio St. 294), in speaking of flowing surface water in well-defined channels, it is said "that, notwithstanding the maxim which affirms the absolute and unlimited dominion of the proprietor of the soil upward and downward, the proprietor below has, in the absence of any modification of relative rights by contract or prescription, no right to throw the water back on him above, and has the right to receive it from the proprietor above substantially undiminished in quantity and uncorrupted in quality; and this right arises, not from any supposed grant or from prescription, but *ex jure naturae*, and for the reason that surface streams of flowing water are the gift of Providence, for the benefit of all lands through which they flow, and, as such, their usufruct is appurtenant to the lands through which they flow." This ⁵⁹⁵ statement contains the doctrine of the English common law as clearly announced in adjudications in that country. In the English case of *Embrey v. Owen*, 15 Jur. 633, it is stated that "the right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes, but flowing water is *publici juris*, not in the sense that it is a *bonum vacans* to which the first occupant may require an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it." Sustaining this view are the following authorities: *Wright v. Howard*, 1 Sim. & S. 190; *Mason v. Hill*, 5 Barn. & Adol. 1; *Wood v. Waud*, 3 Ex. 748; *Dickinson v. Grand Junction Canal Co.*, 9 Eng. L. & Eq. 513; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Tyler v. Wilkinson*, 4 Mason, 397; 3 Kent's Commentaries, 439; Gould on Waters, sec. 204. The American adjudications to the same effect are numerous. The right to the benefit and advantage of the water flowing past one owner's land is subject to the similar rights of all the proprietors on the banks of the stream to the reasonable enjoyment of a natural bounty, and it is therefore only for an unauthorized and unreasonable use of a common benefit that any one has just cause to complain. Judge Story says, in *Tyler v. Wilkinson*, 4 Mason, 397: "The natural streams, ⁵⁹⁶ existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed,

by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatever, and no obstruction or impediment whatever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, *Sic utere tuo ut non alienum laedas.*"

As to the riparian rights to the ordinary use of water flowing past land, it extends to the supplying of natural wants, including the use of the water for domestic purposes of home or farm, such as drinking, washing, cooking, or for stock of the proprietor, and many authorities state that, if necessary for the purposes ⁵⁹⁷ mentioned, all the water of the stream may be consumed: *Evans v. Merriweather*, 3 Scam. 492; 38 Am. Dec. 106; *Wadsworth v. Tillotson*, 15 Conn. 366; 39 Am. Dec. 391; *Anderson v. Cincinnati etc. Ry. Co.*, 86 Ky. 44; 9 Am. St. Rep. 263; *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366; *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102; *Gould on Waters*, sec. 205. There are other uses than those mentioned to which, according to many authorities, flowing water in well-defined and distinct channels may be applied, but the disposition of the present case does not require a further statement as to the rights of adjoining proprietors to running surface water in well-defined channels over their lands.

In reference to rights in subsurface water, there is apparent a contrariety of judicial opinion, as might be expected from the inherent difficulty of ascertaining definitely the character and extent of the right asserted. In the case of *Acton v. Blundell*, 12 Mees. & W. 324, the plaintiff was the owner of factory mills supplied by water from wells sunk into the ground, and it was

alleged that plaintiff used the water of certain underground springs, streams, and watercourses which had run, flowed, and percolated into the wells, and the breach was, that the defendant had sunk divers pits, shafts, holes, and tunnels near the premises of plaintiff, by means whereof the water to the wells had been diverted and they had become dry. It was held that the owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining ⁵⁹⁸ operations on his own land in the usual manner, drains away the water from the land of the first-mentioned owner and lays his well dry. In the opinion it was said, upon a consideration of the grounds and origin of the law controlling running surface streams, and the consequences that would result if the same law was made applicable to streams beneath the surface, that there was a marked difference between the two cases, and they were not governed by the same rule of law. The opinion points out the difference between surface streams where each man can know what he receives from the lands above, and what he transmits below, and of hidden and unknown supplies of water of which he has no knowledge and cannot be informed except by actual test in digging. The consequences that would result from the doctrine that one landowner cannot appropriate in any proper way the unknown sources of spring water on his land are also pointed out.

As we construe this case from its facts, it had no reference to a subterranean stream with a marked and well-defined channel, but was dealing with subsurface percolating water.

The case of *Dickinson v. Grand Junction Canal Co.*, 9 Eng. L. & E. 513, already cited, goes a long way in opposition to the ruling in *Acton v. Blundell*, 2 Mees. & W. 324. It holds that the diversion of water from a well-defined surface watercourse, though never forming a part of the stream, but was prevented from doing so in its natural course by means of an excavation, was actionable, and that this was the case whether the water was part of an underground watercourse or percolated through the earth. The ruling in *Dickinson v. Grand Junction Canal Co.*, 9 Eng. L. & Eq. 513, ⁵⁹⁹ in the particular mentioned, has, however, been repudiated in the case of *Chasemore v. Richards*, 7 H. L. Cas. 349. It was there held that the principles which regulate the rights of owners of land in respect to water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to underground water which merely

percolates through the strata in unknown channels. The case of *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, has generally been regarded as containing a thorough consideration of the subject. The owner of a tanyard had a spring of water upon land where the tannery was established and the water used in the business. A copper mine was discovered on the adjacent farm and a shaft sunk some five hundred and fifty feet from the tanyard, by reason of which the water flowing to the spring was diverted. There was no showing, as appears from the case, that the spring was supplied with water other than that percolating from the land of the one party to the other. It was held that the owner of the tanyard could not recover for the diversion of the water from the spring. It was, however, held in this case that where a subterranean flow of water has become so well defined as to constitute a regular and constant stream, the owner of the land above, through which it flows, may not divert or destroy it, to the injury of the person below, on whose land it issues in the form of a spring. It is said in the opinion that "in limestone regions streams of great volume and power pursue their subterranean courses for great distances, and they emerge from their caverns, furnishing power for machinery of every description, or supplying towns and settlements with ⁶⁰⁰ water, for all the purposes of life. To say that these streams might be obstructed or diverted, merely because they run through subterranean channels, is to forget the rights and duties of man in relation to flowing water. But to entitle a stream to the consideration of the law, it is certainly necessary that it be a watercourse, in the proper sense of the term. . . . When the filtrations are gathered into sufficient volume to have an appreciable value, and flow into a clearly defined channel, it is generally possible to see it, and to avoid diverting it without serious detriment to the owner of the land through which it flows. But percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly, the law has never gone so far as to recognize in one man a right to convert another's farm to his own use, for the purpose of a filter." The views expressed in this case as to subterranean streams have been characterized as obiter dicta (*Frazier v. Brown*, 12 Ohio St. 294), but a consideration of the authorities applicable leads us to the following conclusions as general statements of the rules governing subsurface water: That the owner of the land through which subsurface water, without any distinct, definite, and known channel, percolates or filters through

the soil to that of another, is not prohibited from digging into it and appropriating it to any useful purpose of his own, though by so doing the water may be entirely diverted from the land to which it would otherwise naturally pass. On the contrary, if subterranean water has assumed the proportions of a well-defined and constant stream, the owner of the land through ⁶⁰¹ which it flows will not be authorized to divert it, or improperly use it, any more than if the stream ran upon the surface. The only difference in the application of the law to surface and subterranean streams will be in ascertaining the character of the streams. What is on the surface can be seen, but that which is under the ground cannot be so readily ascertained, and, of course, there will be more difficulty in establishing it. Mr. Gould states (Gould on Waters and Watercourses, sec. 281) that "if underground currents of water flow into defined and known channels, the rules of law which govern the use of similar streams flowing upon the surface of the earth are applicable to them, but if it does not appear that the waters which come to the surface are supplied by a definite flowing stream, they are presumed to be formed by the ordinary percolations of water in the soil. Some such presumption is necessary on account of the difficulty of determining whether the water flows in a channel, but in all other respects there appears to be no distinction between subterranean waters and those upon the surface." The American decisions bearing upon the point are too numerous to discuss in an opinion, and while they, with few exceptions, recognize the principles we have stated, there are extreme applications of them to cases that have arisen. In addition to the authorities cited, we refer to the following as bearing on the subject: *Kauffman v. Griese-mer*, 23 Pa. St. 407; 67 Am. Dec. 437; *Whetstone v. Bowser*, 29 Pa. St. 59; *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445; *Collins v. Chartiers Valley Gas Co.*, 131 Pa. St. 143; 17 Am. St. Rep. 791; *Burroughs* ⁶⁰² *v. Saterlee*, 67 Iowa, 396; 56 Am. Rep. 350; *Hinkle v. Avery*, 88 Iowa, 47; 45 Am. St. Rep. 224; *Hanson v. McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Hale v. McLea*, 53 Cal. 578; *Strait v. Brown*, 16 Nev. 317; 40 Am. Rep. 497; *Chatfield v. Wilson*, 28 Vt. 49; *Hoxsie v. Hoxsie*, 38 Mich. 77; *Upjohn v. Board of Health*, 46 Mich. 542; 41 Am. Rep. 178; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72; *Case v. Hoffman*, 84 Wis. 438; 36 Am. St. Rep. 937.

"A watercourse consists of bed, banks, and water; yet the water need not flow continually; and there are many watercourses which

are sometimes dry": Angell on Watercourses, sec. 4. It is stated in *Ashley v. Wolcott*, 11 Cush. 192, that "to maintain the right of a watercourse or brook, it must be made to appear that the water usually flows in a certain direction, and by a regular channel, with banks or sides. It need not be shown to flow continually; it may be dry at times, but it must have a well-defined and substantial existence." In dealing with subsurface streams their situation and character must, of course, be kept constantly in view.

In applying the principles announced to the facts of the present case, we must state conclusions, as the evidence is too voluminous to be discussed in detail in the opinion. The mere fact that appellant has a contract with the city of Tampa to supply its inhabitants with water, and has expended large sums of money in the erection of a plant, does not confer any additional rights to the water that passes through appellee's land: *Emporia v. Soden*, 25 Kan. 588; 37 Am. Rep. 265; *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366. There is also no question presented ⁶⁰³ as to priority of right growing out of contract, prescription, or legislative grant. The tract of land through which the water in question runs belonged for many years to James T. Magbee, and after his death, some time during the year 1888, his heirs and distributees had it platted into lots, blocks, and streets, which are now within the corporate limits of the city of Tampa. Appellant, through mesne conveyances, acquired title to lots 6 and 7 of the plat in the early part of 1889, and a few months thereafter appellee purchased lots 1, 8, 9, and 10, which were immediately east or northeast of appellant's lots. The formation of the land twelve or fifteen feet below the surface, and in which the water is found, is of a limestone character. There is some diversity of opinion among the witnesses as to the character of the rock in contact with the water. One of the appellant's witnesses, an expert, states that the rock in contact with the water was stratified, and away from it was in boulders lying in detached lumps. Considering all the evidence, there is no doubt that the land is underlaid with rock of a limestone formation. Issuing from the Magbee tract of land, not far from the Hillsborough river, was a bold spring of constantly flowing water, known as "Magbee spring," and the plat located this spring in a street or avenue. The lots purchased by appellant were east and northeast and nearest to the spring. From the spring east and northeast across the lots of both parties there were surface depressions or sinks, such as mark the course of subterranean

streams in limestone regions. On one of appellant's lots a sink went down so that the water below could be seen, and at or near this point the company's waterworks for supplying ⁶⁰⁴ the city with water were established. A deep shaft was dug and a reservoir made to receive the water running in an underground stream, and it is an alleged diversion and disturbance of this water supply that caused the company to complain. Appellant commenced to excavate first, but changed locations. Before the second excavation for the reservoir was commenced, appellee began an excavation in a sink on one of his lots a short distance away, and had reached a stream of running water when the injunction was served on him. From the evidence in the record, we are satisfied that the stream reached by appellee in his excavation extends to the reservoir of appellant. The source of this stream is left in speculation, without definite proof, but, from all that is shown, we are of the opinion that this is a well-defined subterranean stream flowing through the lands of both parties. There is some diversity of opinion among the expert witnesses examined by appellant as to the course and limits of the stream. From "Magbee spring," where the stream issues from the ground, to the Hillsborough river, the banks are twenty or more feet wide, and one expert states that the stream above covers an equal space in circuit; while another was of the opinion that it covered a much larger space, and was probably supplied by several lateral streams converging at the point where the reservoir of appellant was located. The depressions and surface indications in a direct line over the lands of the parties, and for some distance further east, indicate a subsurface stream as found in limestone formations. The capacity of this stream at the reservoir, not more than one hundred and seventy-five feet from appellee's excavation, is between two and a half and three millions gallons of water per day, and ⁶⁰⁵ fresh water fish from six to ten inches long were discovered in both excavations. The water, when muddied or colored with analine dyes in appellee's shaft, showed in a very short time in the one below, and from such evidence of a well-defined stream, taken in connection with that of the experts, we do not doubt that it does exist. The rule as to well-defined surface streams must, therefore, be applied to the stream in question. Appellee has the right to the use of this water as much as if it ran upon the surface of the ground. He cannot divert it or pollute it, but he may open up a water supply on his own land so as not to interfere with the legal rights of adjoining owners, and also make a reasonable application of the water, certainly for domestic purposes. We discover no reasonable ob-

jection to the improvement of his own property by the removal of the soil in the depression between the rocks, over the stream, and beautifying the place by opening an accessible way to the water. The mere opening of a space so that the rays of the sun can reach the water below will not of itself be a contamination or an unreasonable use of it. It is true that impurities from surface drainage might get into the stream if unprotected, and thereby pollute it, but this can be guarded against; and it is the duty of appellee to prevent the surface water from overflowing into the opening made by him. There is no sufficient showing that any serious injury has been done, or will be done with proper precaution, to the stream by reason of the opening. The maxim, *Sic utere tuo ut non alienum laedas*, will apply.

We do not see that we can hold, on the showing made, that appellee has diverted the water in the ⁶⁰⁶ stream. According to the testimony of the witness Campbell, superintendent of the company, there was a diversion, but Wynn and Boardman, also connected with the company, testify that if the excavation of appellee, and described in the bill of complaint, is left open and untouched it would not affect the quantity of water in the stream. Appellee denies positively that there has been any substantial diversion of the water, and as the burden of proof rests upon appellant, we cannot reverse the finding of the chancellor as to a diversion of the stream.

We do not think the testimony shows that appellee acted wantonly and maliciously in making the excavation complained of; at least, we are not authorized to reverse a decision on the proofs adverse to appellant on this point. Whether the motive with which the excavation was made, provided it was in the exercise of a legal right, would be a cause for an injunction, we need not consider. We are further satisfied that it is not sufficiently shown that appellee intended to devote his excavation to bathing purposes. There is some testimony that his son stated a bathing pool would be put in the stream in the excavation, and that appellee asserted a right to devote the stream to such uses, but the son is not a party to the present suit, and it does not sufficiently appear that he had any authority to speak for the father. It further appears from the testimony of appellee, not contradicted, that he informed the agents of appellant before the bill was filed that the stream would not be used for bathing purposes under any circumstances. Relief must always be confined to the allegations of the bill, and an examination will show the allegations of wrongdoing against ⁶⁰⁷ appellee are, in substance, that he,

with intent to harass and injure complainant, had purchased his lots and had excavated a large and deep hole on one of them that penetrated to the water of the stream; that the excavation was made wantonly and maliciously for the purpose of injuring complainant by polluting the water and by diminishing its flow, and that he intended to put bathing pools in the stream, if not restrained. The excavation referred to in the bill is the one to which we have confined the opinion so far. After the injunction was modified, appellee made other excavations on his lots, and there is considerable testimony in the record in reference to such excavations. The object in making such excavations, as claimed by appellee, was to obtain rock for paving purposes. There is some allusion to the rock as fertilizer, but there seems to be nothing of value in this. It is shown that the rock can be used for paving streets and roads. Appellee, of course, has the right to take rock out of his own land if he desires, provided that in doing so he does not divert or pollute the stream that flows through the land. It is claimed by appellant, and expert testimony was introduced tending to show, that blasting or excavating near the stream would have the effect to cause the rock in contact with it to fall in and thereby divert the channel of the water. The additional excavations are not shown to be over, or in immediate contact with, the stream, and the character of the communications between them is left in uncertainty. Water was found in such excavations, and it is shown that it has some temporary visible effect upon the water in appellant's reservoir, but whether this is caused by percolations or streams, and if the latter, their character and extent, is left in uncertainty. If ⁶⁰⁸ it is not affirmatively shown that subsurface water is supplied by a definite flowing stream, the presumption is, that it comes from ordinary percolations. The testimony is also indefinite as to the character of blasting done or contemplated by appellee, and our conclusion is, that the decree should be affirmed on the evidence. While appellee has the right to use the stream in the manner indicated, and may also make such legitimate use of his own property as he pleases, he must do so in a manner not to divert or pollute the stream of water flowing through the same.

On the allegations of the bill and the evidence submitted, the decree will be affirmed, and it is so ordered.

WATERCOURSE—WHAT IS.—A watercourse is a living stream with definite banks and channel and a mouth distinguishable from its source, not necessarily running all the time, but fed from more permanent sources than mere surface water. *Chamberlain v. Hemingway*, 63 Conn. 1; 38 Am. St. Rep. 330, and note.

WATERS—RIPARIAN RIGHTS.—Each riparian proprietor is entitled to a reasonable use of a natural stream, and if, by an unreasonable use of the water by an upper proprietor, a lower owner is deprived of his enjoyment of the water, he is entitled to recover damages for the loss: *White v. East Lake Land Co.*, 96 Ga. 415; 51 Am. St. Rep. 141, and note. Water is the common and equal property of every one through whose domain it flows, and the right of each to its use and consumption is the same: *Tennessee etc. R. R. Co. v. Hamilton*, 100 Ala. 252; 46 Am. St. Rep. 48, and note.

WATERS—MEASURE OF APPROPRIATION.—It is the policy of the law that a stream of water shall be appropriated to the extent only that it is put to for some useful and beneficial purpose: *Wimer v. Simmons*, 27 Or. 1; 50 Am. St. Rep. 685; *Fort Morgan Land etc. Co. v. South Platte Ditch Co.*, 18 Col. 1; 36 Am. St. Rep. 259, and note; to the same effect see *Combs v. Agricultural Ditch Co.*, 19 Col. 146; 31 Am. St. Rep. 275, and note.

SURFACE WATERS.—At common law, surface water was regarded as a common enemy, and any landowner had the right to expel it from his own land without regard to the injury thereby occasioned to another proprietor: *Mayor v. Sikes*, 94 Ga. 30; 47 Am. St. Rep. 132, and note; to the same effect see *Missouri Pac. Ry. Co. v. Keyes*, 55 Kan. 205; 49 Am. St. Rep. 249, and note; in *Beatrice v. Leary*, 45 Neb. 149, 48 Am. St. Rep. 546, this rule was held subject to the limitation that every proprietor must so use his property as not to unnecessarily or negligently injure his neighbor, while in *Kansas City etc. R. R. Co. v. Lackey*, 72 Miss. 881; 48 Am. St. Rep. 589, it was held that one could not collect surface water and lawfully discharge it injuriously upon the land of another.

SURFACE WATER FLOWING IN A DEFINED COURSE, in its primitive condition seeking discharge in a neighboring stream, cannot be retarded or interfered with by a landowner to the injury of neighboring proprietors: *Wharton v. Stevens*, 84 Iowa, 107; 35 Am. St. Rep. 296, and note.

WATERS—PERCOLATING—DIVERSION.—Although the course of percolating water is in some definite direction, the owner of the land in which it is found has exclusive jurisdiction over it, and does not violate the rights of another by appropriating to his own use, though the effect is to divert its course from adjacent lands, or to destroy the advantages therefrom previously enjoyed by the adjoining proprietor: *Gould v. Eaton*, 111 Cal. 639; 52 Am. St. Rep. 201, and note. Injury to a subterranean supply of water by the lawful acts of an adjacent owner done on his own premises is, unless the stream is well defined and its existence known or easily discernible, or unless the injury is caused by malice, *damnum absque injuria*: *Williams v. Ladew*, 161 Pa. St. 283; 41 Am. St. Rep. 891, and note. See, also, *Beatrice Gas Co. v. Thomas*, 41 Neb. 662; 43 Am. St. Rep. 711, and especially the note thereto.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

BOYNTON *v.* SPAFFORD.

[162 ILLINOIS, 113.]

LIMITATIONS OF ACTIONS—NEGOTIABLE INSTRUMENTS.—A PAYMENT BY ONE JOINT DEBTOR, or an extension of time procured by him, without the knowledge, assent, or subsequent ratification by the other, does not stop the running of the statute of limitations as to the latter. Hence, such acts, by one joint debtor on a promissory note, will not keep the note alive against his codebtor.

CHATTEL MORTGAGES—PROCEEDS OF SALE—APPLICATION OF, AS A PAYMENT.—If a sheriff, on execution, seizes mortgaged chattels, and the mortgagee replevies them from the sheriff and sells under a power in his mortgage, the mortgagee must, in a proceeding by him to prove up the mortgage debt against the estate of his deceased joint debtor, be charged with the proceeds of the sale, although the action pending, involving the title, is undecided. The money received from such a sale is not in the custody of the law, and should be applied as a payment on the mortgage indebtedness.

Claim presented in the county court by Charles O. Boynton, against the estate of Charles H. Spafford, deceased. This claim was based on two promissory notes, owned and held by Boynton; one for thirteen hundred dollars, dated December 11, 1880, payable one year after date; and the other for thirteen hundred and fifty dollars, dated January 16, 1882, payable fifteen months after date. Each note was signed by both George J. Dettmer and C. H. Spafford. No payments on either note were made by Spafford, nor was the time of payment extended by him. All payments of interest or principal, on either note, were made by Dettmer. Spafford died on September 19, 1892. The county court refused to allow the claim and Boynton appealed to the circuit court, which found in favor of the claimant as to a portion of the claim, and gave him judgment for nine hundred and sixty-six dollars and sixty-five cents. Boynton appealed to the appellate court, which affirmed the judgment.

Frost & McEvoy, for the appellant.

A. D. Early, for the appellee.

¹¹⁵ CRAIG, J. As this court does not pass upon questions of fact on an appeal of this character, the only question presented for our consideration is, whether the court erred in holding or refusing propositions of law.

At the request of the defendant, the court held that the note dated December 11, 1880, for thirteen hundred dollars, due in one year, was barred by the statute of limitations at the time it was filed, June 14, 1893, in the county court, against the estate of Charles H. Spafford, deceased. It was conceded on the trial that the claimant, Charles O. Boynton, was the owner and holder of both of said notes, and also that all payments of interest appearing on the back of said notes, as well as of any payments of principal thereon, were made by George J. Dettmer, and that the indorsements were all in the handwriting of Boynton. The note for thirteen hundred dollars, by its terms, became due on December 11, 1881, and under the statute of limitations it would be barred on the eleventh day of December, 1891, upon the expiration of ten years from the time it was due, unless revived by payments or an extension of the time of payment by the makers. No payments were made by Spafford, nor was the time of payment extended by him, as was found by the appellate court. Under this finding of fact, the note was barred by the statute, so far as Spafford was concerned, unless the payments made by the other joint maker, Dettmer, or the extension of payment procured by him, kept the note alive.

We understand the law to be settled that a payment by one joint debtor or an extension procured by him, without the knowledge or assent or subsequent ratification by the other, will not operate to bind such other joint debtor. This is the doctrine of *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47, and we think it is well sustained by authority. Under the rule announced in the case cited, the court did not err in the proposition complained of.

¹¹⁶ It appears from the record that on or about the twenty-fourth day of June, 1889, George J. Dettmer, one of the makers of the notes, executed to Boynton a chattel mortgage on certain personal property to secure the two notes in controversy and to secure another note which he had executed with other parties. The chattel mortgage was acknowledged and recorded as required by law. Dettmer sold a part of the mortgaged property and paid a portion of the proceeds to Boynton and retained a portion himself. In March, 1890, certain judgments were ob-

tained against Dettmer, upon which executions were issued and placed in the hands of the sheriff. The sheriff, although notified of the mortgage, levied on the mortgaged property. After the levy, Boynton replevied the mortgaged property and sold the same, receiving two thousand dollars as the proceeds of the sale. On the trial, the court held that the money so received should be applied on the three notes described in the mortgage, and this ruling is relied upon as error. The action of replevin has been tried, but no judgment has ever been rendered in the case, and, upon the ground that the title to the mortgaged property has never been settled by a judicial decision, appellant claims that he should not be required to account for the property sold under the mortgage. No evidence of any character was introduced tending to impeach the validity of the mortgage, and, so far as appears from the record before us, it was a valid instrument, and, as Boynton has sold the mortgaged property and received the proceeds, no reason is perceived why he should not apply the money on the mortgage indebtedness.

But it is said the money derived from the sale of the mortgaged property is in the custody of the law, and that it should not be applied as a payment on the mortgage until ordered by the court before whom the action of replevin is pending. If the property had been sold under the order and direction of the court, and the money derived from the sale had been paid into court or held by ¹¹⁷ appellant under the order of the court, subject to such future order as the court might make, there might be much force in the position of appellant. But such was not the case. When the property was levied upon, appellant took it as mortgagee and sold it under the mortgage, disregarding the action pending involving the title. Under such circumstances, we perceive no reason why he should not apply the money on the mortgage indebtedness.

The judgment of the appellate court will be affirmed.

Mr. Justice Cartwright took no part in the decision of this case.

LIMITATIONS OF ACTIONS—NEW PROMISE OR PAYMENT BY ONE OF SEVERAL JOINT DEBTORS.—Some cases hold that a new promise or payment by one joint debtor before the statute of limitations has run forms a new point from which to reckon the limitation, not only as to himself, but as to his codebtors: *Whitaker v. Rice*, 9 Minn. 13; 86 Am. Dec. 78, and note; *Colt v. Tracy*, 8 Conn. 268; 20 Am. Dec. 110; but the weight of authority is, that every joint debtor stands upon his own footing, and that a new promise or part payment by one of several joint debtors, whether made before or after the debt is barred, takes the case out of the statute only as to the party so promising: *Notes to Van Keuren v. Parmelee*, 51 Am.

Dec. 331; *Ellicott v. Nichols*, 48 Am. Dec. 557. The subject is discussed in the monographic note to *Beitz v. Fuller*, 10 Am. Dec. 695-697, on new promise by joint debtor.

PAYMENTS UPON SALE OF MORTGAGED PROPERTY—APPLICATION OF.—A mortgagee, in the absence of an agreement with the mortgagor, is bound to apply moneys realized from the sales of property covered by the mortgage to the mortgage debt, without any direction to that effect from the debtor: *Boyd v. Jones*, 96 Ala. 305; 38 Am. St. Rep. 100; *Montague v. Stelts*, 37 S. C. 200; 34 Am. St. Rep. 736.

PEOPLE v. KIRK.

[162 ILLINOIS, 138.]

WATERS—TITLE TO LAND UNDER NAVIGABLE LAKES. The title to, and right of dominion over, lands covered by Lake Michigan, within the boundaries of the state of Illinois, is held by the state, in its sovereign capacity, in trust for the people of the entire state, for the purposes of navigation and fishery; and the governmental powers of the state over such lands cannot be relinquished or given away.

WATERS—LEGISLATIVE POWER OVER NAVIGABLE LAKES.—The legislature, which represents not only the state, that holds the title to land under navigable lakes, but also the people, for whose use the title is held, possesses the sovereign power of parliament over the waters of such lakes and the submerged lands covered by the same.

COMMON LAW—LEGISLATIVE POWERS.—The powers of the legislature are in no manner limited or restricted by the common law of a particular state, which owes its existence to an act of the legislature.

CONSTITUTIONAL LAW—LEGISLATIVE POWERS.—The legislature of a state is clothed with all powers of legislation that do not conflict with the constitution of the state, or of the United States, and it cannot part with such governmental powers.

CONSTITUTIONAL LAW—UNWISE OR DETRIMENTAL LEGISLATION.—The propriety or impropriety of legislation is a matter of which the legislative department of the state is the sole judge, and, unless an act infringes upon some provision of the state or federal constitution, or attempts to part with governmental power, the courts will not declare it invalid, because it may be unwise or detrimental to the best interests of the state.

WATERS, NAVIGABLE—STATE CONTROL OVER SUBMERGED LANDS.—In this country, each state, subject to the limitations of the federal constitution, has absolute control of all navigable waters, within its limits. The disposition of lands lying under such waters is a question for the several states to determine for themselves; and each state has power to convey lands so submerged, and held by the state, when the conveyance will not impair the remaining public interest in the lands and waters.

WATERS—NAVIGABLE LAKES—LEGISLATIVE RIGHT TO EXTEND DRIVEWAY.—Under the legislation of Illinois, a board of park commissioners is authorized to extend a driveway over and upon the waters of Lake Michigan, where the rights of navigation, of commerce, and of fishery are not taken away, or materially infringed, but remain substantially in the public as before.

WATERS—NAVIGABLE LAKES—LEGISLATIVE RIGHT TO APPROPRIATE SUBMERGED LANDS.—After a board of park commissioners has, under statutory authority, lawfully extended a driveway over and upon the waters of Lake Michigan, the sub-

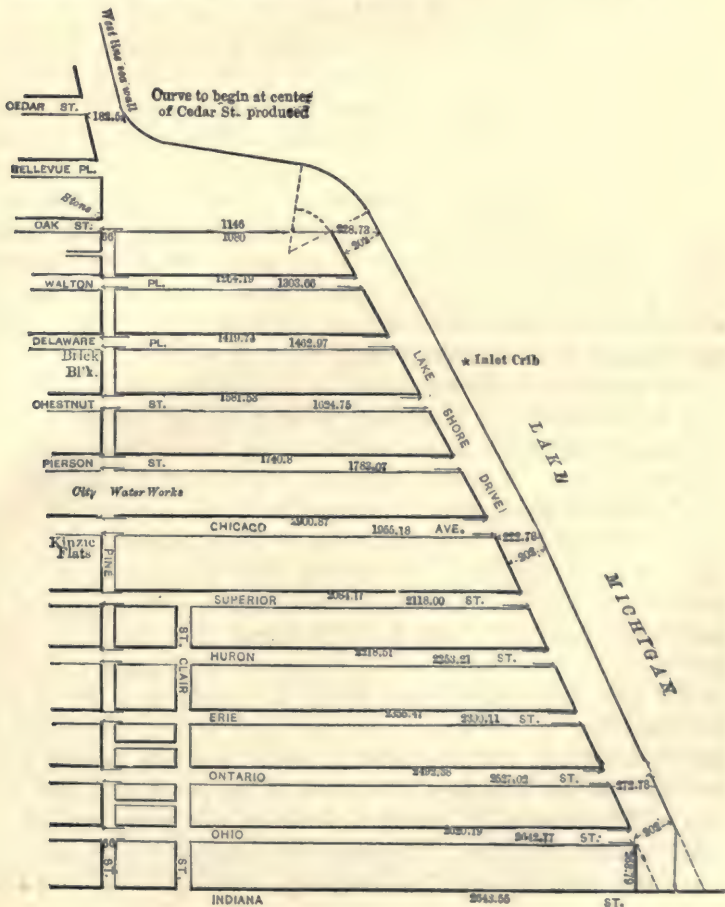
merged lands lying between the shore and the inner line of such extension shall be appropriated, as directed by the statute, to paying for the improvement, and to this end, the board is authorized to sell and convey such lands.

WATERS—NAVIGABLE LAKES—SALE OF SUBMERGED LANDS WITHIN LINE OF IMPROVEMENT.—Under a statute authorizing a board of park commissioners to extend a driveway over a navigable lake, to appropriate the submerged lands lying between the shore and the inner line of such extension toward defraying the cost of the improvement, and to sell and convey such lands to accomplish that end, the board is not bound to sell such lands for cash, but has power to convey them directly to shore owners, who have performed work on the improvement, if the board thereby receives their full value.

STATUTES—EXPRESSION OF SUBJECT IN TITLE.—If the main purpose of an act, as expressed in its title, is to confer power on a board of park commissioners to extend a boulevard or driveway which borders upon any public waters of the state, the constitutional provision, that every act shall embrace but one subject, which shall be expressed in its title, is not violated by provisions in the act to defray the cost of the work, and making an appropriation of the submerged lands between the boulevard, as constructed, and the former shore, for that purpose, as these provisions are germane to the real purpose of the law.

Information filed by the attorney general against the board of commissioners of Lincoln Park and the owners of land adjacent to the shore of Lake Michigan, between Ohio street and Oak street, in the city of Chicago, for the purpose of canceling certain contracts entered into between the park commissioners and such property owners for the extension of the lake shore drive from Oak street to Ohio street, and for the purpose of having removed the filling, breakwaters, and extension of the drive already made under said contracts, which were entered into under an act of the legislature passed in 1889. The contracts were dated June 22, 1891, and provided for the completion of the work called for during 1893. When the act of 1889 was passed, a drive had already been constructed by the park commissioners from the south line of Lincoln Park, at North avenue, to Oak street, over the bed of Lake Michigan a short distance from the shore, and the shore owners had filled out and improved their property to the inner edge of said lake shore drive. Lincoln Park had, in like manner been enlarged by the extension of the lake shore drive north from North avenue over the waters of Lake Michigan, and the filling in of the submerged lands lying between such drive and the original lake shore, excepting such portions thereof as were set apart for a basin to be used by boats. The main features of the act of 1889 appear in the opinion. Under this act, the board located its boulevard or driveway over and upon Lake Michigan in such a manner that 93 acres of submerged land, lying between the shore and the western boundary of the driveway, were reclaimed. The commissioners undertook to build

that part of the driveway lying north of the center line of Oak street extended, and to have the work completed by May 1, 1893. It was also to build the boulevard or driveway between the center line of Pierson street and the center line of Chicago avenue. The board sold the land to shore owners, each one taking that portion lying opposite the land owned by him. The shore owners, in consideration of the sale, agreed to construct the driveway in the lake, and to fill in the submerged lands between the driveway and the shore. In addition to the work thus agreed to be done by the shore owners, they also agreed to pay the commissioners \$100 per lineal foot of their respective frontages on Lake Michigan. The following plat, put in evidence on the trial, shows the location of the boulevard and the lands lying east of Pine street made by its construction:



Maurice T. Moloney, attorney general, T. J. Scofield, M. L. Newell and Louis M. Greeley, for the appellants.

Herrick, Allen & Boyesen, for the appellees, the Newberry Library and Nathaniel K. Fairbank.

Edward O. Brown, for the appellees, the commissioners of Lincoln Park.

Marston, Augur & Tuttle, for the appellee, Arthur L. Farwell

Wilson, Moore & McIlvaine, for the appellees, Andrew H. Green and others, trustees.

Geo. W. Smith, for the appellees, Charles Fitz Simons and others.

¹⁴⁵ CRAIG, J. The first ground relied upon by the people to reverse the judgment of the circuit court has been subdivided in the argument into the three following propositions: 1. That the legislature of the state of Illinois has no power to alienate the submerged lands of Lake Michigan, as proposed by the act of June 4, 1889; 2. That Lake Michigan and its submerged lands (subject to the paramount right of the general government under the commerce clause of the constitution of the United States) can only be disposed of by the state of Illinois in aid of trade, commerce, and the free navigation of the same; ¹⁴⁶ 3. The people of the state having a common right of piscary over all the waters of the lake, the state cannot alienate the submerged lands, or any part thereof, so as to destroy such right of piscary.

The law seems to be well settled in the different states that the title to and dominion over lands covered by tide waters within the boundaries of the several states belong to each state wherein they are located. The state holds the fee in trust for the public. The doctrine established in regard to lands covered by tide waters has also been held applicable to lands bounded by fresh water on our large lakes. As early as 1860 the question arose in this state in regard to the proper construction to be placed on a deed conveying lands with Lake Michigan as a boundary line, and, in disposing of the question, this court, in *Seaman v. Smith*, 24 Ill. 521, held that a grant giving the ocean or a bay as the boundary line, by the common law carries it down to the ordinary high-water mark; that the point at which the tide usually ebbs and flows is the boundary of a grant to the shore, and that the rule which governed in regard to lands on tide water applied to lands on our large lakes. It is there said (page 525): "A fair and reasonable construction of the language, 'running to the lake and

with the lake,' would mean to that place where its outer edge is usually found. . . . We are, therefore, clearly of the opinion that the line at which the water usually stands when free from disturbing causes is the boundary of land in a conveyance calling for the lake as a line."

Aside from the fact that the waters of our large lakes are fresh, and there is no ebb and flow of the tide, they do not differ materially from the open sea, and no reason is perceived why one rule should be applied to lands bounded by the sea and a different rule applied to lands bordering on our great lakes. Where a navigable river is called for as a boundary line, the grantee will take to the thread of the current of the stream. But the rule that ¹⁴⁷ governs our rivers has no application to our great lakes. The supreme court of the United States, in *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387, announces the same doctrine laid down by this court. It is there said: "We hold that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the great lakes applies which obtains at the common law as to the dominion and sovereignty over, and ownership of lands under, tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other and subject to the same trusts and limitations." It is true that the state holding the title to the lands covered by the waters of Lake Michigan does not hold such title subject to barter and sale, as does the United States its public lands; but the state holds the title in trust, in its sovereign capacity, for the people of the entire state, for the purposes of navigation and fishery. The governmental powers of the state over these lands cannot be relinquished or given away. The trust imposed upon the state must be kept and faithfully observed.

But did the state repudiate the trust and transcend its powers on the enactment of the act of June 4, 1889, which authorized the board of park commissioners to extend its boulevard or driveway over and upon the bed of Lake Michigan, and sell and convey the submerged lands which might be reclaimed in extending the driveway in the lake? The extension authorized, as construed by the board of park commissioners in making the improvement, is not a matter of small moment, but, on the other hand, owing to the large amount of territory involved and the large interests of the public in the waters of the lake and property owners on the lake, the proposed extension is so far reaching in its effect as to present questions of great importance. The distances of the outer breakwater from the shore line of the lake as it existed in

1888 are as follows: At the south line of Oak street 1340 feet; at the ¹⁴⁸ north line of Pierson street 1250 feet; at the center of Chicago avenue 1370 feet; at the north line of Ohio street 1330 feet; at the north line of Indiana street 850 feet. The entire area reclaimed or to be reclaimed, from Oak street to Indiana street, taking the shore line of 1888 and the outer face of the breakwater as outer and inner boundaries, is 93.14 acres, of which 31 acres lie between the south line of Oak street and the north line of Pierson street, 10.44 acres between the north line of Pierson street and the center of Chicago avenue, and 51.70 acres between the center of Chicago avenue and the north line of Indiana street. This large tract of land, containing 93 acres, held by the state in trust for the people, is taken and transferred to the adjacent shore owners, to be by them used for such purpose as they may think best, for their own personal interest.

If the question of policy were one to be considered by the court in the decision of this case, we would have no hesitation in condemning the action of the legislature in passing the act as unwise and detrimental to the best interests of the people of the state. But our legislature is chosen by the people and clothed and intrusted with power to enact laws for the people, and the propriety or impropriety of legislation is a matter solely with the legislative department of the state, and, unless an act passed by the legislature infringes upon some provision of our organic law, it is not the province of the courts to declare such legislation invalid. The question before us is not one of policy or expediency, but one of power. Was the legislature clothed with power to convey reclaimed lands which were originally covered by the waters of Lake Michigan?

In *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387, in speaking on this question of power, the court said: "The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they ¹⁴⁹ are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining." In the case cited, the court recognizes the power of the state to convey parcels of the lands held by the state under navigable waters when such conveyance will not impair the public interest in the lands and waters remaining.

In *Weber v. Board of Harbor Commrs.*, 18 Wall. 57, where the

question arose in regard to the conveyance of certain land covered by the waters of the bay of San Francisco, the court, among other things, said: "Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government."

In *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 688, the question arose in regard to the validity of an act of the state of New Jersey, under which certain companies paid the state a certain sum of money for the privilege of filling up and reclaiming for their own use submerged land under public waters of the state in front of lands owned by said parties. The act of the legislature was sustained, and the court, among other things, said: "In the examination of the effect to be given to the riparian laws of the state of New Jersey by the act of April 11, 1864, in connection with the supplementary act of March 31, 1869, it is to borne in mind that the lands below high-water mark, constituting the shores and submerged ¹⁵⁰ lands of the navigable waters of the state, were, according to its laws, the property of the state as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the constitution upon Congress to regulate foreign and interstate commerce."

In *Shively v. Bowlby*, 152 U. S. 9, the correctness of the rulings of the supreme court of Oregon arose. The rulings, as given in the report of the case, were as follows: "2. The supreme court of Oregon decided that said state was the absolute owner of all rights in front of the high land granted by the United States to said grantee, with said Columbia river as a boundary, below the meander line, out to the channel of said Columbia river, to the exclusion of all rights of the grantee aforesaid of the United States under the said act of Congress of September 27, 1850; 3. The supreme court of Oregon decided that said state had the absolute power to dispose of the soil of said river, and of all wharfage rights in front of the high land granted by the United States to said grantee, the predecessor of the plaintiff in

error, with the said Columbia river as a boundary, to a private person for a private beneficial use, and had so disposed of the same to the defendants in error." The court, after reviewing many decisions of different courts in regard to the control of the state over submerged lands, said: "The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another."

¹⁵¹ In *Barney v. Keokuk*, 94 U. S. 324, the disposition of submerged lands was held to be a question for the several states to determine for themselves, and, if they chose to resign to the riparian proprietor rights which properly belong to them, it was not for others to object.

Under the authorities, the law seems to be well settled that the legislature was clothed with power to enact a law authorizing the extension of the driveway over and upon the waters of the lake, so long as the extension did not interfere with navigation, commerce, and the right of fishery upon the lake, and we see no reason why the submerged lands reclaimed by the extension of the driveway may not, as provided in the act, be appropriated for the payment of the improvement. The legislature represents not only the state, which holds the title which at common law was vested in the crown, but the legislature also represents the public, for whose benefit the title is held, and in that capacity it possesses the sovereign power of parliament over the waters of the lake and the submerged lands covered by the waters. In providing for the construction of the drive over and upon the shoal waters of the lake, and placing the control in the hands of the park commissioners for park purposes, no attempt has been made by the legislature to relinquish its governmental powers or place them beyond the power of future legislation. The rights of navigation and of fishery remain substantially in the public as before. If these rights were taken away or materially infringed upon by the act, or the action of the commissioners under the act, the action of the commissioners could not be sustained, as the legislature has no power to dispose of the waters of Lake Michigan, or the lands under the waters, contrary to the trust under which they are held for the people.

But it is said in argument that the king of Great Britain did not, at common law, have the power to dispose of the title to lands covered by navigable waters, and ¹⁵² as the common law has been adopted in this state, the legislature has no such power. The common law in this state owes its existence to an act of the legislature, and it is subject to alteration, modification, or absolute repeal by the legislature at any time it may choose. The powers of the legislature are in no manner limited or restricted by the common law. The first section of the fourth article of our constitution confers the legislative power of the state on the general assembly, and the general assembly is clothed with all power of legislation in regard to all matters pertaining to the state, except so far as it is prohibited by the constitution of the state or of the United States. This question is discussed at considerable length in *Longdon v. New York City*, 93 N. Y. 155, where it is said: "From the earliest times in England, the law has vested the title to, and the control over, the navigable waters therein in the crown and parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership of dry land, was regarded as *jus privatum*, and was vested in the crown, but the right to use and control both the land and water was deemed a *jus publicum*, and was vested in parliament. The crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters in the interest of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by parliament: *Commonwealth v. Alger*, 7 Cush. 53; *People v. New York etc. Ferry Co.*, 68 N. Y. 71. . . . In this country each state, subject to limitations to be found in the federal constitution, has the absolute control of all the navigable waters within its limits. As said by the chancellor in *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89, the state, through its legislature, 'may exercise the same powers which, previous to the Revolution, could have been exercised by the king alone, or by him in conjunction with parliament, subject ¹⁵³ only to those restrictions which have been imposed by the constitutions of the state and the United States': See, also, *Clark v. Providence*, 16 R. I. 338, and *Mowry v. Providence*, 16 R. I. 422, where the same doctrine is announced. In the latter case it is said: "In the case of *Clark v. Providence*, 16 R. I. 337, this court held the act to be constitutional. We held in that case that the state, or general assembly as the organ of the state, is the representative of the

public or people as to the public right, and as such has power to release the right, the general assembly having in the matter the authority, not simply of the English crown, but of both crown and parliament, except so far as it has been limited by the constitution of the state or by the constitution and laws of the United States."

There is here no complaint on behalf of the federal government, or of any of its officers, that the action of the legislature, and the extension of the driveway, in pursuance of the act, upon the waters of the lake, will in any manner interfere with commerce. The only complaint comes from the attorney general, acting for and on behalf of the people. The people, however, have spoken through their representatives, who were clothed by them with full power to act. If the legislation is unwise or detrimental to the best interests of the state, the people cannot complain, because they alone are to blame in selecting men to represent them who were unfit to discharge the duties with which they were clothed. The remedy is in the hands of the people by electing competent and honest men to represent them in the legislature. When the people have chosen their representatives, clothed with legislative power, they cannot complain of the action of their chosen representatives, so long as the legislation does not conflict with the organic law of the state or of the United States, or so long as they do not undertake to part with governmental power.

154 But it is said, if the legislature has the power to dispose of the submerged lands in question under the pretense of constructing a boulevard 200 feet wide, why could it not give away any indefinite quantity of the submerged lands of the lake? It is not claimed here that the legislature has the power to dispose of submerged lands of the lake in any case where the disposition would materially interfere with the navigation of the lake for the purposes of commerce and the right of fishery, and it may be conceded that such power is governmental and does not exist. Indeed, the first section of the act in question in direct terms prohibits an extension of the boulevard in such manner as to interfere with the navigation of the lake for the purpose of commerce. Upon looking into the evidence, it will be found that the waters of the lake west of the driveway as constructed were not adapted to navigation, and were not used to any great extent for that purpose. The learned judge before whom this case was tried, in speaking of the evidence on this branch of the case, said: "It is true that in some cases tugs, small craft for carrying passengers

“small way to and from the government breakwater and to other points near this drive along the lake, small sailing yachts and boats for pleasure, have, from time to time, passed over these waters, and that a very considerable portion of these waters were, before being filled, deep enough to be navigated by small vessels actually engaged in trade and commerce between the port of Chicago and other ports on the lake; but it is also a further fact, shown by the evidence, that all such small vessels are a very insignificant proportion of the whole number of vessels engaged in trade and commerce to and from the port of Chicago, and that these small vessels never have passed over these waters, because, in going to and from the harbor of Chicago, these waters are outside of the usual course, and are considered dangerous by sailors on the lake. Only a very small portion of all the vessels arriving ¹⁵⁵ at and departing from Chicago ever come within the government breakwater off this shore, and when they do they invariably pass quite near the breakwater, which is about 1,500 feet easterly from the easterly line of said proposed drive, in order to avoid shoal water.” From the foregoing it is apparent that the construction of the boulevard authorized by the act will not materially interfere with or obstruct the navigation of the lake.

But it is said the act is invalid because it conflicts with that provision of the constitution which provides that every act shall embrace but one subject, and that shall be expressed in its title. The title of the act is as follows: “An act to enable park commissioners, having control of any boulevard or driveway bordering upon any public waters of this state, to extend the same.” Section 1 provides for the extension of such driveway over and upon the bed of such public waters. Section 2 provides for an estimate of cost and the consent of a certain amount of the frontage abutting on such waters. Section 3 provides that the board may contract for the construction of such extension, and that the submerged lands lying between the shore and the inner line of such extension shall be appropriated to the purpose of defraying the cost of such extension, and to that end the board are authorized to sell and convey such lands, etc. Upon examination, it will be found that the act has but one general object, and that is fairly indicated by the title, and under the rule laid down in *People v. Nelson*, 133 Ill. 565, we do not regard it in conflict with the constitution. The act conferred power on the board of park commissioners to extend a boulevard over and upon the waters of Lake Michigan. This was the main purpose of the act. But, in order to facilitate the work, it was proper to provide means to

defray the cost of the work in the same act. In the prosecution of the work, it was obvious that there would be submerged lands between the boulevard as constructed and the former shore, and these lands were by ¹⁵⁶ the act appropriated to defray the cost of the improvement. These provisions are, as we think, germane to the real purpose of the law as expressed in the title: See *Johnson v. People*, 83 Ill. 431; *Larned v. Tiernan*, 110 Ill. 173.

It is also claimed that the location of the boulevard is not an extension of the lake shore drive, within the meaning of the statute. The lake shore drive, as constructed by the Lincoln Park commissioners at the time the act of 1889 was passed by the legislature, commenced at North avenue and extended along Lake Michigan south to Oak street, where it connected with Pine street. Under an ordinance of the city of Chicago, Pine street, from Oak street south, had been turned over to the Lincoln Park commissioners as a boulevard. The extension of the boulevard as located by the commissioners of Lincoln Park leaves the old lake shore drive at its terminus at the south and extends east a certain distance, and then turns to the southeast, as shown by the map put in evidence. The argument is, that the boulevard as laid out is not an extension of the original lake shore drive because not joined to the end of such drive and does not run in the same direction as the old drive. The act of 1889 did not attempt to locate the extension of the driveway. It merely provided it should be over and upon Lake Michigan, thus leaving a large discretion in the hands of the commissioners, and in the exercise of the discretion vested in them there has been no such departure from the act as to render the action of the commissioners nugatory.

Section 3 of the act contains the following provision: "In all cases where any boulevard or driveway is extended under the provisions hereof, the submerged lands lying between the shore of such public waters and the inner line of the extension of such boulevard or driveway shall be appropriated by the board of park commissioners to the purpose of defraying the cost of such extension, and to that end such board of park commissioners are authorized ¹⁵⁷ to sell and convey such submerged lands in fee simple, by deeds duly executed." Under this statute, it is claimed that the park commissioners were only authorized to sell the submerged lands for cash, and that the contracts entered into by the park commissioners with the shore owners, under which the lands were to be conveyed to the shore owners upon the completion of the work called for by the contracts and upon the pay-

ment of \$100 per foot, were not authorized by the statute. Under the statute *supra*, the submerged lands lying between the shore of the lake and the inner line of the boulevard to be constructed were placed in the hands of the commissioners, to be used in payment of the cost of the improvement. If the park commissioners had sold the submerged lands to the shore owners for cash and used the money to defray the cost of the improvement, it is not suggested that the statute would have been violated. If the work agreed to be performed by the shore owners was done as cheaply as if they had paid cash, and if the price given for the submerged lands was its full market value, in principle it made no difference whether or not the lands were sold for all cash or a part cash and a part in making the improvement. These submerged lands were set apart to be used in payment of the cost of the improvement, and until it has been shown that they have been disposed of in such a way that the commissioners have not received their full value on the improvement no one can properly object.

The right of a shore owner on Lake Michigan to fill up portions of the lake and thus extend his lands does not arise in this case and that question will not be considered.

The judgment of the circuit court will be affirmed.

Of the Title to Land Covered by Tidal and Other Navigable Waters.*

This subject has already been to some extent considered in the notes in this series to which reference is made at the bottom of this page, and the subjects treated in those notes will not be again discussed, except in so far as may be necessary in the effort to reconcile the rules of law stated in them and other rules which apply specially to the topic here under consideration. In the notes in reference to waters as boundaries, it was shown that, in a few of the states the title of persons owning lands bordering upon navigable rivers was deemed to extend to the thread of the stream, while the general rule is, with respect to navigable streams and to tide waters generally, that the line of private proprietorship extends only to ordinary high-water mark. Where the former rule prevails, the title to the soil of the beds of navigable streams is vested in the adjacent riparian proprietors, though doubtless subject to certain trusts in favor of the public, in which is included the right of the public to the use of the streams themselves for the purposes of commerce and of fishing. In the note upon the subject of the rights of landowners in navigable waters fronting upon their lands, we have shown that such owners, even where they are not deemed to possess any title to the lands under the waters, are, nevertheless, entitled to certain

***REFERENCE TO MONOGRAPHIC NOTES.**

Waters as boundary lines: Note to *Allen v. Weber*, 27 Am. St. Rep. 56-63; Note to *Arnold v. Mundy*, 10 Am. Dec. 385-389.

Rights of landowners in navigable waters fronting their lands, and in the lands under such waters: Note to *Miller v. Mendenhall*, 19 Am. St. Rep. 226-235.

valuable privileges, such as the right of access to the navigable portions of the waters, and the right to erect and maintain wharves in front of their lands out to the point of navigability. Various conflicts of interest may arise between riparian proprietors and persons who have received grants of lands lying between the lands of such proprietors and the point of navigability. In many of the states are statutes authorizing the sale of tide lands, and even of submerged lands which are not covered and uncovered by the ebb and flow of the tides and across which owners of adjacent uplands may wish to go for purposes of ingress and egress to and from the navigable waters, and many questions may arise as to the extent to which this right of ingress and egress remains after the title to lands covered by water has vested in a private proprietor.

At the common law, the title to lands covered by navigable waters and constituting part of the realm was vested in the crown, though the subjects had certain rights therein, such, for instance, as that of taking fish: *Warren v. Matthews*, 6 Mod. 73. As to lands lying along the shore, there is some difference of opinion concerning the jurisdiction and proprietorship of the sovereign. In the bays and arms of the sea, and in that portion of the sea itself lying within three miles of the shore, the same jurisdiction was exercised by the crown: *Direct U. S. C. Co. v. Anglo-American T. Co.*, L. R. 2 App. Cas. 394; *Queen v. Keyn*, L. R. 2 Ex. Div. 63; though probably no attempt was ever made to vest in private proprietorship lands lying under the sea, and situate any considerable distance from the shore, though within a marine league thereof. As to lands constituting part of the country proper, but covered by waters, such as beds of navigable rivers and of other waters in which the tide ebbed and flowed, including landlocked bays and perhaps those arms of the ocean across which it is possible to see with the unaided human eye, the title thereto, subject to certain trusts in favor of the public, was vested by the law of England in its sovereign: *Commonwealth v. Manchester*, 152 Mass. 230; 23 Am. St. Rep. 824; *Manchester v. Massachusetts*, 139 U. S. 740.

"By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore, the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the king as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit." "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage: *Fitzwalter's case*, 2 Keb. 242; 1 Mod. 105; 3 *Shepherd's Abridgment*, 97; *Comyns' Digest*, tit. Navigation, A, B; *Bacon's*

Abridgment, tit. Prerogative, B; *The King v. Smith*, 2 Doug. 441; *Attorney General v. Parmeter*, 10 Price, 378, 400, 411, 412, 464; *Attorney General v. Chambers*, 4 De Gex, M. & G. 206, and 4 De Gex & J. 55; *Malcomson v. O'Dea*, 10 H. L. Cas. 591, 618, 623; *Attorney General v. Emerson* (1891), L. R. App. Cas. 649; and that this title, *jus privatum*, whether in the king or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing: *Attorney General v. Parmeter*, 10 Price, 378, 400, 411, 412, 464; *Attorney General v. Johnson*, 2 Wils. Ch. 87, 101-103; *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 192. The same law has been declared by the house of lords to prevail in Scotland: *Smith v. Stair*, 6 Bell, 487; *Lord Advocate v. Hamilton*, 1 Macq. 46, 49. It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention: *Lord Hale*, in *Hargrave's Law Tracts*, 17, 18, 27; *Somerset v. Fogwell*, 5 Barn. & C. 875, 885; 8 Dowl. & R. 747, 755; *Smith v. Stair*, 6 Bell, 487; *United States v. Pacheco*, 2 Wall. 587. By the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished, or seized and rented for his benefit, if it is not a nuisance to navigation: *Lord Hale*, in *Hargrave's Law Tracts*, 85; *Mitford's Pleading*, 4th ed., 145; *Blundell v. Catterall*, 5 Barn. & Ald. 268, 298, 305; *Attorney General v. Richards*, 2 Anstr. 603, 616; *Attorney General v. Parmeter*, 10 Price, 378, 411, 464; *Attorney General v. Terry*, L. R. 9 Ch. 425, 429, note; *Weber v. Harbor Commrs.*, 18 Wall. 57, 65; *Barney v. Keokuk*, 94 U. S. 324, 337"; *Shively v. Bowlby*, 152 U. S. 1, 13.

Upon the establishment of the independence of the United States, the title of lands, which had before that time been vested in the sovereign of England, ceased to be so vested. It passed from that sovereign to the power which became sovereign in this country. That power was not, however, with respect to the lands here under consideration, the government of the United States, but was the states themselves, each of which has, as to such lands within its boundaries, become vested with the proprietary right theretofore vested in the crown of England, subject to the same trusts in favor of the public to which that sovereign was subject: *Miller v. Mendenhall*, 43 Minn. 95; 19 Am. St. Rep. 219; *Wendell v. Jackson*, 8 Wend. 183; 22 Am. Dec. 635; *Barney v. Keokuk*, 94 U. S. 324; *Hoboken v. Pennsylvania etc. Co.*, 124 U. S. 656; *Illinois etc. Co. v. Illinois*, 147 U. S. 387; *Knight v. United Land Assn.*, 142 U. S. 161; *Martin v. Waddell*, 16 Pet. 367. In some instances, even before the Revolution, the title of the crown had terminated in these lands by virtue of grants of them to private proprietors, and this seems to have been true as to all of the state of Maryland: *United States v. Morris*, 23 Wash. L. Rep. 754; 24 Wash. L. Rep. 168. The respective states existing at the time of the Revolution and of the adoption of the constitution of the United States reserved to themselves their proprietary interests in these lands within their respective jurisdictions, and in the waters above them, except in so far as their title and right of control may have been impaired by the grant to

the Congress of the United States of the right to regulate commerce. The states since admitted into the Union were admitted upon the same footing as the original states, and hence have the same title to the lands within their limits and which are covered by tidal and other navigable waters: *People v. Kirk*, 162 Ill. 138; ante, p. 277; *Hobson v. Monteith*, 15 Or. 251; *Pollard v. Hagan*, 3 How. 212; *Shively v. Bowlby*, 152 U. S. 1; *Weber v. Board of Harbor Commrs.*, 18 Wall. 57; *Knight v. United States Land Assn.*, 142 U. S. 161. This remains true though all of the territory constituting the new state was acquired by the United States from another sovereign nation either by purchase or by conquest, or the United States became entitled thereto by right of discovery: *Knight v. United States Land Assn.*, 142 U. S. 161; *Shively v. Bowlby*, 152 U. S. 50. It therefore necessarily follows that if, as between two litigants, each claiming title to a tract of land of the class here under consideration, one holds by a grant from the United States and the other by a grant from a state, the latter must prevail: *Goodtitle v. Kibbe*, 9 How. 471; *Doe v. Beebe*, 13 How. 26; unless the grant by the former was before the admission of the state into the Union and while the national authority remained the controlling one within the territory.

By the common law, all tidal waters, and none other, were deemed navigable, and all waters in which the influence of the tide was ordinarily perceptible were deemed tidal, and therefore navigable, whether they were salt or not, but this rule did not extend to waters which were affected and held back by the tide in extraordinary circumstances only: *Reece v. Miller*, L. R. 8 Q. B. Div. 630.

In the United States, waters, though not tidal, are deemed navigable if they are, in fact, adapted to the ordinary purposes of navigation, and hence the great inland lakes which are navigable in fact are subject to the rules herein stated, and the respective states within whose boundaries they are have the same title in their waters and in the underlying lands which they have in navigable rivers or navigable tidal waters: *The Genesee Chief v. Fitzhugh*, 12 How. 443. "It is the settled law of this country that the ownership of, and dominion and sovereignty over, lands covered by tide waters, within the limits of the several states, belong to the respective states in which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation as far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has often been announced by this court, and is not questioned by counsel of any of the parties: *Pollard v. Hagan*, 3 How. 212; *Weber v. Harbor Commrs.*, 18 Wall. 57. The same doctrine is, in this country, held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects, they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over, and ownership by, the state of lands covered by tide waters that is not equally applica-

ble to its ownership of, and dominion and sovereignty over, lands covered by the fresh waters of these lakes": Illinois etc. Ry. v. Illinois, 146 U. S. 435.

For the purposes of fishery, at least, the title of each state seems to extend at least one marine league from the coast and over bays wholly within the territory, the headlands of which are not more than six geographic miles apart. "More extensive rights in this respect have been and are now claimed by some nations, but, so far as we are aware, all nations concede to each other the right to control the fisheries within a marine league of the coast and in bays within the territory, the headlands of which are not more than two marine leagues apart"; and this right, which is thus stated to be claimed and conceded by nations, vests in the several states with respect to the waters within their jurisdiction, and gives them the power to regulate and control the fisheries thereof: Commonwealth v. Manchester, 152 Mass. 230; 23 Am. St. Rep. 824; Manchester v. Massachusetts, 139 U. S. 240.

Trust upon which the Title is Held.—Neither the title of the crown of England nor that of the states as its successors in interest to the lands covered by tidal and other navigable waters is ever spoken of as an absolute title. On the contrary, it is generally described as being held in trust for the benefit of the public. It is difficult to state the character of this trust, or, perhaps, more accurately speaking, it is difficult to determine the extent to which the trust is subject to legislative action and to grants made by authority of the state. In the absence of such a grant, the public has certain rights which are subject to legislative regulation, but not, as a general rule, to legislative destruction. The chief of these are the right of fishery, the right of access to navigable waters, and the right to use them for the purposes of navigation and commerce.

Fishing Trust in Favor of.—With respect to the interest of the state in lands covered by navigable waters, and its right to control the fisheries thereof, it has been said: "But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish: Martin v. Waddell, 16 Port. 367; Den v. Jersey Co., 15 How. 426 Corfield v. Coryell, 4 Wash. C. C. 376; Fleet v. Hageman, 14 Wend. 42; Arnold v. Munday, 1 Halst. 1; 10 Am. Dec. 356; Parker v. Cutler etc. Corp., 20 Me. 353; 37 Am. Dec. 56; Peck v. Lockwood, 5 Day, 22; Weston v. Sampson, 8 Cush. 347; 54 Am. Dec. 764. The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held: Vattel's Law of Nations, c. 20, sec. 246; Corfield v. Coryell, 4 Wash. C. C. 376. It has been exercised by many of the states: See Angell on Tide Waters, 145, 156, 170, 192, 193"; Smith v. Maryland, 18 How. 71, 75; Commonwealth v. Manchester, 152 Mass. 230; 23 Am. St. Rep. 824; Manchester v. Mas-

sachusetts, 139 U. S. 240. The general subject of the public right to fish in navigable waters, and the control of the states thereover, has already been considered in former notes in this series: *Notes to Commonwealth v. Manchester*, 23 Am. St. Rep. 837-841; *Sterling v. Jackson*, 13 Am. St. Rep. 416-420, and *Mather v. Chapman*, 16 Am. Rep. 51-68.

Trust in Favor of Riparian Owners.—As we have shown elsewhere, there exists a right in favor of every riparian owner whose lands front upon navigable waters of access thereto, and "for that purpose to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the public," and where the water of the shore is too shoal to be navigable, there is a right to erect wharves, piers, and landing places extending across the shore waters to the point of navigability: *Illinois etc. Ry. v. Illinois*, 146 U. S. 446; *Dutton v. Strong*, 1 Black, 23; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Prior v. Swartz*, 62 Conn. 132; 36 Am. St. Rep. 333; *Miller v. Mendenhall*, 43 Minn. 95; 19 Am. St. Rep. 219, and note 226-235. These, and, perhaps, other decisions (*McLennan v. Prentice*, 85 Wis. 427) tend to support the conclusion that riparian proprietors have such an interest in the navigable waters in front of their lands as is not subject to divestment by authority of the state, and particularly with the respect to the right of access to the point of navigability of such waters, together with the right to construct piers, wharves, and landing places out to that point. The more recent decisions, however, characterize the earlier expressions of opinion to this effect as dicta, and maintain the right of the state in this respect to the control of navigable waters, and show that all that was meant by the earlier decisions was, that in the absence of some regulation on the part of the state to the contrary, it was not unlawful for a riparian proprietor to construct and maintain wharves out to this point of navigability. It is, therefore, now settled that the state may deprive riparian proprietors of this right of access to navigable waters in front of their lands, either by prohibiting the construction and maintenance of wharves and landing places within navigable waters, or by granting the lands under such waters to other persons, and thus vesting it in private proprietorship: *Bowlby v. Shively*, 22 Or. 410; *Eisenbach v. Hatfield*, 2 Wash. 236; *Harbor Line Commrs. v. State*, 2 Wash. 530; *Hoboken v. Pennsylvania Ry. Co.*, 124 U. S. 656; *Shively v. Bowlby*, 152 U. S. 1.

The Trust in Favor of Navigation and Commerce, existing in the navigable waters of a state, is one which it is the duty of each state to respect, and which it is beyond its power to substantially impair; and grants and other acts upon its part, which necessarily destroy commerce and navigation, may be likened to a conveyance made by a trustee in contravention of an express trust, when called in question in those states whose statutes declare such transfers to be void.

"The power vested in the general government to regulate interstate and foreign commerce, involves the control of the waters of the United States, which are navigable in fact, so far as may be necessary to insure their free navigation, when either by themselves, or in connection with other waters, they form a continuous channel

for commerce among the states or with foreign countries": *Escanaba Co. v. Chicago*, 107 U. S. 682; *Illinois Cent. R. R. v. Illinois*, 146 U. S. 387. In the case last cited it was said: "That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters, and in commerce over them, may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state, over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which, when occupied, do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revo-

cation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government, the use of such powers may, for a limited period, be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers, and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state": Illinois Cent. R. R. v. Illinois, 146 U. S. 387.

This decision has sometimes been understood as prohibiting the alienation of the lands of the state covered by navigable waters, but rightfully construed, we think it goes no farther than to maintain that such an alienation cannot be permitted to destroy the trust existing in favor of commerce and navigation, at least, in those cases in which the state, acting by its legislature, has declared that its duty, as a trustee of this trust, requires it to resume possession of property theretofore granted by it, in order that such property may be devoted to the purposes of commerce or navigation. A very large portion of the navigable waters of every state may be withdrawn from use for navigation by the vesting in private proprietorship of the lands thereunder, and the waters remaining may yet be sufficient for all the purposes of commerce and navigation. Portions of such waters, and the underlying lands, may be vested in private ownership for the express purpose of promoting commerce and navigation, as where shoal waters out to the point of navigability are granted to persons who will fill them up to that point, and by this, and other means, make more convenient the loading and unloading of sea-going vessels. As to lands which are covered and uncovered by the ordinary ebb and flow of the tides, as well as to other lands lying between the shore and the point of navigability, and which are susceptible of reclamation, so as to be devoted to commercial and agricultural purposes, it has always been the custom of the various states to authorize their sale, or to otherwise dispose of them, and such grants, made by authority of the state, have never, so far as we are aware, been held invalid.

We have shown as between grants and conveyances of these lands made by the state, and those made by the United States after the state had been admitted into the Union, the former must prevail, for the simple reason that they are made by the owner, while the latter are made by a grantor having no proprietary interest in the property granted. When, however, these lands are part of a territory not yet admitted into the Union, the United States is the paramount, or, more accurately speaking, the only, authority having any right of control over them, and may therefore make grants thereof which will be as effectual as are grants made by a state after it obtains control over them; and the grant so made by the United States can-

not be revoked or impaired by any action which may be made subsequently by the state after its admission into the Union: *Shively v. Bowlby*, 152 U. S. 47; *Goodtitle v. Kibbe*, 9 How. 471.

Alienation.—There are, indeed, decisions in the state courts, asserting in general terms not only that the state holds the navigable waters within its limits, and the lands under them in trust for the benefit of the public, but further, that it cannot make any grant thereof to a private person, and hence it was said that a grant of the right to take the soil from the bed of a navigable river could not be sustained: *Goodwin v. Thompson*, 15 Lea, 209; 54 Am. Rep. 410; but, in this case, the state had not made any grant of this character, and the opinion of the court was merely a dictum. Other cases may be cited also containing the general statement that the beds of navigable rivers are not subject to private grant: *Home v. Richards*, 4 Call, 441; 2 Am. Dec. 574. An examination of these cases will show that in most, if not in all, of them, the question actually before the court was whether or not laws and grants in which lands of this character are not specifically mentioned should be deemed applicable to them; and the cases very properly affirm: 1. That grants and other conveyances of lands bordering upon navigable waters should be construed, in the absence of express language to the contrary, as extending only to the line of ordinary high water mark; and 2. That statutes purporting to authorize the disposition of public lands, whether of a state or of the nation, without specifically mentioning tidal and other lands covered by navigable waters, do not extend to them. These propositions are no longer disputed, except in those states wherein the fee of lands, fronting upon navigable waters, is held to be vested in riparian proprietors: *Baer v. Moran etc. Co.*, 2 Wash. 608; *Hardin v. Jordan*, 140 U. S. 371; *Gould v. Hudson River R. R.*, 6 N. Y. 522. It therefore devolves upon a person claiming title, whether from the state or the United States, to prove that the officers executing the grant were authorized to do so, and evidence to the effect that such officers were authorized to sell or dispose of public lands merely is not sufficient. Authority to sell lands of this particular class must be shown: *Concord Mfg. Co. v. Robertson*, 66 N. H. 1; *Collins v. Benbury*, 5 Ired. 118; 42 Am. Dec. 155; *Eisenbach v. Hatfield*, 2 Wash. 236; *Baer v. Moran etc. Co.*, 2 Wash. 608; *Mann v. Tacoma Land Co.*, 153 U. S. 283.

While a grant of lands made by a state will not be construed so as to include lands covered by navigable waters, unless they are clearly embraced within the descriptive terms of the grant, and while an authority given to a public officer to dispose of public lands will ordinarily be construed as not extending to the class of lands here under consideration, we think there is no longer doubt that each state has full authority over all these lands within its limits, subject only to the power of Congress to regulate commerce, and subject to the further qualification that no disposition of such lands shall necessarily prohibit, or substantially impair, the trust existing in favor of commerce and navigation, and therefore that the state may authorize the disposition of these lands, either by setting them aside for special purposes, or by conveying them to private proprietors to be held and transferred by them as other lands may be held and transferred of which they are seised in fee: *Stevens v. Paterson*

etc. Ry., 34 N. J. L. 532; 3 Am. Rep. 269; *Langdon v. Mayor*, 93 N. Y. 129; *Hogg v. Beerman*, 41 Ohio St. 81; 52 Am. Rep. 71; *Eisenbach v. Hatfield*, 2 Wash. 236; *Delaplaine v. Railway Co.*, 42 Wis. 225; 24 Am. Rep. 386. A railway company may therefore be authorized to take possession of, hold, and use lands covered by navigable waters and required for the purposes of its road: *Saunders v. New York etc. Ry. Co.*, 145 N. Y. 75; 43 Am. St. Rep. 729; a public board may be authorized to extend and maintain a driveway over and upon the waters of a navigable lake: *People v. Kirk*, 162 Ill. 138; ante, p. 277; portions of such lake may be set aside to be used exclusively for the purposes of hunting and fishing: *People v. Silverwood* (Mich. 1896); the right to plant oysters in navigable waters may be restricted to citizens of the state: *McCready v. Virginia*, 94 U. S. 391; valid statutes may be enacted relating to the phosphate interests of the state in its navigable waters, prescribing the terms and conditions on which phosphates may be taken therefrom: *State v. Phosphate Co.*, 32 Fla. 82, 106; rights may be granted to riparian owners to build wharves out to navigable water in front of their lands, and if, acting under permission and license from the state, they construct such wharves, their interest therein becomes vested in the sense that it cannot be taken from them for a public use, or otherwise, without due process of law, and after compensation made to them therefor: *Lewis v. Portland*, 25 Or. 133; 42 Am. St. Rep. 772; sales may be made of lands situate within navigable waters, or persons may be authorized to fill in or otherwise reclaim such lands, and the same may thereupon become vested in private ownership: *Elizabeth v. Railroad Co.*, 53 N. J. L. 494; *Weber v. Harbor Commrs.*, 18 Wall. 57; *Landon v. Mayor*, 93 N. Y. 148; *Hoboken v. Pennsylvania R. R.*, 124 U. S. 656. It is true that the decisions generally speak of the rights of grantees from the state as being subject to the paramount trust in favor of navigation and commerce, but where lands are authorized to be reclaimed, and thus wrested from the sea or other navigable waters, or where persons are otherwise authorized to take exclusive possession of them, it is difficult to see how any trust in favor of navigation or commerce can be enforced with respect to them, nor, in our opinion, is this fact any valid objection to the grant, provided always that the remaining lands undisposed of are adequate for all the purposes of navigation and commerce existing, or which may reasonably be anticipated. The leading case upon this topic is that of *Shively v. Bowlby*, 152 U. S. 1, to which reference has already been made. It involved the validity of a grant made by the state of Oregon to lands in the Columbia river. The case as decided by the state court will be found reported in 22 Or. 415. The court there referred to the various statutes of Oregon providing for the sale and disposal of its tide lands, by virtue of which the owners of lands abutting or fronting upon the shore of the Pacific ocean or of any harbor, bay, or inlet of the same, or rivers and bays in which the tide ebbs and flows, were given the right to purchase all lands of the state in front of the lands owned by them, within a certain time, and upon certain conditions, and, upon their failure to so purchase, the lands became open to purchase by any other person who was a resident and citizen of the state; and the court added: "These statutes

are based on the idea that the state is the owner of the tide lands, and has the right to dispose of them; that there are no rights of upland ownership to interfere with this power to dispose of them, or convey private interests therein, except such as the state saw fit to give adjacent owners, subject, of course, to the paramount right of navigation secured to the public. These statutes have been largely acted upon, and many titles acquired under them to these lands. In the various questions relating to these lands which have come before the judiciary, the validity of these statutes has been recognized, and taken for granted, though not directly passed upon." "From all this it appears," said the court, "that when the state of Oregon was admitted into the Union, these lands became its property, and subject to its jurisdiction and disposal; that in the absence of legislation or usage the common-law rule would govern the rights of the upland proprietor, and by that law the title to them is in the state; that the state has the right to dispose of them in such manner as she might deem proper, as is frequently done in various ways, and whereby sometimes large areas are reclaimed and occupied by cities, and are put to public and private uses, state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. The whole question is for the state to determine for itself; it can say to what extent it will preserve its rights in them or confer them on others." The opinion rendered in the supreme court of the United States quoted this language with apparent approval, and declared that the grant made by the state to lands covered by navigable waters was valid.

It has been held that the right of Congress to regulate commerce involves the right to regulate navigation, included in which is the right to use submerged lands in so far as such use may be essential to the maintenance of public highways, and, therefore, that the United States may, without making compensation to the owner of submerged lands, erect structures thereon in aid of commerce between the states, and that it is immaterial that such structures are placed in shallow water so near the shore as to interfere with the owner's access to deep water. The structure, the right to maintain which was thus affirmed, consisted of a pier covering the entire water front of the plaintiff's lands, which pier was a prolongation westward into deep water of the banks of a government canal. The court regarded the rights of the United States in the land as being the same as if the title thereto had remained in the state, saying: "The state would hold subject to the public use, and its property right in the submerged soil of a navigable stream would be subservient to the power of Congress to regulate navigation, and the use of such soils, as a support for a structure in aid of navigation, would not have been the taking of private property of the state within the meaning of the constitutional provision inhibiting it without compensation. This point was expressly ruled upon in a very able opinion by the late Justice Bradley in *Stockton v. Railroad Co.*, 32 Fed. Rep. 19. The *Hawkins Point Lighthouse* case, reported in 39 Fed. Rep. 77, was a case identical in principle to the one under consideration. The plaintiff, under a grant from the state of Maryland, was the owner of the fee in the submerged land under the Patapsco river. The United States erected a lighthouse supported on the soil

owned by the plaintiff. Suit in ejectment was brought upon the theory that the keeper of the lighthouse was a trespasser, the site never having been condemned, nor any compensation paid. It was held, upon elaborate argument, that the United States, in thus erecting the lighthouse in aid of navigation, by authority of Congress, was not taking private property without compensation; that the plaintiff's title and ownership were necessarily subservient to the use of the same in aid of public navigation": *Scranton v. Wheeler*, 57 Fed. Rep. 803, 815.

LEGISLATURE.—The legislature of a state is clothed with the whole legislative power capable of being exercised therein, subject only to such restrictions and regulation as are embraced in the state and national constitutions: *Mauldin v. City Council*, 42 S. C. 293; 46 Am. St. Rep. 723, and note. It has no power to grant away absolutely any of the essential attributes of sovereignty pertaining to the state government: *Mott v. Pennsylvania R. R. Co.*, 30 Pa. St. 9; 72 Am. Dec. 664. The justice and propriety of legislation is peculiarly a question for legislative determination: *Olmstead v. Camp*, 33 Conn. 532; 89 Am. Dec. 221. The legislature is the sole tribunal to determine the expediency, as well as the details, of all legislation: *In re Madera Irr. Dist.*, 92 Cal. 296; 27 Am. St. Rep. 106.

STATUTES—EXPRESSION OF SUBJECT IN TITLE.—The constitutional provision that no act shall contain more than one subject, which shall be clearly expressed in its title, is not infringed by a statute whose subjects are all "referable and cognate" to the subject expressed in its title. All that is necessary is, that the act shall embrace some one general subject; and by this is meant merely that all matters treated of should fall under some one general idea, and be so connected with and relate to each other, either logically or in popular understanding, as to be parts of and germane to one general subject: *Note to Jones v. Aspen Hardware Co.*, 52 Am. St. Rep. 226.

KELLOGG NEWSPAPER COMPANY v. PETERSON.

[162 ILLINOIS, 158.]

SALES—SYMBOLICAL DELIVERY.—If personal property sold is not susceptible of an actual, immediate, and complete delivery, a symbolical delivery is sufficient. Hence, heavy machinery and appliances, sold in good faith, may be delivered by locking the doors of the room containing the property, and delivering the keys to the purchaser.

LANDLORD AND TENANT—DISTRESS LAWS—CONSTRUCTION.—Laws which enlarge the common-law remedy by distress must be strictly interpreted.

LANDLORD AND TENANT—LIEN FOR RENT.—Except as to crops grown or growing upon the demised premises, a landlord has no lien for rent upon his tenant's property, until seizure by distress or other proceeding. Hence, as against the landlord's right of distress, the tenant may sell his property, and confer title thereto, where the sale is made in good faith on the part of buyer and seller.

TROVER—CONVERSION.—If one buys personal property of which symbolical delivery has been made, a third person's refusal to allow the property to be removed, and a subsequent sale and delivery thereof by such third person, whereby the purchaser loses the property, are wrongful acts, and constitute a conversion.

Trover to recover the value of certain property, converted under the following circumstances. One F. B. Schuchardt was engaged in photograph printing, and, as a tenant, under a lease, occupied the seventh floor of a building owned by the appellant, Peterson. Schuchardt had on the floor six photogravure printing presses, one lead-lined acid tank, five lithograph stones, six brass and rubber tympan, one Anson Hardy paper cutter, one office table, and one office desk and chair. He became indebted to the appellee, the Kellogg Newspaper Company, in the sum of one thousand dollars for money loaned, and, being unable to pay the money when due, he, still being in possession of the leased floor, sold the above-described property to the company in satisfaction and discharge of his debt. On February 26, 1892, a bill of sale was made and delivered and filed for record. The property, being heavy printing machinery and appliances, except a few articles, was not easily susceptible of removal, so the doors of the rooms containing the property were locked and the keys delivered to the appellee. Schuchardt exercised no control over the property after the sale, and, on the day following the sale, he informed the appellant's secretary that he had sold the property to the appellee, who would remove it. The appellee, on the day after the sale, gave the keys to its drayman, directed him to get the property, and to take it to a certain storehouse. The appellant, when the drayman went after the property, on February 29, 1892, refused to allow him access to the seventh floor of the building where the property was situated. At this time, there was some correspondence between the appellant and the appellee, the former asserting a claim for a lien on the property for rent, the latter, asserting ownership. On or about March 10, 1892, the property was levied on by a distress warrant issued by the appellant. It was subsequently sold and lost to the appellee, who brought trover and recovered a verdict for twelve hundred and fifty dollars. It was urged below that the lien of the landlord existed if there was rent due, and that the bill of sale was fraudulent, unless the purchaser took possession under it; but it was held that the delivery of the bill of sale and of the keys, and their retention, constituted a delivery of possession; that the sale was not fraudulent, and that the landlord had no lien on the property before the levy of his distress warrant. Hence this appeal.

Thornton & Chancellor, for the appellant.

W. J. Lavery, for the appellee.

¹⁶⁰ PHILLIPS, J. Where the goods and chattels sold are of a nature or character that they do not admit of an actual, immediate, and complete delivery, the law recognizes and allows a symbolical delivery as being a sufficient transfer and delivery. The delivery of the keys of a store or building in which goods are is construed clearly expressive of a symbolical delivery which will pass the possession, where such is the intent of the parties, in good faith: *Wilkes v. Farris*, 5 Johns. 335; 4 Am. Dec. 364; *Packard v. Dunsmore*, 11 Cush. 282; *Marsh v. Fuller*, 18 N. H. 360; *Vining v. Gilbreth*, 39 Me. 496; *Sullivan v. Smith*, 15 Neb. 476; 48 Am. Rep. 354; *Sharp v. Carroll*, 66 Wis. 62; *Hart v. Wing*, 44 Ill. 141; *Logsdon v. Spivey*, 54 Ill. 104; *Ticknor v. McClelland*, 84 Ill. 471; *Feltenstein v. Stein*, 157 Ill. 19. The goods and chattels sold were of a nature and character they were not susceptible of an actual, complete, and immediate delivery and removal, and the sale being in good faith, a symbolical delivery, by locking ¹⁶¹ the doors and delivering the keys to the appellee, was a delivery of possession to him, and was not fraudulent, in fact or in law, as against appellant.

It is a principle of construction that laws which enlarge the common-law remedy by distress must be strictly interpreted. Our statute does not give the landlord a prior lien by distress greater than existed at common law, except in the case of crops grown or growing on the demised premises: *Hadden v. Knickerbocker*, 70 Ill. 677; 22 Am. Rep. 80. At common law, a levy of a distress warrant could only be made upon the demised premises, and a right of distress terminated by a removal of goods from such demised premises, and the goods of a stranger upon the demised premises, except in a very few instances, were at common law liable to distress. The excepted cases were such as the goods of a boarder in his room on the premises, etc. By section 16 of the landlord and tenant act, the landlord may seize for rent any personal property of his tenant that may be found in the county where the tenant resides. That section also provides: "And in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant."

At common law, the goods of a tenant were free from a lien until they were actually taken. The lien attached on seizure, only. Except as to crops grown or growing upon the demised premises, that is the rule in this state. A landlord can in this state, with the above exception, only acquire a lien by commencing proceedings. Until he does so, the tenant is as

much the owner of his effects as any other person who owns property and owes debts. No dormant or secret lien of a landlord exists against a tenant's property until a seizure by distress or other proceeding. The tenant may sell, and the buyer may remove the purchased goods. The tenant may convey title where the sale is made in good faith on the part of both buyer and seller: *Morgan v. Campbell*, 22 Wall. 381; ¹⁶² *Becker v. Dupree*, 75 Ill. 167; *Hadden v. Knickerbocker*, 70 Ill. 677; 22 Am. Rep. 80. By the sale and delivery of the keys in this case, the possession and right to possession passed to appellee. The refusal to allow appellee to remove the goods, and the subsequent sale and delivery thereof, by reason of which he lost the property, were wrongful acts and a conversion.

The trial court, in its instructions, correctly laid down the law, and there was no error in the admission or exclusion of evidence. The question of damages being excessive is not for this court.

We find no error in the record, and the judgment of the appellate court is affirmed.

SALES—SYMBOLICAL DELIVERY.—If goods are sold, and actual delivery is impracticable, as in the case of ponderous articles, a symbolical delivery is sufficient, not only to gratify the statute of frauds, but to satisfy the requirements, as to delivery, in the law of sales, wherever a delivery is required to make a sale valid: See monographic note to *King v. Jarman*, 37 Am. Rep. 16, discussing the subject; monographic note to *Shindler v. Houston*, 49 Am. Dec. 336, on delivery and acceptance to take a verbal sale of goods out of the statute of frauds; *Atwell v. Miller*, 6 Md. 10; 61 Am. Dec. 294; but, as against creditors and subsequent purchasers, a symbolical or constructive delivery cannot take the place of a real delivery, where the latter can reasonably be made: See monographic note to *Claffin v. Rosenberg*, 97 Am. Dec. 345, 347, on change of possession sufficient as against creditors and subsequent purchasers.

LANDLORD AND TENANT—DISTRESS FOR RENT.—The ancient remedy of distress for rent is being gradually abolished in the United States: See monographic note to *Lichtenthaler v. Thompson*, 15 Am. Dec. 584, on distress for rent; and exemptions from seizure under distress are being gradually increased: See monographic note to *Hoskins v. Paul*, 17 Am. Dec. 458-461, on exemption from seizure under distress.

TROVER—CONVERSION.—Any unauthorized act which deprives a man of his property, permanently or for an indefinite time, is a conversion: *Union Stock Yard etc. Co. v. Mallory etc. Co.*, 157 Ill. 554; 48 Am. St. Rep. 341, and note; *Terry v. Birmingham Nat. Bank*, 93 Ala. 599; 30 Am. St. Rep. 87, and note.

HATELY v. PIKE.

[162 ILLINOIS, 241.]

CORPORATIONS—NEGOTIABLE INSTRUMENTS—WORD “PRESIDENT” AS DESCRIPTIO PERSONAE.—If a note of a corporation is made payable to the order of “Adolph Pike, President,” and is so indorsed, the word “president,” in each instance, is mere descriptio personae. The note is, therefore, not payable to the order of the corporation, but to the president individually, and the indorsement is his individual indorsement.

EVIDENCE—INDORSEMENT—GUARANTY—PAROL EXPLANATION OF INTENTION.—If a note of a corporation, payable to the order of its president, is indorsed by him twice, the first signature having the word “president” attached to it, and the second one not having it, parol evidence is inadmissible to vary the contract of indorsement, as shown by the first signature, or to prove that the indorser, by his second signature, intended and agreed to guarantee the payment of the note.

NEGOTIABLE INSTRUMENTS—GUARANTY—INSTRUCTIONS.—As parol evidence is inadmissible to contradict a contract of indorsement, or to prove a contract of guaranty, instructions authorizing the jury to find from such evidence whether or not the payee of a note put his signature upon the back of it for the purpose of guaranteeing its payment are improperly given.

NEGOTIABLE INSTRUMENTS—INDORSEMENT—INSTRUCTIONS.—An instruction that the indorsement of a note before delivery is a guaranty of its payment is clearly inapplicable to a note payable to the order of the maker.

NEGOTIABLE INSTRUMENTS—INDORSEMENT BY MAKER AND PAYEE.—If the maker of a note, who is also its payee, puts his name upon its back, he intends to assume the responsibility of second indorser, and not of guarantor.

EVIDENCE—CONTRACT OF INDORSEMENT.—PAROL EVIDENCE is not admissible to alter or vary the liability created by a contract of indorsement, by showing that it was a contract of guaranty, or any other kind of a contract than one of indorsement, and this is true, whether the indorsement consists merely of the indorser's signature, or whether the agreement imported by the signature is written over it in full.

CORPORATIONS—TWO INDORSEMENTS OF NOTE BY PRESIDENT—PAROL EVIDENCE.—If a note of a corporation, payable to the order of its president, is to be regarded as payable to its own order, the president's name in blank, upon the back of the note, under a preceding signature of his, to which is attached the word “president,” renders him liable as second indorser, and parol evidence is inadmissible to show the contract to be one of guaranty.

APPEAL—REVERSAL WITHOUT REMANDING.—The general rule that, if the appellate court reverses a judgment, it should remand the cause for another trial, does not apply where nothing could be gained by sending the case back for a new trial. Hence, it is not error to reverse a judgment against one sued as guarantor upon a note, without remanding the cause, where the defendant is liable only as indorser, and the declaration is not sufficient to charge him as such, as there could be no recovery by the plaintiff.

Burhans & Hill, for the appellant.

Jesse Cox, for the appellee.

242 MAGRUDER, C. J. This is an action, commenced on February 5, 1895, by appellant against appellee upon an alleged guaranty by appellee of a promissory note. The note is as follows:

"\$10,000.00

Chicago, September 17, 1892.

"Two (2) years after date, for value received, the Exposition Depot and Hotel Company promises to pay to the order of Adolph Pike, President, the principal sum of ten thousand dollars in gold coin of the United States of America, with interest thereon at the rate of seven (7) per cent per annum, payable **243** semi-annually on the 17th days of March and of September, according to the tenor of, and as evidenced by, the four interest notes or coupons hereto annexed. Both principal and interest are payable at the office of Cooper and Burhans, Chicago, Illinois. This note is secured by a trust deed, of even date herewith, to William D. Cooper, on real estate in Chicago, Cook county, Illinois, and is to bear interest at the rate of seven per cent per annum, after maturity.

"THE EXPOSITION DEPOT AND HOTEL CO.,

"Adolph Pike, President

"Eli Brandt, Secretary."

The following are the indorsements on said note:

"Pay to the order of Walter C. Hately.

"ADOLPH PIKE, President."

"For value received, I hereby guarantee the payment of this note, and interest at maturity, or any time thereafter.

"ADOLPH PIKE."

It is conceded that the words of guaranty were not on the note when appellee put his name on the back of the note, but that they were written over his name at the time of the trial. It is also conceded that the words, "Pay to the order of Walter C. Hately," were written over the signature of "Adolph Pike, President," at the time of the trial. It appears that Pike, in behalf of the Exposition Depot and Hotel Company, of which he was the president, negotiated a loan from Hately through Cooper & Burhans. To secure the loan, the company gave a mortgage or trust deed to W. D. Cooper, and, as additional security and a further consideration for making the loan, Pike was required to personally indorse the notes evidencing the loan. After applying the proceeds of the sale realized from the foreclosure of the trust deed, and a further payment made by Cooper as receiver, appellant brought this suit to recover the unpaid balance due upon the note.

The trial in the circuit court was before the judge and a jury, and resulted in verdict and judgment in favor of the plaintiff. Upon appeal to the appellate court, the latter court reversed the judgment without remanding the ²⁴⁴ cause and entered judgment for the appellee here, appellant there. The present appeal is prosecuted from the judgment of reversal so entered by the appellate court.

Upon the trial of the case, the court permitted the plaintiff, against the objection and exception of the defendant, to introduce parol testimony for the purpose of showing that the defendant, in writing his name upon the back of the note, intended and agreed to guarantee its payment. The court gave the following instruction on behalf of the plaintiff:

"The court instructs the jury, if they are satisfied, from the evidence, that the defendant was required to write or indorse his name thereon as a guaranty thereof before the plaintiff or person taking the same would advance the money borrowed thereon, such indorsement or writing of his name thereon by the defendant amounts to a legal guaranty of the said notes, and the plaintiff or holder had the right to write over such signature the words of guaranty appearing on this note, such writing or indorsement before delivery being a guaranty of the said note."

The defendant asked the court to give the following instruction, except the last clause thereof, which is in italics; but the court refused to give the instruction as asked, and modified it by adding said clause in italics, and then gave it as so modified and as follows:

"The jury are instructed that when a person places his name upon the back of a note below the signature of the payee thereof, the contract that such person thereby undertakes is a contract of indorsement. The liability thus created by such contract of indorsement is other and different from that of a contract of guaranty such as is expressed by the words on the back of the note in question in this case, written above the signature of the defendant; and the jury are instructed that the mere placing of the defendant's name by defendant on the back of said note did not constitute a contract of ²⁴⁵ guaranty, nor did it authorize the plaintiff or his agents to place above the signature of the defendant upon the back of said note the words of guaranty which now appear thereon, *unless you shall find, from the evidence, that defendant put his signature upon the back of said note for the purpose of guaranteeing the payment thereof.*"

It is assigned as error that the trial court permitted the intro-

duction of the oral testimony above referred to, and that it gave the instructions above set forth. We think that it was error to admit the oral evidence, and also that the instructions in question were erroneous as applied to the facts of this case.

1. It is contended by appellant that the note in question is payable to the order of the corporation, the Exposition Depot and Hotel Company, and that the first indorsement is that of said company. On the other hand, it is contended by appellee that the note is payable to the order of Adolph Pike, and that both indorsements are by Adolph Pike. The solution of the question depends upon the meaning which is to be given to the word "President," written after the name of Adolph Pike in the body of the note and in the first indorsement thereon. The note is payable to the order of "Adolph Pike, President." If the word, "President," is to be regarded as the designation of the corporation itself by the use of the name of its official head in his official capacity, then the note must be regarded as being payable to the order of the company. In *Falk v. Moebs*, 127 U. S. 597, it was held that a note made by the "Peninsular Cigar Co.," payable to the order of "George Moebs, Sec. & Treas.," and indorsed, "Geo. Moebs, Sec. & Treas.," was a note drawn by, payable to, and indorsed by the corporation. This ruling, however, is opposed to the decisions in this state and in several other states.

Under the decisions in Illinois, the word, "President," as here used, is to be taken as a mere *descriptio personae*. This view makes the note payable to the order of Adolph ²⁴⁶ Pike individually, and makes the first indorsement that of Adolph Pike individually.

In *Chadsey v. McCreery*, 27 Ill. 253, appellant, Chadsey, commenced an action of *assumpsit* against appellee, McCreery, on a note payable to "James G. McCreery, treasurer of the Rock Island and Alton Railroad Company"; and we said: "The note is made payable to the appellee, who is described to be the treasurer of the Rock Island and Alton Railroad Company. It is a mere description of the person": See, also, *Powers v. Briggs*, 79 Ill. 493; 22 Am. Rep. 175; *Hypes v. Griffin*, 89 Ill. 134; 31 Am. Rep. 71; *Cahokia v. Rautenberg*, 88 Ill. 219; *Vater v. Lewis*, 36 Ind. 288; 10 Am. Rep. 29. Mr. Daniel, in his work on *Negotiable Instruments*, fourth edition, volume 1, section 415, says: "If a note be payable to an individual with the mere suffix of his official character, such suffix will be regarded as mere de-

scriptio personae, and the individual is the payee." It is also said in section 416 of the same work: "Where a note is payable to a corporation by its corporate name, and is then indorsed by an authorized agent or official, with the suffix of his ministerial position, it will be regarded that he acts for his principal who is disclosed on the paper as the payee, and who therefore is the only person who can transfer the legal title." Section 16 would be applicable to the case at bar, if the note here was payable to the order of the Exposition Depot and Hotel Company, and then indorsed by "Adolph Pike, President." The note in question is not, however, payable to the corporation by its corporate name; nor was the note in *Falk v. Moebs*, 127 U. S. 597, payable to the corporation by its corporate name, although the doctrine announced in said section 416 seems to be relied upon for the conclusion reached by that case.

In view of the rulings heretofore made by this court, we are inclined to hold that the word "President," following the name of "Adolph Pike" in the body of the note, is a mere descriptio personae, and that the individual, Adolph Pike, is the payee named in the body of the note. The word "President," following the name of Adolph Pike in ²⁴⁷ the first indorsement upon the back of the note, must also be regarded as descriptio personae, and the first indorsement is that of the individual, Adolph Pike.

It results that we here have a case where the payee has written his name upon the back of the note twice, and the doctrine of *Johnson v. Glover*, 121 Ill. 283, is precisely applicable. In that case, where the suit was against the defendant as alleged guarantor of a note payable to his own order, which he had sold before its maturity, and upon the back of which he had written his name twice, "the one signature above the other with a slight space intervening," we held that evidence offered to show that the appellant in that case, who was the payee in the note and the defendant below, agreed to guarantee the note when he sold it, and for that purpose wrote his name across the back of the note twice, was improperly admitted; and we there said (page 286): "The general rule is, that the name of the payee appearing on the back of the instrument is evidence that he is indorser, and proves that he has assumed the liability of an indorser as fully as if the agreement were written out in words: *Mason v. Burton*, 54 Ill. 349; *Beattie v. Browne*, 64 Ill. 360; *Courtney v. Hogan*, 93 Ill. 101. Parol evidence is no more admissible to contradict or vary this contract than any other written contract. . . .

But it is contended, there being two signatures, the law raises a different presumption as to each. No authority is cited for this contention, and, in our opinion, it is not supported by reason."

As parol evidence was improperly admitted to contradict appellee's contract as indorser, and to show that he made a contract as guarantor, the instructions which authorized the jury to find from such evidence whether or not the appellee put his signature upon the back of the note for the purpose of guaranteeing its payment, were improperly given.

2. If, however, the note here in question should be regarded as payable to the order of the Exposition ²⁴⁸ Depot and Hotel Company, then it is a note made by the maker thereof payable to its own order. Where a note is payable to the order of the maker of it, it has no validity until it is indorsed and transferred by the payee, who is at the same time the maker; and, in such case, "the person writing his name in blank upon the note understands that, when the note takes effect, his name will appear upon it as a second indorser." Where the maker and payee thus puts his name upon the back of the note, he intends to assume the responsibility of second indorser, and not of guarantor: *Blatchford v. Milliken*, 35 Ill. 434; *Kayser v. Hall*, 85 Ill. 511; 28 Am. Rep. 624; *Bogue v. Melick*, 25 Ill. 91. And "an authority to fill out an undertaking over a signature is to be exercised consistently with the nature of the instrument and the intention of the parties": *Blatchford v. Milliken*, 35 Ill. 434.

Where the contract is that of an indorser, parol evidence is not admissible to alter or vary the liability created by such contract, by showing that it was a contract of guaranty, or that it was any other kind of a contract than one of indorsement. And this is true, whether the indorsement consists merely of the indorser's signature, or whether the agreement imported by the signature is written over it in full. The presence and position of the indorser's signature upon the instrument "are as plain a manifestation of the intention of the party as if it were set forth in express words, and parol evidence should not be admitted to vary or contradict it": 1 *Daniel on Negotiable Instruments*, 4th ed., sec. 717. The case of *Worden v. Salter*, 90 Ill. 160, resting mainly upon the case of *Croskey v. Skinner*, 44 Ill. 321, and holding that parol testimony could be introduced for the purpose of proving that the contract indicated by a blank indorsement by the payee of a note was intended by the payee to be a contract of guaranty, was expressly overruled in *Johnson v. Glover*, 121 Ill. 283. In the latter case, we said (page 286): "It is necessary that

the payee shall indorse the note to transfer ²⁴⁹ it and vest the legal title in the assignee. But (at least until after it has passed into the hands of the assignee, and beyond the control of the payee) his relations to the note are only those of payee, and the law implies no contract from his indorsement but that of indorser. . . . If the payee and assignee intended to add another and different one, it should have been written out." To the same effect are *Skelton v. Dustin*, 92 Ill. 49; *Mason v. Burton*, 54 Ill. 349; *Jones v. Albee*, 70 Ill. 34; *Beattie v. Browne*, 64 Ill. 360; *Courtney v. Hogan*, 93 Ill. 101; *Finley v. Green*, 85 Ill. 535; *Kingsland v. Koeppe*, 137 Ill. 344; *Martin v. Cole*, 104 U. S. 30.

The case at bar is to be clearly distinguished from those cases in which a third party or stranger to the note places his name upon the back of the note before it has come into the hands of the payee of the note. A person, who is not a party to a promissory note which is to become a valid obligation against the maker upon its delivery to the payee, by writing his name in blank upon the note is presumed to assent to the obligation of a guarantor: *Blatchford v. Milliken*, 35 Ill. 434, and cases there cited. And this presumption, that a party not the payee, who places his name on the back of a note before its delivery to the payee, is a guarantor, may be rebutted by parol evidence. In case of such indorsement by a third person under such circumstances, it may be shown by parol what the real contract was, whether of indorsement or of guaranty: *Carroll v. Weld*, 13 Ill. 682; 56 Am. Dec. 481; *Webster v. Cobb*, 17 Ill. 459; *Stowell v. Raymond*, 83 Ill. 120; *Eberhart v. Page*, 89 Ill. 550; *Kingsland v. Koeppe*, 137 Ill. 344.

Confusion has arisen in some of the reported decisions by failing to limit the right thus to introduce parol testimony to cases where it is sought to rebut the presumption of a guaranty arising from the indorsement of a note by a stranger before delivery to the payee. The general remarks in *De Witt County Nat. Bank v. Nixon*, 125 Ill. 615, must be understood as referring to a case where the name ²⁵⁰ of the third party is placed upon the back of the note before its delivery to the payee.

In *Bigelow v. Colton*, 13 Gray, 309, 74 Am. Dec. 633, a suit was brought upon a promissory note given by one Hurlbut to the order of himself. Hurlbut indorsed the note first, and then the defendant, Colton, indorsed it. It was attempted to be shown by parol evidence that Colton was a joint maker, but it was held that the evidence was inadmissible. In that case the court said:

"This case does not fall within that anomalous class of cases where a third person, neither maker nor payee, puts his name on the back of a note before its indorsement by the payee, but is the ordinary case of an indorsement of a note payable to bearer, the effect of which cannot be varied by parol proof": See, also, *Lake v. Stetson*, 13 Gray, 310; note; *Prescott Bank v. Caverly*, 7 Gray, 217; 66 Am. Dec. 473.

It follows that the admission of the oral testimony to establish a contract of guaranty in the case at bar was equally as erroneous if the note be regarded as a note made by the hotel company payable to its own order, as it was upon the theory that the note was payable to the order of appellee as an individual. The doctrine announced in the first instruction, that indorsement before delivery is a guaranty of the payment of the note, is clearly inapplicable to a note payable to the order of the maker.

It is said, however, that the appellate court erred in reversing the judgment of the circuit court without remanding the cause and entering judgment for appellee here, who was appellant there. The general rule laid down by this court is, that if the appellate court reverses a judgment of the trial court on account of any erroneous ruling on any question of law that arose on the trial, the cause should be remanded for another trial where the errors may be obviated: *Siddall v. Jansen*, 143 Ill. 537. But here the declaration seeks to charge the appellee upon a contract of guaranty, whereas there was no contract of guaranty, but a contract of indorsement. ²⁵¹ To hold appellee liable as indorser, it would have been necessary to show that suit had been begun and prosecuted against the maker of the note, or that such suit would have been unavailing, but no such proof was introduced by appellant, or could have been introduced under the declaration. It is apparent that, upon a remandment of the cause, there could be no recovery by the plaintiff. Hence, nothing could be gained by sending the case back for a new trial. This being so, we cannot see that appellant was injured by the judgment of reversal as entered.

The judgment of the appellate court is affirmed.

NEGOTIABLE INSTRUMENTS — PAYEE — WORDS OF DESCRIPTION.—The word "cashier," "president," "treasurer," etc., in a negotiable promissory note, following the name of the person designated as payee, is merely descriptive: *Horah v. Long*, 4 Dev. & R. 274; 34 Am. Dec. 378; *Pierce v. Robie*, 39 Me. 205; 63 Am. Dec. 614. But it is held that notes payable to "A. B., Cashier," may be indorsed by him with the same addition to his signature, and that such indorsement will bind the bank: See monographic note to *Rose*

v. Laffan, 42 Am. Dec. 379, on who may sue upon a note payable to a cashier. It is held that a note payable to the order of "L. M., President of M. F. & M. Ins. Co.," is a note payable to such insurance company, and that an indorsement by the president as such would operate to transfer the note, in the absence of proof that he was unauthorized to transfer it: *Nichols v. Frothingham*, 45 Me. 220; 71 Am. Dec. 539. A note with the name of a company attached thereto, written by its president, with his name and designation as president, thereunder, is the note of the company only: *Liebscher v. Kraus*, 74 Wis. 387; 17 Am. St. Rep. 171. Compare *McCandless v. Belle Plaine Canning Co.*, 78 Iowa, 161; 16 Am. St. Rep. 429.

EVIDENCE—INDORSEMENT—PAROL EXPLANATION OF INTENTION.—An indorser's liability cannot be changed or varied by parol evidence: *Farwell v. St. Paul Trust Co.*, 45 Minn. 495; 22 Am. St. Rep. 742; note to *Drennan v. Bunn*, 7 Am. St. Rep. 366; and monographic notes to *Hill v. Ely*, 9 Am. Dec. 381-385; *Stack v. Beach*, 39 Am. Rep. 116-123, where the subject is discussed. Parol evidence is not admissible to vary the legal effect of indorsements appearing upon a promissory note, where such note is indorsed first by the payee, and his name is followed on the back of the note by other names in blank: *Vore v. Hurst*, 13 Ind. 551; 74 Am. Dec. 268; *Stack v. Beach*, 74 Ind. 571; 39 Am. Rep. 113. That the real character of the obligation intended to be assumed by one indorsing a negotiable instrument and signing his name, with the word "president" following it, may be shown by parol testimony, see note to *Kulenkamp v. Groff*, 15 Am. St. Rep. 288.

NEGOTIABLE INSTRUMENTS PAYABLE TO ONE'S OWN ORDER—INDORSEMENT—PAROL EVIDENCE.—A note payable to one's order is not a complete promissory note until indorsed by him; Notes to *Pitcher v. Barrows*, 28 Am. Dec. 309; *Armstrong v. Harshman*, 28 Am. Rep. 666; *Pickering v. Cording*, 92 Ind. 306; 47 Am. Rep. 145. One who simply writes his name on the back of a promissory note made payable to his own order, is liable only as indorser, and upon due protest and notice: *Smith v. Long*, 40 Mich. 555; 29 Am. Rep. 558. Compare *Pickering v. Cording*, 92 Ind. 306; 47 Am. Rep. 145. A blank indorsement creates the same liability from the indorser to the indorsee as if it were full: *Bean v. Briggs*, 1 Iowa, 488; 63 Am. Dec. 464.

APPEAL—REVERSAL OF JUDGMENT—REMANDING.—The practice of remanding a cause generally is proper, if the decree is reversed for a variance between the allegations of the bill and the proofs, or for any reason not going to the merits of the cause; otherwise, if upon the merits there can be no recovery: *Price v. Dime Sav. Bank*, 124 Ill. 317; 7 Am. St. Rep. 367.

BOARD OF TRADE OF CHICAGO v. NELSON.

[162 ILLINOIS, 431.]

JUDGMENT—WHEN NOT RES JUDICATA.—A judgment of the appellate court, reversing the judgment of the superior court, and remanding the cause to that court for further proceedings is not final, and does not conclude the parties, in the supreme court, upon a subsequent appeal, from a later judgment of the superior court.

BOARDS OF TRADE.—Although incorporated, the Chicago board of trade is merely a voluntary association, although it rents out rooms and derives an income therefrom.

BOARDS OF TRADE—MEMBERSHIP AS A PROPERTY RIGHT.—While the right to pursue a business, as a member of the Chicago board of trade, in the hall of a building devoted to that purpose, may be a thing of value, its value is incidental to the membership, and a determination of such membership destroys the rights under it.

BOARDS OF TRADE—ENFORCEMENT OF BY-LAWS.—**COURTS** will not attempt to enforce the by-laws of a voluntary association, such as the Chicago board of trade. The association or board must itself enforce its rules and regulations by such means as it may adopt for its government.

BOARDS OF TRADE—STATUS OF MEMBER.—One who becomes a member of a board of trade voluntarily submits himself to the operation of its laws, and agrees to be bound thereby, so far as they are within the corporate authority.

BOARDS OF TRADE.—A BY-LAW of a board of trade, providing that a member, who fails to comply with a business contract made with another member, shall be expelled, is valid.

BOARDS OF TRADE—DISCIPLINARY POWERS.—**COURTS** of equity, as well as courts of law, will refuse to interfere with the disciplinary powers of a board of trade.

BOARDS OF TRADE—JUDGMENT SUSPENDING MEMBER—COLLATERAL ATTACK.—The judgment of a board of trade, suspending one of its members, according to rules assented to by him when he became a member, and upon due notice of the proceedings, is conclusive, like that of any other tribunal, and cannot be collaterally reviewed by the courts.

BOARDS OF TRADE.—A CHARGE AGAINST A MEMBER of a board of trade is not to be tested by the strict rules of criminal pleading. Hence, a charge of bad faith and dishonorable conduct in not carrying out an agreement is sufficient, where a copy of the agreement is attached, thus informing the accused of what the charge consists.

BOARDS OF TRADE—SUSPENSION—REVIEW OF EVIDENCE.—**COURTS** will not review the evidence upon which a board of trade acted in suspending one of its members for dishonorable conduct.

BOARDS OF TRADE—SUSPENSION—VALID BY-LAW.—The Chicago board of trade, having authority to admit or expel members, and to make such rules, regulations, and by-laws as the members may think necessary or proper for its government, has power to enact a by-law providing for the suspension of a member for dishonorable conduct.

CORPORATIONS—POWER OF OFFICERS.—The president of a corporation, being its chief officer, is presumably authorized to carry out its lawful contracts.

Green, Robbins & Honore and A. W. Green, for the appellant.

George W. Smith and Murry Nelson, Jr., for the appellee.

434 CARTWRIGHT, J. The relator, Murry Nelson, filed his petition in the superior court of Cook county for a writ of mandamus to compel the board of trade of the city of Chicago, and its officers and directors, the appellants, to permit him to resume his privileges and rights as a member of said board, from which he had been suspended. To the petition a demurrer was

filed, which was sustained, but, on appeal, the judgment was reversed by the appellate court and the cause was remanded. Upon the reinstatement of the case in the superior court, an answer was filed to the petition, to which a demurrer was interposed, and, the demurrer having been sustained, judgment was entered in accordance with the petition. That judgment was affirmed by the appellate court.

The facts set out in the petition which are necessary to be stated are substantially as follows: Prior to 1859 the board of trade of the city of Chicago was a voluntary unincorporated association, organized for the following purposes: "To maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustments of business disputes; to acquire and disseminate valuable commercial and economic information, and, generally, to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits." In that year it was incorporated by a special act of the general assembly, creating the persons then composing it a body politic and corporate, with power to make such rules, regulations, and by-laws from time to time as its members might think proper or necessary for the government of the corporation, not contrary to the laws of the land. By section 6 of the act of incorporation it was provided: "Said corporation shall have the right to admit or expel such ⁴³⁵ persons as they may see fit, in a manner to be prescribed by the rules, regulations, and by-laws thereof." Among the by-laws adopted was one which provided: "When a member of the association shall be guilty of any act of bad faith, or any attempt at extortion, or of any other dishonorable or dishonest conduct, he shall be censured, suspended, or expelled by the board of directors, as they may determine from the nature and gravity of the offense committed." Provisions were also made in the by-laws regulating the making of charges against members, and the action of the board of directors upon the same.

The relator was president of the National Elevator and Dock Company, and James B. Wayman was secretary and treasurer thereof, with the usual powers and duties of like officers of corporations. On August 31, 1894, charges were preferred against the relator, as follows:

"Chicago, Aug. 31, 1894.

"To the Board of Directors of the Board of Trade of Chicago:

"Gentlemen: The undersigned, chairman of a committee of the

association, hereby charges Murry Nelson with an act of bad faith and dishonorable conduct in not carrying out the terms of an agreement signed by J. B. Wayman, secretary and treasurer of the National Elevator and Dock Co., a copy of which agreement is hereto attached.

“Respectfully,

“GEORGE R. NICHOLS, Chairman.”

To the charges were attached a copy of an amended rule of the board of trade concerning warehouses which were declared regular, and an agreement signed by said National Elevator and Dock Company, by said J. B. Wayman, secretary and treasurer, together with other owners of warehouses, as follows: “We, the undersigned elevator proprietors and managers, agree to apply to have our elevators made regular if the above section of rule 21, as presented to us, is adopted by the board of trade.” Communications passed between the relator and the president and directors of the board of trade, and a time was fixed ⁴³⁶ for the hearing of the charges. The hearing was twice postponed, of which the relator had due notice, and finally the hearing took place, when he attended and was found guilty of the charge made and suspended from the privileges of the board. The relator made a lengthy written statement to the president and directors of the board of trade in reply to the charges, claiming that the agreement could not be considered a contract from want of mutuality; that it was not based upon sufficient consideration; that the board of trade could not complain of his failure to perform it because not a party to it, and stating that Wayman, as secretary and treasurer of the National Elevator and Dock Company, exceeded his authority in signing the agreement; that neither he nor Wayman owned a majority of the stock, and could not bind the corporation in such a matter without a resolution of the board of directors, and that the controlling interest in the corporation was held in trust for wards of court in Erie county, Pennsylvania, so that the officers could do nothing whatever not strictly in accord with the laws governing trustees.

It was not alleged by the petition that there was any want of jurisdiction in the board of directors to hear and determine charges against members of acts of bad faith or dishonorable conduct under the by-laws in question, or that there was any irregularity in the proceedings of the board, but it was averred that the failure to carry out the agreement annexed to the charge did not constitute an act of bad faith or dishonorable conduct, and therefore the charge made was not sufficient to confer jurisdic-

tion in this instance, and that the relator was not guilty, for want of power to carry out such agreement. The court was called upon to review the proceedings and to re-examine the questions involved on these grounds.

The answer to which the demurrer was sustained set up the regularity of the proceedings, the appearance of the relator and the trial before the board of directors, ⁴³⁷ and averred that great loss and damage resulted to the members of the board of trade by the willful refusal of the relator to carry out the agreement, and especially to members who held warehouse receipts of said company, who had lost a great many thousand dollars by the conduct of petitioner, and averred that the board of directors, upon the hearing, found, as matters of fact, that Wayman had full power to sign the said agreement on behalf of the National Elevator and Dock Company; that the petitioner was president, and knew that said agreement had been signed on behalf of said company and never repudiated the same; that by his conduct he led the members of the board of trade to believe that the corporation would carry out the agreement if section 1 of rule 21, as amended, was adopted; that the members of the board voted upon the proposition to amend such rule under such belief; that after such rule was adopted, the petitioner declined to permit the National Elevator and Dock Company to carry out the agreement; that it was within his power to carry it out; that he willfully refused so to do, and that such conduct on his part was an act of bad faith, and dishonorable.

It is first contended that the decision of the appellate court when the case was first taken there is of binding authority in this court. No appeal was taken from that judgment, and therefore it is insisted that it became *res judicata*, and that this court is concluded and powerless to examine the questions involved. This is not the law. The judgment of the appellate court on that appeal merely reversed the judgment of the superior court and remanded the cause to that court for further proceedings not inconsistent with the opinion of the appellate court. This direction was no more than the law requires of the trial court in every case. There was no order to do any specific thing. Such a judgment is not final, and does not conclude the parties in this court. No appeal could be taken from the former judgment: *Harzfeld v. Converse*, ⁴³⁸ 105 Ill. 534; *Anderson v. Fruitt*, 108 Ill. 378; *Jones v. Fortune*, 128 Ill. 518; *Linington v. Strong*, 111 Ill. 152; *Chicago etc. Co. v. Andrews*, 148 Ill. 27.

The status of the board of trade has been determined by this

court in numerous cases, and it has been held to be merely a voluntary organization, although incorporated under an act of the general assembly. It is averred in the petition that it owned a building and rented out rooms as offices, from which it derived an income; that this income was insufficient for its expenses and an assessment was required each year, and that the present value of a membership is about eight hundred dollars. This does not change, in any respect, the character of the association, which must be determined by its charter. Any club or voluntary association, whether incorporated or unincorporated, may rent out rooms and derive income therefrom, but the character of the association is not changed by that fact. The right to pursue a business, as a member of such an organization, in the hall of the building devoted to that purpose may be a thing of value, but its value is incidental to the membership, and a determination of such membership destroys the rights under it. This corporation is not bound to admit any person to membership, nor was the relator in any way forced into such association. He voluntarily became a member, and by his contract is bound to abide by the rules and regulations of the board. The courts will never interfere to control the enforcement of by-laws of such associations, but they will be left to enforce their rules and regulations by such means as they may adopt for their government: *People v. Board of Trade*, 80 Ill. 134. When the relator became a member of the board of trade, he voluntarily submitted himself to the operation of all laws enacted for its government, and agreed to be bound by them so far as within the corporate authority. The by-law in question was not unreasonable, immoral, contrary to public policy, nor in contravention of the laws of the ⁴³⁹ land. A by-law of this board providing that if a member failed to comply with a business contract made with another member he should be expelled, was held to be valid in *People v. Board of Trade*, 45 Ill. 112, and the validity of this by-law is unquestionable. The court has repeatedly refused to interfere with the disciplinary powers of this board, in equity as well as at law: *Fisher v. Board of Trade*, 80 Ill. 85; *Baxter v. Board of Trade*, 83 Ill. 146; *Sturges v. Board of Trade*, 86 Ill. 441; *Pitcher v. Board of Trade*, 121 Ill. 412.

In the case of *Ryan v. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305, which was unlike the other cases in this court in not involving the disciplinary powers of the board, but where the board constituted a committee for the trial of disputes as to property rights between members of the board, this court held a member

not bound by a proceeding not according to the rules and regulations provided for the action of such committee. In that case, the complainant was held to be entitled to the relief because the committee refused to hear any evidence in his behalf and turned him away without a hearing. In that case, it was said that the complainant, when he became a member of the board, agreed to abide by its rules, regulations, and by-laws, and it was held that, having selected his tribunal, he was estopped from denying the jurisdiction of the committee, either as to the person or the subject matter, and the court expressly disclaimed any intention to interfere with the disciplinary power of the board over its members. No such question is involved in this case as in that. There is no question that the judgment of the board of directors was arrived at in accordance with the rules and regulations of the board. The relator was suspended by a tribunal which he had voluntarily chosen to determine the question, and according to the rules to which he assented in becoming a member, and he had due notice of the proceedings. Such a judgment cannot be collaterally reviewed by the courts. So far as the ⁴⁴⁰ courts are concerned, the judgment of the board of directors is conclusive, like that of any other tribunal.

It is argued that the charge made was not sufficient to confer jurisdiction. It expressly charged the relator with bad faith and dishonorable conduct in not carrying out a certain agreement of the corporation of which he was president, and a copy of that agreement was attached to the charge. Being the chief officer of the corporation, he was presumably authorized to carry out its lawful contracts. This paper is not to be tested by the strict rules of criminal pleading. The accused was informed in what the bad faith and dishonorable conduct consisted, and his communication to the board, set up in his petition, showed that he was fully informed as to its nature. Anything further would be matter of mere form, affording neither security nor information to him.

Whether the evidence before the board of directors was sufficient to authorize its finding cannot be examined into by the courts. The relator stands convicted by the sentence of a tribunal of his own choice. With the question whether that judgment was correct upon the facts the courts have nothing to do. Having given him notice and made due inquiry, where there is no question of the jurisdiction or legality of the proceedings, the courts will not sit as courts of appeal and re-examine the

facts. To do that would be to usurp an authority in cases of this kind for which there is no justification in the law.

It is urged that the judgment of suspension was invalid. But the by-law provided for such suspension, and the enactment of such a by-law was within the powers of the corporation. The charter provided that the corporation might admit or expel members, but it also provided for such rules, regulations, and by-laws as the members might think necessary or proper for the government of the corporation, and the enactment of the by-law for suspension was within the power thereby given. The petition showed a case with which the court was powerless ⁴⁴¹ to interfere, and the demurrer should have been carried back to it.

The judgments of the appellate court and superior court will be reversed, and the cause will be remanded to the latter court with directions to dismiss the petition.

JUDGMENT—WHEN NOT RES JUDICATA.—The doctrine of *res judicata* is applicable only to those judgments, decrees, or orders of record, which are so far material and final that a review thereof may be had, through the ordinary procedure, such as appeals or writs of error: *Rockwell v. District Court*, 17 Col. 118; 31 Am. St. Rep. 265. An order of the general term reversing a judgment entered upon a verdict directed by the trial court; and ordering a new trial, is not *res judicata* between the parties: See monographic note to *Hawk v. Evans*, 14 Am. St. Rep. 252, on *res judicata*.

BOARDS OF TRADE—RESORT TO COURTS.—A member of a board of trade must abide by its rules and regulations. If the board, however, fails to conduct an investigation in accordance with its charter and by-laws, its judgment is not binding. Hence, if property rights are involved, courts have power to so far supervise the action of a board of trade as to determine whether it has proceeded according to the rules and regulations provided for its action, and if it has failed in a substantial manner, courts may correct abuses which may result from its unwarranted proceedings: *Ryan v. Cudahy*, 157 Ill. 108; 48 Am. St. Rep. 305, and note.

VOLUNTARY ASSOCIATIONS—RESORT TO COURTS—RES JUDICATA.—Voluntary associations are bound by their constitutions, by-laws, rules, etc., so far as they are reasonable, and not in contravention of the law of the land or of public policy: See monographic note to *Austin v. Searing*, 69 Am. Dec. 672, discussing the subject. The decisions of any kind of a voluntary society or association in admitting, disciplining, suspending, or expelling members are of a quasi judicial character, and the courts will never interfere in such cases, except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, in good faith, and not in violation of the law of the land. If it is found that the proceeding was had fairly, in good faith, and pursuant to its own laws, and that there was nothing in it in violation of the law of the land, the sentence is conclusive, like that of a judicial proceeding: *Connelly v. Masonic etc. Ben. Assn.*, 58 Conn. 552; 18 Am. St. Rep. 296, and monographic note thereto discussing the right of members of voluntary associations to redress in the courts. The courts will decide whether a ground of expulsion is well taken: *Otto v. Journeyman etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156. A judgment of expulsion of a member of a social club, after conviction under its charter and by-laws,

in good faith and in a proper and legal manner, renders the case res judicata, and precludes its re-examination by a court of justice: *Commonwealth v. Union League*, 135 Pa. St. 301; 20 Am. St. Rep. 870.

CORPORATIONS—PRESUMPTION AS TO AUTHORITY OF PRESIDENT.—The president of a manufacturing corporation, who is in the active conduct and management of the business, must be presumed to have all the powers of any agent exercising like control and management, and to have authority to do what is done by such agents: *Note to Wait v. Nashua Armory Assn.*, 49 Am. St. Rep. 631. One dealing with the president of a corporation, in the usual course of business, and within the powers which he has been accustomed to exercise without objection from the directors, has the right to assume that he has been invested with those powers: *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352; 50 Am. St. Rep. 830.

MEDINAH TEMPLE COMPANY v. CURREY.

[162 ILLINOIS, 441.]

LANDLORD AND TENANT—ASSIGNMENT OF LEASEHOLD ESTATE FOR BENEFIT OF CREDITORS.—A valid voluntary assignment for the benefit of creditors transfers the title of all the assignor's property to the assignee. Hence, a voluntary assignment of a leasehold estate, for the benefit of creditors, when accepted by the assignee, transfers the leasehold interest as would a sale and transfer of the lease to a purchaser in the ordinary way.

LANDLORD AND TENANT—FORFEITURE BY ASSIGNMENT.—If a lease contains a condition that it shall not be assigned without the written consent of the lessor, and provides for a forfeiture if the condition is broken, the covenant is broken by the lessee's voluntary assignment for the benefit of creditors, and the lease may be forfeited for the breach, because such an assignment transfers the lessee's interest by his voluntary act, and not by operation of law.

LANDLORD AND TENANT—ASSIGNMENT—WAIVER OF FORFEITURE—RENT.—If a lessee violates a condition of his lease by making a voluntary assignment for the benefit of creditors, for which breach the lease may, by its terms, be forfeited, and the assignee occupies the premises for a time without electing whether to accept or to refuse the lease, the landlord's right to declare a forfeiture, because of such assignment, is not waived by his receiving rent from the assignee for the period covered by the latter's occupation of the premises.

M. B. and F. S. Loomis, for the appellant.

Ela, Grover & Graves, for the appellee.

443 **WILKIN, J.** Appellant leased to the F. Halbe Baking Company certain property in the city of Chicago for the term of five years. The lease contained this condition: "The said lessee shall not assign this lease, or let or underlet said premises or any part thereof, without the written consent of the lessor." and provided for a forfeiture if the condition was broken. After the term had run some ten months, the lessee made a

general voluntary assignment for the benefit of its creditors, naming Arthur L. Currey as assignee, who took possession of the leased premises and afterward claimed to hold the same under said lease. Appellant filed its petition in the county court of Cook county, where the assignment proceeding was pending, praying that court to declare the lease forfeited under the above condition. This petition was denied, and it appealed to the appellate court, where the order ⁴⁴³ of the county court was affirmed, and it now brings the case to this court.

By agreement of parties, the only questions presented for decision in the appellate court and here are, whether the condition was violated by the assignment so as to entitle the lessor to declare a forfeiture of the lease, and, if it was, whether the right of forfeiture was waived by the subsequent acts of the parties.

The general voluntary assignment by the lessee no doubt had the effect to transfer its leasehold interest to its assignee. True, the assignee might have refused to take it, and would be understood to have done so if he had not expressly or by unequivocal acts accepted it: *Smith v. Goodman*, 149 Ill. 75; *Burrill on Assignments*, sec. 374. The latter question is not, however, involved here, it being admitted that there was a positive election on the part of the assignee to accept the lease prior to the filing of the petition in the county court.

We have held that a valid voluntary assignment under our statute transfers the title of all the assignor's property to the assignee: *Davis v. Chicago Dock Co.*, 129 Ill. 180; *Freydendall v. Baldwin*, 103 Ill. 325; *Lowe v. Matson*, 140 Ill. 108; *Smith v. Goodman*, 149 Ill. 75; *Orr v. Hanover Fire Ins. Co.*, 158 Ill. 149; 49 Am. St. Rep. 146. In the latter case we said (page 154): Upon the execution and delivery of the deed of assignment, all the title and interest originally held by the assignor passed from him to the assignee. His legal interest was gone and the right of possession was gone. The assignee was clothed with the right and power to sell and convey the property and distribute the proceeds among the creditors. After the assignment, the assignor had no more control over the property than he would have in case of an absolute sale." It is clear, under these decisions, that a voluntary assignment of a leasehold estate, when accepted by the assignee, has the same effect as would the sale and transfer of the lease to a purchaser in the ordinary way.

⁴⁴⁴ But it is claimed the transfer in the case of a voluntary assignment is by operation of law, and therefore, under the well-established rule of law, no breach of the assignor's condition.

This position we regard as untenable. The act by which the title to the assigned estate is transferred from the assignor to the assignee is purely voluntary on the part of the former. Voluntary assignments for the benefit of creditors are transfers without compulsion of law. They are termed "voluntary" to distinguish them from such as are made by compulsion of law, as under statutes of bankruptcy and insolvency: Burrill on Assignments, secs. 2, 3. There can be no such thing as an involuntary assignment under our statute: Weber v. Mick, 131 Ill. 520. Therefore, those authorities which hold that if the lessee makes an involuntary assignment the leasehold will pass by operation of law have no application here. The authorities generally seem to sustain the position that when an assignment by the lessee is a voluntary one, the lease does not pass to his assignee by operation of law but by act of the party, and the distinction in this regard between voluntary and involuntary assignments is well defined: Wood on Landlord and Tenant, 716; Holland v. Cole, 1 Hurl. & C. 67; Rockford v. Hackman, 9 Hare, 474; Brandon v. Ashton, 21 Eng. Ch. 23. While language is found in some of the cases cited by counsel for appellee which seems to sustain their contention, yet when the real questions for decision in those cases are considered, they are not in conflict with those cited above.

But without reference to authorities cited by counsel on either side, it cannot be held an assignment, under our statute, passes the estate of the assignor to the assignee relieved of the condition that an assignment without the consent of the lessor shall entitle him to a forfeiture. All our decisions are to the effect that the transfer is by the voluntary act of the assignor in executing and delivering the deed of assignment. No process of law whatever ⁴⁴⁵ intervenes in order to vest the title in the assignee. In Davis v. Chicago Dock Co., 129 Ill. 187, we said: "The assignee, however, took no greater interest or better title than his assignors possessed. In his hands, the title was affected with every infirmity and subject to all the equities that existed in respect thereof in the hands of the grantor in the deed of assignment." And section 11 of the act is to that effect. It is there provided that the assignee shall have as full power and authority to dispose of all the estate, real and personal, assigned as the debtor or debtors had at the time of the assignment. Clearly, this language implies that he has no greater power or authority to dispose of property than had the debtor or debtors at the time the assignment was made. Hence, to hold the assignment operated to **extinguish** the condition would be to maintain the inconsistent,

not to say absurd, position, that while an assignment by the lessee would have been a violation of the condition, still the transfer of the lease by his assignee, who holds it subject to the same condition upon which he held it, will pass it free from the condition. We entertain no doubt that the voluntary assignment, under the law of this state, was a violation of the condition against assigning.

The other question is, Was there by the subsequent acts of the lessor a waiver of the right to declare the forfeiture? We think not. It is contended by appellee that receiving rent from the assignee after the assignment was a waiver of that right. It appears from the agreed state of facts in the record that upon the assignment being made and the assignee taking possession of the estate, which consisted of restaurant supplies and fixtures, in the leased premises, conversations took place between the president and general manager of appellant and the assignee and his attorney with reference to the assignee's occupancy of the premises, and both the assignee and his attorney stated to him that the rental stipulated in the lease would be paid by the assignee ⁴⁴⁰ during the time he occupied the premises. The assignee had not at that time declared his purpose to accept the lease nor did he do so until after the payment of the rent which it is claimed operated as a waiver of the condition. The rent paid was for a month, commencing December 13, 1894 (the date upon which the assignee took possession), and was not a payment of a month's rent according to the terms of the lease. Other facts appear in evidence from which it clearly appears that it was not the intention of either party that the payment of the rent by the assignee should be in any sense a recognition of his right to hold the property under the lease. We have already seen that the assignee had the right to accept or refuse the lease, and until he had made his election the lessor had a right to deal with him, as to the use of the property, without reference to the lease. The mere fact that its president arranged with him for the payment of rent during the time that he was using the property, without declaring his intention to accept it under the lease, in no way proved an intention to waive any condition of forfeiture. It was said in *Cheney v. Batten*, Cowp. 243, by Lord Mansfield, where the question was whether the acceptance of rent operated as a waiver upon the landlord: "The question, therefore, is, *quo animo* the rent was received and what the real intention of both parties was. If the truth of the case is that both parties intended the tenancy should continue, there is an end of the plaintiff's

title; if not, the landlord is not barred of his remedy by ejectment." This clear and concise statement of the law is in harmony with all the authorities. Under the facts of this case, we think it cannot be said that there was a waiver on the part of the lessor.

The judgment of the appellate court will be reversed.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE.—An assignee in bankruptcy does not become tenant under a lease, so as to be personally answerable for rent, unless he takes possession of the premises, or otherwise elects to accept the term. But if he enters on the demised premises, or elects to accept them, he becomes a tenant and is liable for rents: *Martin v. Black*, 9 Paige, 641; 38 Am. Dec. 574, and note. The lessee's assignee of the term is not liable for rent where he is not in actual possession: *Damainville v. Mann*, 32 N. Y. 197; 88 Am. Dec. 324; but an assignee for the benefit of creditors of an insolvent lessee entering with the intent to occupy as assignee by virtue of the assignment, and so occupying, has no ground of complaint in being ordered to pay that quarter's rent out of moneys in his hands realized out of the assigned estate, instead of out of his own funds: *Note to Childs v. Clark*, 49 Am. Dec. 170. While there is no privity of contract between a lessor and an assignee of the term, there is a privity of estate rendering the assignee liable upon the covenants of the lease so long as he holds the term. This rule applies to assignees in bankruptcy and insolvency, providing they take possession: *Bell v. American Protective League*, 163 Mass. 558; 47 Am. St. Rep. 481.

LANDLORD AND TENANT—FORFEITURE—WAIVER.—The happening of a cause of forfeiture, in any lease, only renders the lease voidable. The forfeiture must be promptly enforced, and by some positive act on the part of the lessor: See monographic note to *Guffy v. Hukill*, 26 Am. St. Rep. 912, on forfeiture of lease for breach of condition by lessee. A forfeiture of a lease by a breach of a condition not to assign is not waived by acceptance of rent from the assignee, unless the landlord has knowledge of the assignment; but if he has such knowledge, his acceptance of rent from the assignee has been held to be a waiver of the forfeiture, although, when receiving the rent, the landlord protested against such effect being given to his act in accepting: See monographic note to *Moses v. Loomis*, 47 Am. St. Rep. 199, on waiver of forfeiture of lease. The assignment of leases, and the respective rights and liabilities of lessor, assignee, and assignor thereafter is the subject of a monographic note to *Washington Natural Gas Co. v. Johnson*, 10 Am. St. Rep. 557-565.

CHICAGO v. STRATTON.

[162 ILLINOIS, 494.]

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.—The constitutional maxim which prohibits the legislature from delegating its power to any other body or authority is not violated by vesting municipal corporations with certain powers of legislation as to matters purely of local concern, of which the parties immediately interested are supposed to be better judges than the legislature.

CONSTITUTIONAL LAW—STATUTES DEPENDING UPON A CONTINGENCY.—It is competent for the legislature to pass a law, the ultimate operation of which may, by its own terms, be made to depend upon a contingency. Hence, while it cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.

MUNICIPAL CORPORATIONS—EXERCISE AND DELEGATION OF POWERS.—Powers conferred upon a municipal corporation must be exercised by the municipality; and, so far as they are legislative, cannot be delegated to others.

STATUTES—GRANT OF MEANS TO ACCOMPLISH END.—A grant of legislative power to do a certain thing carries with it the power to use all necessary and proper means to accomplish the end; and the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself.

MUNICIPAL CORPORATIONS—POWER AS TO LOCATION OF LIVERY STABLES.—An express legislative grant of power to a municipality to direct the location of livery stables in its midst, includes the power to prohibit or forbid the location of stables within residence districts; and, in the exercise of this power, the city council may impose whatever conditions and restrictions it may see fit, in relation to such districts.

MUNICIPAL CORPORATIONS—ORDINANCES—DELEGATION OF POWER AS TO LOCATION OF LIVERY STABLES.—An ordinance of a city, which has statutory power to regulate the location of livery stables in its midst, making it unlawful to locate, build, or keep a livery stable in any block in which two-thirds of the buildings are residences, unless the owners of a majority of the lots consent in writing, is not a delegation of legislative power to the property owners of such block, but is simply a prohibition against the location of such stables, which is avoided by the happening of the contingency provided for, to wit, the consent of a majority of the lot-owners in the block. The ordinance is, therefore, valid.

Suit to recover a penalty for the violation of an ordinance prohibiting the location of livery stables, in any block of the city of Chicago, in which two-thirds of the buildings were residences, without the consent of a majority of the lotowners in the block. It was conceded that the appellees, Stratton and others, kept a livery stable in Chicago; that there were thirty-one buildings in the block in which the stable was located, twenty-eight of which were devoted exclusively to residence purposes; and that no petition was ever signed by a majority of the property owners as required by the ordinance governing the location and keep-

ing of livery stables in the city of Chicago. The suit was first brought before a justice of the peace, and judgment entered against the defendants, who appealed to the circuit court. That court held the section of the ordinance in question to be invalid, and entered judgment for the defendants. The appellate court, on appeal, affirmed this judgment, and the plaintiff appealed to the supreme court. The plaintiff, the city of Chicago, asked the supreme court to hold, as a matter of law, that the section of the ordinance in question, as given in the opinion, was not a delegation of legislative power by the common council of the city to the property owners; that the section named was lawful, valid, and binding upon the defendants; that under the evidence the plaintiff was entitled to recover; that if the court found that the consent required had not been obtained, and that two-thirds of the buildings in the block containing the stable were devoted exclusively to residence purposes, the defendants were guilty of a violation of the ordinance; and that the plaintiff, was, therefore, entitled to recover the penalty provided for in the ordinance.

Farson & Greenfield, William G. Beale, corporation counsel, and George A. Du Puy, assistant corporation counsel, for the appellant.

Samuel J. Howe, for the appellees.

499 MAGRUDER, J. The eighty-second paragraph of section 1 of article 5 of the city and village act, which has been adopted by the city of Chicago, provides that the city council in cities shall have the power "to direct the location and regulate the use and construction of . . . livery stables . . . within the limits of the city": 3 Starr and Curtis' Annotated Statutes, 191. The power to make laws, which the constitution confers upon the legislature, cannot be delegated by the legislature to any other body or authority. The constitutional maxim, which prohibits such delegation of legislative power, is not violated when municipal corporations are vested with certain powers of legislation, in view of the recognized propriety of conferring upon such municipal organizations the right to make local regulations, of the need of which they are supposed to be better judges than the legislature of the state. But such powers as are conferred upon municipal corporations must be executed by the municipality, and, so far as they are legislative, cannot be delegated to any subordinate or to any other authority. The same restriction which rests upon the legislature as to the legislative functions conferred upon it by the constitution rests upon a

municipal corporation as to the powers granted ⁵⁰⁰ to it by the legislature: Cooley's Constitutional Limitations, 6th ed., 137, 138, 248, 249. Accordingly, "the principle is a plain one, that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others": 1 Dillon on Municipal Corporations, 4th ed., sec. 96.

The question, then, in the present case is, whether the power to direct the location of livery stables and regulate their use and construction, which has been conferred upon the common council of the city of Chicago by the city and village act, is delegated by section 49 of the building ordinance to the owners of a majority of the lots in the blocks therein specified. That section provides, that "it shall not be lawful for any person to locate, build, construct, or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes a livery, boarding, or sales stable . . . within two hundred feet of such residence, on either side of the street, unless the owners of a majority of the lots in such block fronting or abutting on the street consent in writing to the location or construction of such livery stable." It is to be noticed that the ordinance does not prohibit the location or construction or keeping of livery stables in blocks which are vacant, or where the buildings are devoted to business purposes, or where less than two-thirds of the buildings are devoted to exclusive residence purposes. It forbids the location of such stables in blocks where two-thirds of the buildings are devoted to exclusive residence purposes, but provides that they may be located even in such blocks if the owners of a majority of the lots therein consent thereto in writing. There is a general prohibition against the location of livery stables in blocks where two-thirds of the buildings are devoted to exclusive residence purposes, and then an exception to the prohibition is created in favor of blocks of the class designated, where a majority of the lotowners ⁵⁰¹ consent in writing to the location of a livery stable there. We are unable to see how this exception amounts to a delegation by the common council of its power to direct the location of livery stables to such lotowners.

While it may be true that a livery stable in a city or town is not per se a nuisance, "yet it becomes so if so kept or used as to destroy the comfort of owners and occupants of adjacent premises, and so as to impair the value of their property": 13 Am. & Eng. Ency. of Law, 935. A livery stable in close proximity to an existing residence may be injurious to the comfort and even health

of the occupants by the permeation of deleterious gases and by the near deposit of offal removed therefrom: *Shiras v. Olinger*, 50 Iowa, 571; 32 Am. Rep. 138, and note. As cities are constructed, the division of the territory is into blocks bounded by streets. The persons who will be injuriously affected by a livery stable, so kept as to be a nuisance, are those whose residences are in the same block where the stable is located. The prohibition against the location of a stable in a residence block is for the benefit of those who reside there. If those for whose benefit the prohibition is created make no objection to the location of such a stable in their midst, an enforcement of the prohibition as to that block would seem to be unnecessary.

By section 49 the lotowners are not clothed with the power to locate livery stables, but are merely given the privilege of consenting that an existing ordinance against the location of a livery stable in such a block as theirs may not be enforced as against their block. They are simply allowed to waive the right to insist upon the enforcement of a legal prohibition which was adopted for their benefit and comfort.

It is competent for the legislature to pass a law, the ultimate operation of which may, by its own terms, be made to depend upon a contingency: *People v. Hoffman*, 116 Ill. 587; 56 Am. Rep. 793, and cases cited. As was said by the supreme ⁵⁰² court of Pennsylvania in *Locke's Appeal*, 72 Pa. St. 491; 13 Am. Rep. 716: "The true distinction . . . is this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." In the case at bar, the ordinance provides for a contingency, to wit, the consent of a majority of the lotowners in the block, upon the happening of which the ordinance will be inoperative in certain localities. The operation of the ordinance is made to depend upon the fact of the consent of a majority of the lotowners, but the ordinance is complete in itself as passed. What are known as local option laws depend for their adoption or enforcement upon the votes of some portion of the people, and yet are not regarded as delegations of legislative power: 13 Am. & Eng. Ency. of Law, 991. Delegation of power to make the law is forbidden, as necessarily involving a discretion as to what the law shall be; but there can be no valid objection to a law, which confers an authority or discretion as to its execution, to be exercised under and in pursuance of the law itself: *Cincinnati etc. R. R. Co. v. Commissioners of Clinton County*, 1 Ohio

St. 77. Here, the provision in reference to the consent of the lot-owners affects the execution of the ordinance rather than its enactment: *People v. Salomon*, 51 Ill. 37; *Bull v. Read*, 13 Gratt. 78; *Aurora v. United States*, 7 Cranch, 382; *Alcorn v. Hamer*, 38 Miss. 652. The ordinance in question does not delegate to a majority of the lotowners the right to pass or even approve of it. On the contrary, their consent is in the nature of a condition subsequent, which may defeat the operation of the prohibition against the location of a livery stable in a block where two-thirds of the buildings are devoted to exclusive residence purposes, but which was never intended to confer upon the ordinance validity as an expression of the legislative will: *Alcorn v. Hamer*, 38 Miss. 652.

503 The express grant of the power to direct the location of livery stables, as made by the legislature to the municipal corporation, carries with it all necessary and proper means to make the power effectual: *Huston v. Clark*, 112 Ill. 344. In other words, a grant of legislative power to do a certain thing carries with it the power to use all necessary and proper means to accomplish the end; and the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278. In determining the question of the location of a livery stable, the common council may properly consult the wishes and ascertain the needs of the residents of the block where the stable is to be kept, and to that end make their written consent the basis of the action of the commissioner of buildings in issuing the permit. In matters of purely local concern, the parties immediately interested may fairly be supposed to be more competent to judge of their needs than any central authority: *Cooley's Constitutional Limitations*, 6th ed., 138.

In *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580, there was involved the question of the validity of a section of the Criminal Code, which provides that "whoever, during the time of holding any camp or field meeting for religious purposes, and within one mile of the place of holding such meeting, hawks or peddles goods, wares, or merchandise, or, without the permission of the authorities having charge of such meeting, establishes any tent, booth, or other place for vending provisions or refreshments, or sells or gives away, or offers to sell or give away, any spirituous liquor, wine, cider, or beer, or practices or engages in gaming or horseracing, or exhibits or offers to exhibit any show or play, shall be fined," etc. In that case, we held that

"the rule which would control an ordinance would also apply to an act of the legislature," and that the statute did "not confer the power to license on the authorities in charge of the meeting," and we there said: "The ⁵⁰⁴ fact that the act confers on the authorities the right to consent, or refuse consent, cannot be held to authorize such authorities to license. The right to consent or refuse consent is one thing, while the right or power to license a person to conduct a certain business at a certain place is quite a different thing. Had the legislature intended to authorize the authorities to license, language expressing that intention in plain words would no doubt have been used. But however this may be, we see nothing in the language of the act which can be construed as authorizing the authorities to license."

Where an annexation act of the legislature provided that when territory was annexed to a city under the provisions of that act, and, prior to such annexation, there were in force ordinances providing that licenses to keep dramshops should not be issued except upon petition of a majority of the voters residing within a certain distance of the location of such proposed dramshop, it was held that such ordinance still remained in force after the annexation, and that it was not unreasonable: *People v. Cregier*, 138 Ill. 401.

The case of *St. Louis v. Russell*, 116 Mo. 248, is relied upon as announcing a different view of the present question from that which is here expressed, but the ordinance condemned in that case provided that no livery stable should "be located on any block of ground in St. Louis without the written consent of the owners of one-half of the ground of said block." It will be noticed that, in the Missouri case, the ordinance requiring the consent of adjacent property owners related to the entire city. Under the operation of such an ordinance livery stables might be totally suppressed and prohibited everywhere within the municipal limits. The ordinance, however, in the case at bar is not thus unreasonable, as it relates only to certain residence districts which are clearly defined. Within such specified residence districts, the city council undoubtedly has the power to ⁵⁰⁵ prohibit or forbid the location of livery stables, and, having the power of total prohibition within those districts, it may impose such conditions and restrictions in relation to their limited area as it may see fit.

For the reasons stated, we are of the opinion that the ordinance here in question is not void as being a delegation of leg-

islative power, and that the circuit court erred is not holding as law the propositions submitted to it as the same are set forth in the statement preceding this opinion.

Accordingly, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — DELEGATION OF LEGISLATIVE POWER.—Legislative power cannot, as a rule, be delegated: *O'Neil v. American Fire Ins. Co.*, 166 Pa. St. 72; 45 Am. St. Rep. 650, and note; but the legislature may confer upon municipal corporations the power to enact certain rules and regulations with respect to subjects which are appropriate ones for municipal regulation: See monographic note to *Robinson v. Mayor* etc. of Franklin, 34 Am. Dec. 632, on general limitations on the power of municipal corporations to pass ordinances. Municipal corporations are mere instrumentalities of the state for the convenient administration of government, and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature: See monographic note to *Mount Hope Cemetery v. Boston*, 35 Am. St. Rep. 529, on legislative control over the property of municipalities. Municipal corporations have such powers of local self-government as have been usually exercised in England and in this country: Note to *St. Paul v. Colter*, 90 Am. Dec. 284. The legislature has power to pass a conditional statute, and to make its taking effect depend upon some subsequent event, and it may also provide within what time an act must be done, if done at all: *People v. McFadden*, 81 Cal. 489; 15 Am. St. Rep. 66. Making certain provisions of an act to depend upon the vote of the people of a county does not delegate to the people the power to pass or repeal the act. Such an act is constitutional: *People v. McFadden*, 81 Cal. 489; 15 Am. St. Rep. 66; *Commonwealth v. Weller*, 14 Bush, 218; 29 Am. Rep. 407; *Boyd v. Bryant*, 35 Ark. 69; 37 Am. Rep. 6; *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 508; note to *Parker v. Commonwealth*, 47 Am. Dec. 500; but is not valid unless specially authorized by the constitution: Note to *O'Neil v. American Fire Ins. Co.*, 45 Am. St. Rep. 655. A grant of power to a municipality to regulate lawful occupations and business places is not an express grant of power to locate or prescribe the limits of carrying on lawful occupations upon private premises. Hence, an ordinance prohibiting the location of a livery stable in any city block in which a school building is situated, or in any block opposite to a block in which a school building is situated, without regard to the manner in which such stable is constructed, kept, or used, is void. Livery stables in cities are not nuisances per se; but they may become such if not constructed and used in a proper manner: *Phillips v. Denver*, 18 Col. 179; 41 Am. St. Rep. 230. Public powers or trusts devolved by charter upon the common council of a municipal corporation, to be exercised by it when and in such manner as it shall judge best, cannot be delegated by such body to others: Notes to *Thompson v. Schermerhorn*, 55 Am. Dec. 386; *Birdsall v. Clark*, 29 Am. Rep. 100.

WALD v. PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY.

[162 ILLINOIS, 545.]

CARRIERS—ACT OF GOD, WHAT IS.—An unprecedented flood, causing the baggage of a passenger to be swept away from the charge of a common carrier, is an act of God. The "Johnstown flood," as it was called, was *actus dei*.

CARRIERS—ACT OF GOD.—A LOSS OR INJURY is due to the act of God, when it is occasioned exclusively by natural causes such as cannot be prevented by human care, skill, and foresight.

CARRIERS—NEGLIGENCE CONCURRING WITH ACT OF GOD.—A common carrier is excused for a loss occurring solely through an act of God; but he is liable for damage caused by the concurring force of his own negligence and some other cause for which he is not responsible, including the act of God.

CARRIERS—NEGLIGENCE CONCURRING WITH ACT OF GOD.—If a common carrier negligently exposes property in his care to loss from natural causes, or negligently brings it directly into contact with forces of nature that work its destruction, he is liable. Hence, unnecessary delay on his part, subjecting goods in his possession to loss by an act of God, which would not have happened, had the carrier been diligent, is of itself negligence that makes him liable for the loss.

RAILROADS—BAGGAGE—DUTY AS TO SENDING.—There is an implied undertaking on the part of a railway company that the baggage of a passenger upon a limited express train shall go on the same train, and the company must send it on that train, unless the passenger gives some direction, or does something, or omits to do something, which authorizes it to send the baggage by some other train. If, therefore, the passenger and baggage become separated, through the carrier's own action, the company bears the risk.

RAILROADS—BAGGAGE—DELAY IN SHIPPING—LOSS—LIABILITY.—If a railway company negligently fails to ship the trunk of a passenger upon the limited express train taken by such passenger, but does send it by a later train, and the trunk is destroyed by a flood coming upon the later train, the company is liable for the loss though the flood was an act of God.

RAILROADS—NEGLIGENCE—QUESTION OF FACT FOR JURY.—Whether or not a railroad company was guilty of negligence in not sending a passenger's baggage by the train on which he traveled, and to have it so carried throughout the journey, is a question of fact for the jury, and it is error not to submit it to them.

Suit by the appellant, Wald, against the appellee, the railroad company, to recover the value of appellant's trunk and its contents, which were lost between Cincinnati, Ohio, and New York City, while in the possession of the railroad company as a common carrier. The plaintiff bought a ticket at Cincinnati, on May 30, 1889, for passage by the so-called "limited express train" over the defendant's road, to New York City. The limited express was a fast train, arriving in New York City two hours sooner than the regular day express. The plaintiff presented his tickets and had his trunk checked at Cincinnati for New York.

Passengers and their baggage, for both the limited and day express, traveled on the same train from Cincinnati to Pittsburgh. Both left Cincinnati at the same time. The Cincinnati sleeper, carrying passengers for the limited train, was attached, at Pittsburgh, to the regular limited express which had come from Chicago, and the Cincinnati baggage for the limited train was transferred, at Pittsburgh, from the baggage-car of the Cincinnati express to the baggage-car of the limited train. To accomplish this transfer of baggage at Pittsburgh, it was the custom of the company to attach to each trunk at Cincinnati a white pasteboard tag in addition to the regular brass check. Unless the white tag was attached, a trunk would remain on the baggage-car from Cincinnati, and go through on the day express from Pittsburgh to New York. No white tag was so attached to the plaintiff's trunk, and it remained on the day express, which followed along some time after the limited train. This train was caught in a flood at Johnstown, Pennsylvania, and the baggage-car, with its entire contents, including the plaintiff's trunk, was lost. The limited express, on which the plaintiff traveled, had passed beyond the danger point before the flood came, and was uninjured. The testimony was conflicting as to whether or not it was the defendant's fault that the white tag was not attached to the plaintiff's trunk at Cincinnati. It was agreed that there was no negligence in the management of the train, or in the care of the baggage in question while on the train. The court directed a verdict for the defendant, and the judgment entered thereon was affirmed by the appellate court. The case was taken to the supreme court under a certificate of importance. As gathered from the testimony to be found in the record, the appellate court, in their opinion, thus described the flood which destroyed the baggage-car containing the appellant's trunk: "The flood that was encountered far exceeded what had ever before been known in the region where it occurred. There was a great deal of rain, lasting many hours, which raised the river to a height never before known, and caused washouts and landslides to an extent necessitating the train carrying the trunk to come to a stand. As the stream rose the train was shifted from place to place to keep it in safety, and because of washouts ahead and behind it could not proceed far either in the direction of returning or advancing. After remaining in this position for several hours, the South Fork dam, which was located on a tributary stream a few miles above where the train stood, and formed a reservoir there at a very much greater elevation, broke, and let into the narrow

valley what witnesses described as a great wall or wave of water from twenty to thirty feet high. Of course, everything was swept before it. Trees, houses, railroad tracks, cars and engines, iron bridges, and stone viaducts, were carried before its force, and so complete was the devastation wrought, it was testified in the case that it cost the railroad company six hundred thousand dollars to put its roadbed, tracks, and bridges, within a distance approximating seven miles, in the condition they were in before the flood. Only those persons who were on the alert and on the hillsides escaped death. The engineer of the locomotive to the train in question escaped only by fleeing up the hillside. His locomotive was turned over, and the baggage-car, which was coupled to it and in which the plaintiff's trunk was being carried, was swept away, and it was testified that the car was never afterward found in recognizable form."

Burnham & Baldwin, for the appellant.

George Willard, for the appellee.

550 MAGRUDER, C. J. Appellee's contention is, that the flood, by reason of which appellant's baggage was lost, was an act of God; and that it is not liable for such loss, under the well-established rule that "a common carrier, liable as an insurer for the property intrusted to him for the purpose of transportation, is, nevertheless, excused from responsibility for losses which are caused by an act of God": 1 Am. & Eng. Ency. of Law, 2nd ed., 592.

It is appellant's contention that the railroad company should, by placing a white tag on his trunk at Cincinnati, or by some other means, have provided that it should travel with him by the same train throughout the journey; that it did not do so; that as a result of its negligence in so failing properly to check his trunk, it was separated from him during the journey and was lost; and that, even if this flood was an act of God, yet the appellee's negligence in failing properly to check the trunk concurred with the act of God, and thereby made appellee liable for the resulting loss or damage.

1. The "Johnstown flood," as it is called, by reason of which appellant's baggage was lost, was an act of God. ⁵⁵¹ In *Long v. Pennsylvania R. R. Co.*, 147 Pa. St. 343, 30 Am. St. Rep. 732, which was an action brought to recover the value of two trunks and their contents delivered to the Pennsylvania Railroad Company in Cincinnati for transportation to Washington, and where it appears that the trunks lost were contained in the baggage-

car of the day express which was destroyed by the Johnstown flood, so called, on May 31, 1889, the supreme court of Pennsylvania held, upon substantially the same evidence which is found in the record in the case at bar, that said flood was "an inevitable accident, properly described as *actus dei*." In *Long v. Pennsylvania R. R. Co.*, 147 Pa. St. 343, 30 Am. St. Rep. 732, however, there was no question as to whether or not the goods lost were upon the right train; that is to say, the point was not there made that the personal baggage of the passenger had been shipped upon a different train from that on which the passenger himself took passage.

2. There is some conflict among the authorities as to the liability of a common carrier where the loss of goods in its or his possession is due, not solely and only to an act of God, but to an act of God combined with the negligence of the carrier. Many cases hold, and such seems to be the tendency of the decisions in this state, that a common carrier is not exempt from liability for a loss which takes place because of an act of God, if such carrier has been guilty of any previous negligence or misconduct which brings the property in contact with the destructive force of the *actus dei*, or unnecessarily exposes it thereto. A loss or injury is due to the act of God when it is occasioned exclusively by natural causes such as could not be prevented by human care, skill, and foresight; and where property, committed to a common carrier, is brought by the negligence of the carrier under the operation of natural causes that work its destruction, or is, by the negligence of the carrier, exposed to such cause of loss, the carrier is responsible. "It is universally agreed that if the damage is caused by the concurring ⁵⁵² force of the defendant's negligence and some other cause for which he is not responsible, including the act of God, . . . the defendant is nevertheless responsible if his negligence is one of the proximate causes of the damage: 1 *Shearman and Redfield on Negligence*, 4th ed., sec. 39. The doctrine is thus clearly stated by the supreme court of Missouri in *Wolf v. American Exp. Co.*, 43 Mo. 421; 97 Am. Dec. 406: "The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is, that it must be the sole cause. And where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible."

In line with this principle, many authorities hold, that, where the unnecessary delay of the carrier subjects the goods in his

possession to a loss by an act of God which they would not otherwise have met with, the delay is of itself such negligence as will make him liable for the loss: *Michigan Cent. R. R. Co. v. Curtis*, 80 Ill. 324; *Michaels v. New York Cent. R. R. Co.*, 30 N. Y. 564; 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630; 86 Am. Dec. 426; *McGraw v. Baltimore etc. R. R. Co.*, 18 W. Va. 361; 41 Am. Rep. 696; *Deming v. Grand Trunk R. R. Co.*, 48 N. H. 455; 2 Am. Rep. 267; *Read v. St. Louis etc. R. R. Co.*, 60 Mo. 199; *Williams v. Grant*, 1 Conn. 487; 7 Am. Dec. 235; *Davis v. Garrett*, 19 Eng. Com. L. 716; *Crosby v. Fitch*, 12 Conn. 410; 31 Am. Dec. 745; *Rodgers v. Central Pac. R. R. Co.*, 67 Cal. 606; *Salisbury v. Herchenroder*, 106 Mass. 458; 8 Am. Rep. 354; *Higgins v. Dewey*, 107 Mass. 494; 9 Am. Rep. 63; *Philadelphia etc. R. R. Co. v. Anderson*, 94 Pa. St. 360; 39 Am. Rep. 787; *Baltimore etc. R. R. Co. v. School District*, 96 Pa. St. 65; 42 Am. Rep. 529. We are inclined to think that this is the correct doctrine. There are cases which hold to the contrary—among which are the leading cases of *Denny v. New York Cent. R. R. Co.*, 13 Gray, 481, 74 Am. Dec. 645, and *Morrison v. Davis*, 20 Pa. St. 171; 57 Am. Dec. 695—upon the ground that such delay, whether justifiable or not, should not be regarded as the proximate, but only as the remote, cause of the loss. It will be found, however, upon examination, that most ⁵⁵³ of these cases are cases where mere delay without other negligence brings the property lost within the operation of the natural cause defined to be an act of God: 1 Am. & Eng. Ency. of Law, 2d ed., 596.

In the case at bar, when the appellant bought his tickets for a passage upon the limited express train and applied to have his baggage checked, there was an implied undertaking on the part of appellee that his baggage should go on the same train on which he took passage; and appellee was bound to send his baggage on the same train on which he went, unless the appellant gave some direction, or did something, or omitted to do something, which authorized appellee to send his baggage by some other train. "The implied undertaking of the passenger carrier as to transporting baggage is, that passenger and baggage shall go together; since all baggage is taken with reference to the wants of a particular journey. . . . Nor ought the carrier, without permission, to send the baggage by later trains or a different route, unless in a strong case of necessity. We need hardly add that if, through the carrier's own action, passenger and baggage become separated, the carrier bears the risk": *Schouler on Bailment and Carriers*, 2d ed., sec. 675; *Wilson v.*

Grand Trunk R. R. Co., 56 Me. 60; 96 Am. Dec. 435; *Fairfax v. New York Cent. etc. R. R. Co.*, 73 N. Y. 167; 29 Am. Rep. 119; *Toledo etc. R. R. Co. v. Tapp*, 6 Ind. App. 304.

It was a question of fact in this case whether or not appellee was guilty of a violation of its implied undertaking or contract to send the baggage on the same train with appellant; in other words, whether or not appellee was guilty of negligence in not taking proper steps to have the baggage carried by the train on which appellant traveled, and to have it so carried throughout the whole length of the journey; or whether the failure to have the baggage transferred to the baggage-car of the limited express train at Pittsburg was in any way the ⁵⁵⁴ fault of the appellant. We think that the court erred in not submitting this question of fact to the jury, and in directing a verdict for the defendant without permitting the jury to pass upon such question.

If appellant's trunk had been transferred at Pittsburg to the baggage-car attached to the limited express train from Chicago, as was done with the sleeping-car in which appellant was traveling, the trunk would have passed through the place of danger before the flood occurred, and would not have been destroyed or lost by reason of the flood. If the appellee was guilty of negligence in failing to put the trunk upon the right train—upon the train where its implied contract with appellant required it to put the trunk—it was guilty of negligence which brought the trunk in direct contact with the force known as an act of God. "If the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury": *Shearman and Redfield on Negligence*, 4th ed., sec. 39. But here it cannot be said, that the flood would have caused the loss if the trunk had been transferred to the limited express train at Pittsburg.

It is said, however, that the contract of transportation was made at Cincinnati, Ohio; that such a contract and the liabilities of the parties under it are governed by the law of the place where the contract was made; that the contract to transport appellant's trunk, having been made in Ohio, must be governed by the law of Ohio; that by the law of that state, loss of goods in the possession of a common carrier occurring by reason of an act of God, even though such loss would not have been met with but for unnecessary delay on the part of the carrier, relieves the carrier of liability for the loss; and that the case of *Daniels v. Ballentine*, 23 Ohio St. 532, 13 Am. Rep. 264, which was in-

troduced in evidence, shows what the law of Ohio is upon this subject. If the doctrine of *lex loci contractus* is applicable to this case, and if the case referred to is the ⁵⁵⁵ law of Ohio, we do not think that the contention set up can be maintained, because the doctrine of *Daniels v. Ballentine*, 23 Ohio St. 532, 13 Am. Rep. 264, is not applicable here.

In that case, the action was brought to recover the value of a barge, which defendants contracted to tow by means of a steam tug from Bay City, Michigan, to Buffalo, New York, and which was lost in a storm on Lake Erie. It appears that, after the voyage was begun, the defendants delayed on the route three days, and then began the voyage again, and, while on such delayed voyage, the barge and tug were overtaken by the storm and lost. The court expressly states that the defendants in that case were not common carriers, and that, although they had such control of the barge as was necessary to enable them to move it, yet the plaintiffs had possession of it, "and for most purposes it remained in their custody and care." The case, however, presents an instance of mere delay without other negligence. If, in the case at bar, the trunk had been placed upon the right train, and that train had been delayed on the way, and, by reason of such delay, had come in contact with the flood, then perhaps there would be a resemblance between this case and the Ohio case. But here the delay did not result simply from a halting, or stoppage, in the movement of a train which was carrying the trunk in pursuance of the contract of carriage, but it resulted from negligence in failing to keep an implied contract to carry the trunk upon a particular train, and in violating that contract by carrying the trunk upon a different train from the one agreed upon, that is, upon the assumption that the facts would show no excuse for not keeping the contract. It is like a deviation from the usual course by the master of a vessel, during which a cargo is injured by a storm at sea; in such case, the deviation is regarded as a sufficiently proximate cause of the loss to entitle the freighter to recover, as it brings the vessel in contact with the storm, in itself the act of God: *Davis v. Garrett*, 6 Bing. ⁵⁵⁶ 716; 19 Eng. Com. L. 212. Here was a deviation from the contract by the use of one agency of transportation not agreed upon, instead of the use of another agency of transportation which was agreed upon, thereby bringing the property in transit in contact with the flood, in itself the act of God. In *Davis v. Garrett*, 6 Bing. 718, it was urged that there was no natural or necessary connection between the wrong of the master in taking the barge out

of its proper course and the loss itself, "for that the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course," but the court held the objection untenable, and Tindal, C. J., there said: "The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable."

The language last quoted is precisely applicable to the case at bar, which is not a case of delay in the transportation of goods being carried by the right conveyance, as in *Daniels v. Ballentine*, 23 Ohio St. 532, 13 Am. Rep. 264, but a case of neglect in forwarding a trunk by the wrong conveyance, to wit, by the day express, instead of the limited express. Of course, in all that is here said, it is not intended to express any opinion as to whether the failure to ship the trunk by the right train at Pittsburgh was or was not the fault of the appellee in view of the conflict in the testimony as to the circumstances attending the checking and shipment of the trunk. But, if there was nothing in such circumstances which excuses appellee from its implied obligation to ship the trunk from Pittsburgh upon the train carrying appellant eastward from that point, then we think that the property was unnecessarily exposed to the destructive power of the flood in question through the previous negligence or misconduct of appellee, and, consequently, that appellee is not excused: *Williams v. Grant*, 1 Conn. 487; 7 Am. Dec. 235. Hence, the case should have been allowed to go to ⁵⁵⁷ the jury under the instructions asked by appellant upon this question.

For the reason thus indicated, the judgments of the appellate court and of the superior court of Cook county are reversed, and the cause is remanded to said superior court for further proceedings in accordance with the views herein expressed.

AN ACT OF GOD means something superhuman, or something in opposition to the act of man. Thus, a loss arising from a great fire is not a loss arising from the act of God: *Chicago etc. Ry. Co. v. Sawyer*, 69 Ill. 285; 18 Am. Rep. 613; but a loss arising from an unprecedented flood is a loss arising from an act of God, and excuses the carrier from liability for a loss, provided he has been guilty of no negligence or departure from duty contributing to the occurrence of such loss: *Norris v. Savannah etc. Ry. Co.*, 23 Fla. 182; 11 Am. St. Rep. 355, and monographic note thereto on a carrier's liability for loss or deterioration of goods by delay: *Smith v. Western Ry.*, 91 Ala. 455; 24 Am. St. Rep. 929.

CARRIERS—NEGLIGENCE CONCURRING WITH ACT OF GOD.—An act of God which excuses a carrier must not only be the proximate cause of the loss, but the sole cause. If the loss is caused by the act of God, and the negligence of the carrier mingles with it

as an active and co-operative cause, he is still responsible: *Wolf v. American Exp. Co.*, 43 Mo. 421; 97 Am. Dec. 406. This rule is laid down in the monographic note to *Norris v. Savannah etc. Ry. Co.*, 11 Am. St. Rep. 363, 364, on carriers' liability for loss or deterioration of goods by delay, and to *Wolf v. American Exp. Co.*, 97 Am. Dec. 409, on a carrier's liability for loss occasioned partly by act of God and partly by other means. Other views, however, are given in these notes. A common carrier is liable for the safety of a passenger's baggage in his keeping as carrier, except a loss from an act of God or a public enemy: *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736. The same rules of care and diligence on the part of a railway company apply whether baggage is forwarded on the same, preceding, or subsequent train, where the passenger has paid his fare, and his baggage is sent pursuant to the contract of carriage: *Warner v. Burlington etc. R. R.*, 22 Iowa, 166; 92 Am. Dec. 389. A common carrier is responsible for injury to goods by an act of God, if he departs from his line of duty, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury: *Michaels v. New York etc. R. R. Co.*, 30 N. Y. 564; 86 Am. Dec. 415.

NEGLIGENCE—QUESTION OF FACT.—Negligence is ordinarily a question of fact for the jury to determine from all the circumstances of the case: *Durbin v. Oregon etc. Co.*, 17 Or. 5; 11 Am. St. Rep. 778.

CASES
IN THE
APPELLATE COURT
OF
INDIANA

MERCHANTS' AND MECHANICS' SAVING BANK v. FRAZE.

[9 INDIANA APPEALS, 161.]

NEGOTIABLE INSTRUMENTS—NON-NEGOTIABLE NOTE—EQUITIES—DEFENSES.—A promissory note, though payable to order at a bank in this state, which contains a clause waiving all defenses based upon any extensions of time for its payment that may be given by its holder to the maker, is not negotiable, under the statute, as an inland bill of exchange. Such a clause destroys the negotiability of the instrument, and an indorser for value, before maturity, takes it subject to, and charged with, all the equities and defenses against it.

SALES—SPECIFIC PURPOSE OR USE.—If an article purchased is to be manufactured or produced for a specific purpose or use, there is an implied warranty that the article is reasonably fit or suitable for the purpose or use for which it was ordered.

SALES—HORSES—SPECIFIC PURPOSE OR USE.—There is an implied warranty in the sale of a stallion for breeding purposes, where such sale is made by one who raises horses of that kind, deals in them, and therefore knows their qualities, that the animal shall be reasonably fit for breeding purposes.

NEGOTIABLE INSTRUMENTS—DEFENSES—BREACH OF WARRANTY.—In an action on a non-negotiable promissory note, given for the purchase price of a stallion sold for breeding purposes, an answer setting up a breach of the implied warranty that the horse is reasonably fit for such purposes is sufficient, where the note is subject to equities.

SALE—RESCISSION—TENDER.—If a stallion sold for breeding purposes turns out not to be reasonably fit for such purposes, and timely notice of this fact is given, but the seller and buyer agree that the latter shall keep the horse another season to give him a better trial, the death of the horse during the season in which he is to have a final trial renders it unnecessary to make another tender of the horse before that season has expired.

APPEAL—ASSIGNMENT OF ERROR—NEW TRIAL.—It is not proper practice to assign as error that which is cause for a new trial, such as a refusal to give correct instructions submitted.

INSTRUCTIONS—CONTRACTS.—There is no error in instructing a jury that they may adopt that construction of a contract which the parties themselves have placed upon it.

APPEAL—REVIEW OF MOTION FOR JUDGMENT NON OBSTANTE.—Upon an assignment of error in overruling a motion for judgment notwithstanding the general verdict, the appellate court cannot look into the evidence to determine whether it sustains a finding established by such verdict.

E. L. Watson and J. M. Smith, for the appellant.

G. H. Ward and J. S. Engle, for the appellees.

¹⁶² **REINHARD, J.** The appellant sued the appellees in the Randolph circuit court, on a promissory note alleged to have been given by the appellees to Galbraith Brothers, and by them assigned, before maturity, to the appellant.

The complaint is in two paragraphs, each of which contains a copy of the note sued upon, which is as follows:

“275. Winchester, Ind., Jan. 20, 1890.

“June 1, 1890, for value received, we, the undersigned, of Saratoga, county of Randolph, and state of Indiana, jointly and severally promise to pay to the order of Galbraith Bros., of Janesville, Wis., the sum of two hundred and seventy-five dollars, negotiable and payable at the Randolph County Bank of Winchester, with interest at the rate of 8 per cent per annum from date, with exchange ¹⁶³ and cost of collection and customary attorney's fees, without any relief whatever from valuation and appraisal laws. And the drawers and indorsers severally waive presentment for payment, protest for nonpayment and notice thereof, and all defenses on the grounds of any extension of the time of its payment that may be given by its holders to them, or either of them.

“BENJAMIN E. FRAZE,
“WILLIAM FRAZE.”

The note was indorsed in blank, “Galbraith Bros.”

There was an answer in five paragraphs, to each of which a demurrer was filed and overruled. At this point in the proceedings, the venue of the cause was changed to the court below, where, at a subsequent term, the appellants filed their reply in four paragraphs.

Upon the issues thus joined, there was a jury trial and a verdict in favor of the appellees. With their general verdict the jury also returned answers to interrogatories submitted to them. Motions for judgment, notwithstanding the verdict, and for a new trial were filed by the appellant and overruled.

Separate errors are assigned upon the ruling of the court in overruling the demurrers to the several paragraphs of the answer.

It is conceded in the brief of appellant's counsel that the second paragraph of the answer is sufficient. No particular objection is pointed out to the fifth paragraph.

The third and fourth paragraphs of the answer aver that the note in suit was given to the payees in part consideration for a breeding horse; that there was an implied warranty accompanying the sale of the horse, and a breach of such warranty. It is claimed, on behalf of appellant, in argument, that neither of these paragraphs set up a valid defense: 1. Because the note is governed by the law merchant, ¹⁶⁴ and is alleged in the complaint to have been indorsed to the appellant for value, before maturity, and without knowledge of the defense now set up; 2. That even if the note was not negotiable by the law merchant the facts averred in these answers are insufficient to show that there was an implied warranty.

Is the note negotiable by the law merchant? It is payable at the Randolph County Bank, at Winchester, and is in all respects sufficient as a note of that character, unless its negotiability is destroyed by the clause, waiving "all defenses on the grounds of any extension of time of its payment that may be given by its holders" to the makers or either of them. It is sufficient for us to say upon this point that the question has been fully and explicitly settled against the contention of the appellant: *Oyler v. McMurray*, 7 Ind. App. 645, and authorities cited.

The note not being governed by the law merchant, the appellant took it subject to, and charged with, all the equities and defenses existing against it: *Sims v. Wilson*, 47 Ind. 226; *Ayers v. Harshman*, 66 Ind. 291; *Carithers v. Stuart*, 87 Ind. 424; *Henry v. Gilliland*, 103 Ind. 177.

Do the facts averred in these answers constitute an implied warranty? It is averred in each of these paragraphs, in substance, that the note was given in part consideration of a stallion purchased by the appellees of the payee; that the sellers were, at the time of the execution of the note, and before, engaged in importing, raising, and selling breeding horses for breeding purposes, and that the appellee, Benjamin E. Frazee, being desirous of purchasing a stallion for breeding purposes, made application, through the agent of said Galbraith Brothers, to buy a stallion for that purpose, and that said Galbraith Brothers, through their agent, sold to the said ¹⁶⁵ Benjamin E. Frazee a stallion for breeding purposes, and that the note in suit was given in part consideration of the purchase price of said horse, and for no other or different consideration; that said Galbraith

Brothers were informed and knew of the purpose for which said horse was wanted, and sold him to said appellee for that purpose and no other; and that said Galbraith Brothers thereby impliedly warranted said horse to be fit and suitable for breeding purposes and a reasonably sure foal-getter, and that said appellee accepted said horse with the implied warranty and belief that he was fit for the purpose of breeding and a reasonably sure foal-getter.

It was averred that the other appellee signed said note as surety for Benjamin E. Frazee. Facts are then averred from which it is made to appear that the horse was not as represented; that, after a fair trial, he proved to be utterly worthless as a foal-getter and for breeding purposes, and that in fact he possessed no value for any purpose.

It may be stated to be the general rule that an executed sale for a chattel does not carry with it an implied warranty, and that in the absence of fraud or misrepresentation the purchaser takes the article with all its defects. In such cases the maxim *caveat emptor* applies: *Court v. Snyder*, 2 Ind. App. 440; 50 Am. St. Rep. 247, and authorities cited.

This rule, however, has no application in cases of executory sales where the article contracted for is to be manufactured or produced for a specific purpose or use. In that class of cases, there is an implied warranty that the article is reasonably fit or suitable for the purpose or use for which it was ordered: *Bushman v. Taylor*, 2 Ind. App. 12; 50 Am. St. Rep. 228.

Says a standard law writer upon this topic: "But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily ¹⁰⁶ used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given, as is shown by the authorities now to be reviewed": *Benjamin on Sales*, sec. 965.

The contract here relied upon is, perhaps, strictly speaking, not an executory one, but for obvious reasons the same rule must be applied to it. The appellee, Benjamin E. Frazee, desired to purchase a stallion for breeding purposes, and so informed Galbraith Brothers, through their agent. They were producers of, and dealers in, this kind of live stock, and undertook to sell Frazee a horse for breeding purposes. Here the contract was to supply an article which the seller produced and was dealing in; the article was for a particular purpose, and the implication necessarily arises that the buyer relied upon or trusted in the judg-

ment or knowledge of the seller. Hence the sale carried with it an implied warranty that the horse should be reasonably fit for breeding purposes: Benjamin on Sales, sec. 988. See, also, *Conant v. National State Bank of Terre Haute*, 121 Ind. 323; *Brenton v. Davis*, 8 Blackf. 317; 44 Am. Dec. 769; *Gurney v. Atlantic etc. Ry. Co.*, 58 N. Y. 358; *Jones v. Bright*, 5 Bing. 533.

In the case last cited, it was said by Best, C. J: "The decisions, however, touching the sale of horses turn on the same principle. If a man sells a horse generally, he warrants no more than that it is a horse; the buyer puts no question, and, perhaps, gets the animal the cheaper. But if he asks for a carriage horse, or a horse to carry a female, or a timid and infirm rider, he who knows the qualities of the animal, and sells, undertakes, on every principle of honesty, that he is fit for the purpose indicated. The selling, upon a demand for a horse with particular qualities, is an affirmation that he possesses those qualities."

¹⁶⁷ We think there was, under the contract alleged, an implied undertaking that the horse was a reasonably sure breeder or foal-getter. The horse being alleged to have no value for that, or any other purpose, the answers under consideration sufficiently show a breach of the warranty, and a total failure of the consideration. The demurrer to the third and fourth paragraphs of the answer was, therefore, properly overruled: *Dill v. O'Ferrell*, 45 Ind. 268.

The appellant has assigned as error the refusal of the court to give instruction number 7, as requested. This is not a proper assignment. The refusal to give correct instructions submitted is a cause for a new trial. A ruling which forms the basis for a new trial is not assignable as error: *Elliott's Appellate Procedure*, sec. 347, and cases cited.

The same is true of the alleged error in giving instruction number 5 on the court's own motion. This ruling, like the other, is made a specification of error, but is not assigned as a cause for a new trial.

The appellant assails instruction number 6, given by the court of its own motion. This ruling is properly assigned as a cause for a new trial, and the overruling of the motion for a new trial is assigned as error. By this charge, the jury were instructed that they might adopt that construction of the contract which the parties had placed upon it themselves. In this there was no error: *Reissner v. Oxley*, 80 Ind. 580; *Noblesville v. Lake Erie etc. R. R. Co.*, 130 Ind. 1.

Error is predicated upon the overruling of the motion of ap-

pellant for judgment, notwithstanding the general verdict. The answers of the jury to the interrogatories indicate that the only notice given by the appellees to the payees of the note that the stallion was not suitable for the purpose of breeding was given in the year 1890. ¹⁶⁸ It is admitted that an agreement was subsequently made between the parties that the purchaser should keep the horse and stand him during the season of 1891, so as to give him a better trial, and, if he then proved unsatisfactory, the sellers were to take him back and supply another horse in his place.

We do not see why the appellee should have been required, as contended by the appellant, to make another tender of the horse before the season of 1891 had expired, as it was during this season that the horse was to receive a final trial. If the jury found the horse to be worthless, as the general verdict implies, the fact that the legal title of the horse was in the appellee Benjamin E. Frazee, when he died, would not debar the appellees from recouping the damages sustained by them, and, if the horse was in fact of no value whatever, such fact would defeat the right to recover on the note. The answers to the interrogatories must be irreconcilable with the general verdict upon any theory. By the general verdict, the jury, in effect, found that the horse was worthless. We cannot look to the evidence, under this assignment, to determine whether it sustained such a finding.

It is claimed, finally, that the evidence is insufficient to sustain the general verdict. The particular vice in the evidence is claimed to be its insufficiency to prove a tender of the horse back to the payees of the note. There was evidence tending to show that the sellers requested the appellees, and the latter agreed, to keep the horse and try him another season. This dispensed with the necessity of a tender before the expiration of such season. The horse died before the season had expired. No tender could, therefore, have been made after the expiration of such season.

If the animal had any value, possibly that fact might debar the appellees, under the pleadings, from defeating ¹⁶⁹ the entire claim on the note. This question, however, we need not now decide. But it is not contended that the uncontradicted evidence proves that the horse possessed some value. The failure to make a tender, under the circumstances of the case, does not vitiate the verdict.

Some of the paragraphs of the answer set up a written warranty, and a breach thereof, while others rely upon an implied warranty.

In the fifth paragraph, it is averred that the note was given in consideration of a resale of the horse after he had been taken back by the sellers and again sold to Benjamin E. Frazee.

The appellant introduced the several paragraphs of answer in evidence, and contends that they show such an inconsistency as to disprove the averments of the fifth paragraph. It is not claimed, however, that the verdict of the jury was based upon the last-named paragraph alone, and appellant's counsel have failed to point out in what manner the alleged inconsistency could avail them.

We have not been able to discover any prejudicial error.

Judgment affirmed.

NEGOTIABLE INSTRUMENTS—NON-NEGOTIABLE NOTE—UNCERTAINTY AS TO TIME OF PAYMENT.—A note providing that "the payee or his assigns may extend the time of payment from time to time indefinitely, as he or they may see fit," is not, under the statute of Indiana, negotiable as an inland bill of exchange: *Glidden v. Henry*, 104 Ind. 278; 54 Am. Rep. 316. See, also, *Woodbury v. Roberts*, 59 Iowa, 348; 44 Am. Rep. 685.

NEGOTIABLE INSTRUMENTS—BREACH OF WARRANTY IN SALE AS A DEFENSE TO ACTION ON NOTE—RESCISSION.—In an action to recover on a note to secure payment for a farming implement, and containing a condition that "no promise or contract outside of this note will be recognized, the defendant and maker of the note may allege and prove that the implement was sold under a warranty that it was sufficient for a particular purpose, which warranty wholly failed, and that he offered to return the implement, and rescinded the sale: *Gale etc. Mfg. Co. v. Stark*, 45 Ark. 606; 23 Am. St. Rep. 739, and note.

SALES—SPECIFIC PURPOSE OR USE—IMPLIED WARRANTY.—If a man buys an article for a particular purpose, made known to the seller at the time of the contract, and relies upon the skill and judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose; aliter, if the buyer purchases on his own judgment: See note to *McCray etc. Storage Co. v. Woods*, 41 Am. St. Rep. 605. So, in case of an executory contract for the manufacture of articles to be delivered at a future day, there is always an implied warranty that the articles delivered shall answer the purpose for which they were designed: *Notes to McCray etc. Storage Co. v. Woods*, 41 Am. St. Rep. 606; *Standard etc. Oil Co. v. Excelsior Refining Co.*, 49 Am. St. Rep. 389.

INSTRUCTIONS—REVERSIBLE ERROR—CONSTRUCTION OF CONTRACTS.—A refusal to instruct the jury correctly is reversible error: *Note to Osborne v. Francels*, 45 Am. St. Rep. 871. Courts will enforce a contract as construed by the parties in interest: *Note to Davis v. Robert*, 18 Am. St. Rep. 130.

ROCKEBRANDT v. MADISON.

[9 INDIANA APPEALS, 227.]

MUNICIPAL CORPORATIONS—POWER TO PURCHASE MATERIALS AND TO EMPLOY LABOR FOR LIGHTING STREETS.—A city which has power, under its charter or general legislative authority, to own and to operate a plant of its own for the purpose of lighting its streets, also has the power to purchase all the materials and to employ all the labor necessary for carrying it on, as this is a matter exclusively within its general discretionary powers, and is not subject to judicial intervention or control, except in cases of fraud, or when it is shown that such power or discretion is being grossly abused, to the detriment or oppression of the public rights or interests. The courts will, therefore, enforce such a contract, made by a city, which is not, upon its face, oppressive, and where no fraud is shown in its making or object.

C. A. Korbly and W. O. Ford, for the appellant.

S. J. Bear and C. E. Walker, for the appellee.

227 ROSS, J. The appellant brought this action to recover damages for the breach of a contract, alleging that the appellee, through her common council, employed him as a lineman for its electric light system for the term of three years from the fifteenth day of April, 1892, for which services he was to receive fifty dollars per month.

It is also alleged that the appellant had been in the appellee's service in the same capacity for three years preceding the execution of the contract sued on, it being but a renewal of the previous contract under which he had been working.

228 It is also alleged that he entered upon his duties under the contract, and was performing the same pursuant to the terms of the contract when the appellee repudiated the contract and refused to be bound thereby.

The complaint also contains the proper allegation with reference to appellant's ability and willingness to perform his part of the contract and the appellee's refusal to permit him to comply therewith.

There are two paragraphs of the complaint, to the first of which a demurrer was originally overruled, and to the second, a demurrer sustained; the demurrer to the first paragraph was sustained later, and these rulings are the only questions presented by the record.

The only material question urged by the appellant, and which we need consider in determining the sufficiency of the complaint, is, Did appellee, through its common council, have power to make the contract sued on?

A municipal corporation is a creature of the statute, a body politic, specially chartered by the state or organized under general legislative authority, and while it may, unless restricted by its charter or legislative enactment, make all contracts necessary to enable it to carry out the powers conferred upon it, yet, if the mode of proceeding is prescribed, or the powers generally limited, such mode must be strictly pursued, and such contracts must be within the limit.

As said by the court in *Indianapolis v. Indianapolis Gas etc. Co.*, 66 Ind. 396: "A municipal corporation, not having either body, limbs, feet, or hands, but being merely a legal entity, cannot execute its own acts, nor administer its own affairs. To do this it must employ persons, other corporations, or agencies of some kind, and to employ them and to agree to pay them is to make a contract; and if it could not make such contracts, and was not bound thereby, it could not carry on ²²⁹ the purposes or attain the objects for which it was established."

Under the act of March 3, 1883 (Rev. Stats. 1894, sec. 4301), the common council of any city of this state, incorporated either under the general act for the incorporation of cities, or under a special charter, has power to light its streets, alleys, and other public places with electric lights, and may either contract with other corporations, or with individuals, for such lighting, or may operate their own plants: *Rushville Gas Co. v. Rushville*, 121 Ind. 206; 16 Am. St. Rep. 388; *Crawfordsville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214.

The corporation possessing the power, as it does, either to contract with other corporations or individuals, for the lighting of its streets, or to own and operate a plant of its own for that purpose, has the power, also, to purchase all the materials and employ all the labor necessary for carrying it on. The right to purchase such materials and employ the required labor is a matter exclusively within the sphere of its general discretionary powers, and is not subject to judicial intervention or control, except in cases of fraud or when it is shown that such power or discretion is being grossly abused to the detriment or oppression of the public rights or interests. Upon this principle, a contract made by a city, which does not show on its face that it is oppressive, will not be overthrown by the courts, unless fraud is shown in its making or object.

Many authorities have been cited by both the appellant and the appellee, which each party relies upon as decisive of the question here involved, and yet, although they have had great weight

with the court in the decision of this case, they are not decisive of it. We deem it unnecessary to cite each case and draw the distinction between it and the case under consideration, for it would ²³⁰ subserve no good purpose, and would very materially lengthen this opinion.

From the facts alleged in this complaint, the appellant was employed by the appellee as a lineman for a term of three years from April 15, 1892, and that he entered upon, and was performing, the duties which he contracted to perform, and that while in the performance of such duties, under said contract, the appellee "notified him that it would not be bound by said contract, and that it had repudiated all and every part of the same."

Although neither paragraph of the complaint is as specific as is necessary to a clear understanding of the facts relative to the performance of appellant's duties under the contract, the length of time he had been performing such duties when prevented by the appellee, and the nature and extent of his injury, yet we think it states a cause of action entitling him to some relief; hence, the court erred in sustaining the demurrer to each paragraph thereof.

Judgment reversed, with instructions to overrule the demurrer to each paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

MUNICIPAL CORPORATIONS—POWER AS TO LIGHTING STREETS.—The power to light the streets and public places of a city is one of the implied and inherent powers of the municipality. It carries with it, incidentally, the further power to procure or furnish whatever is necessary for the production and dissemination of the light. The discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused, to the oppression of the citizen: *Crawfordsville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214, and monographic note thereto on the power of municipal corporations to furnish light. The legislature is authorized to delegate to a city the power to supply its inhabitants with electric light: *Jacksonville etc. Light Co. v. Jacksonville*, 36 Fla. 229; 51 Am. St. Rep. 24.

HUFFMAN v. HENDRY.

[9 INDIANA APPEALS, 324.]

EXECUTORS AND ADMINISTRATORS—ESTATE OF DECEDENT IS NOT LIABLE FOR ADMINISTRATOR'S MISREPRESENTATIONS, TORT, OR BREACH OF CONTRACT.—Neither an action of tort nor of contract can be maintained against the estate of a deceased person for damages growing out of alleged representations, warranties, or statements made to a purchaser of the trust property, by an administrator, or other representative of the decedent, at an administrator's sale. Hence, if the purchaser at such sale buys two cows represented to be with calf from a thoroughbred bull, and it turns out that one is barren and the other not with calf, thus decreasing their value, the estate is not liable for the damage.

EXECUTORS AND ADMINISTRATORS—MUTUAL MISTAKE—EQUITABLE RELIEF.—If a purchaser at an administrator's sale and the administrator, acting in good faith, make a mutual mistake, either of fact or of law, the result of which is to benefit the estate under the control of the court, the court, having jurisdiction of the trust, may, in a proper case, in the exercise of a sound discretion, grant the injured party equitable relief, but he must first restore, or offer to return to the estate, what he has received, or show a good reason for his failure to do so.

W. G. Croxton and F. M. Powers, for the appellant.

F. S. Roby, for the appellee.

324 DAVIS, C. J. The appellee, in the court below, filed a claim, in two paragraphs, against said Margaret Huffman, as administratrix of the estate of Daniel Huffman, deceased, pursuant to the provisions of section 2465 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 2310).

The substantial averments in the first paragraph are, that at the sale of the personal property of said decedent, the appellee, upon the faith of the representations and warranty of said administratrix, which he believed to be true, that two Durham cows were with calf, from a thoroughbred bull, purchased and paid for them, and that said cows in fact were not with calf, and that, by reason thereof, said cows were worth twenty-five dollars less than they would have been had they been with calf, as represented.

325 The material averments in the second paragraph are, in substance, the same as in the first, with the exception that no warranty is alleged, and that the representations are averred to have been made by the administratrix through the auctioneer who cried the sale, and that the purchase price paid by appellee for the cows has become, and is, a part of the assets of said estate in the hands of the administratrix, and is under the control and subject to the order of the court, and that, by reason of the mutual mistake of the parties in supposing and believing said cows were with calf, the said estate is indebted to appellee in said sum,

etc. Appellee recovered judgment for eighteen dollars. Whoever succeeds in this litigation will be a loser. Each party has undoubtedly expended more than the entire amount in controversy. The printed brief of eighteen pages, filed by appellant, has evidently cost the estate more than the judgment, to say nothing of the attorney's fees, and neither of these items can be recovered in the event of success. Such litigation is not to be commended.

The sufficiency of the complaint is attacked for the first time in this court. The action cannot be maintained against the estate. The estate is not liable for the torts of the administratrix. Neither is the estate liable for her representations, warranties, or statements in respect to the condition or quality of said cows. She may be liable personally for any damages appellee may have sustained in reliance on her representations, warranties, or statements, but there can be no recovery against the estate on account thereof.

In *Moody v. Shaw*, 85 Ind. 88, the administrator sold real estate which was encumbered by taxes which the administrator agreed to pay, and it was held that the "promise made by the administrator will bind him personally, but not the estate."

³²⁶ In *Rodman v. Rodman*, 54 Ind. 444, the supreme court said: "When property or money, which does not belong to the estate of a decedent, may come into the possession of a party who happens to be the administrator of such estate, such party cannot, by charging himself as such administrator with such property or money, make such property or money a part of the assets of his decedent's estate, nor can he, by so doing, render the estate of his decedent, or himself as administrator, liable for such property or money to the lawful owner thereof."

In *Riley v. Kepler*, 94 Ind. 308, this language is used: "If he made false representations in the sale, that was his individual tort for which he alone could be held individually liable": See, also, *Rose v. Cash*, 58 Ind. 278; *Holderbaugh v. Turpin*, 75 Ind. 84; 39 Am. Rep. 124; *Mills v. Kuykendall*, 2 Blackf. 47; *Cornthwaite v. First Nat. Bank*, 57 Ind. 268.

Whether the claim of appellee sounds in tort or is founded in contract, the result is the same. In any view that may be taken of the case, it is clear, under the authorities cited, that the estate is not liable for any damages sustained by appellee, growing out of the alleged representations, warranties, or statements of said administratrix.

Neither can either paragraph of the complaint be sustained on

the theory that the money was paid by appellee to the estate on account of the mutual mistake of the parties. There might be circumstances under which such a claim could be sustained, but it clearly appears, in this case, that the only mistake, if such it can be called, grows out of the fact that neither of the cows was with calf at the time of the sale. It is conceded that appellee obtained the identical cows he purchased, and that he paid the administratrix the amount he agreed to pay ³²⁷ for them. There was, therefore, no mistake, either of law or fact, as to the property he purchased or as to the price he paid therefor. The gist of the claim is, that because one of the cows was barren and the other was not with calf, they were less valuable than they would have been if each of them had been with calf, as represented. It is not alleged that the cows were not worth what he paid for them, or that appellee offered, at any time, to rescind the contract or to return the property. It may be conceded that if parties acting in good faith make a mutual mistake, either of fact or law, as the result of which an estate under control of the court is benefited, such court, having jurisdiction of the trust, may, in a proper case, in the exercise of a sound discretion, grant the injured party equitable relief, but, as a condition precedent to such equitable relief, it would certainly be necessary for him to restore or offer to return to the estate what he had received, or show a good reason for his failure to do so.

In this case, appellee is not entitled to recover from the estate, either under the rules of law or the principles of equity, and our conclusion is, that inasmuch as neither paragraph of the complaint states facts sufficient to constitute a cause of action, the judgment of the court below should be, and hereby is, reversed.

EXECUTORS AND ADMINISTRATORS—LIABILITY OF ESTATES OF DECEDENTS FOR TORTS OR CONTRACTS OF.—Neither an executor nor an administrator can as such commit a tort: See monographic note to Schlicker v. Hemenway, 52 Am. St. Rep. 129, on the liabilities of the estates of decedents upon contracts, and for torts of executors and administrators. An estate can neither be charged nor can it charge others by means of illegal and fraudulent acts of its legal representative. If he makes a misrepresentation inducing a sale of property, damages resulting therefrom cannot sustain a claim against the estate he misrepresents, nor, on the other hand, can it hold the advantages accruing to it from such misrepresentation. The general rule is, that an estate is not answerable for contracts or wrongs of its executor or administrator, though the estate is benefited thereby, and that no action at law can be sustained against him as such on account of any contract made or act done by him after the death of the testator or intestate: Note to Schlicker v. Hemenway, 52 Am. St. Rep. 119, 130, 134.

CONTRACTS—RESCISSION—RETURN OF CONSIDERATION.—If a person enters into a contract and afterward seeks to avoid its effect on any ground that will entitle him to rescind it, he must first restore what he has received: Note to *Gibson v. Western etc. R. R. Co.*, 44 Am. St. Rep. 596. He who seeks equity must do equity, and a party rescinding a contract for fraud must return what he has received on it, or offer to do so: Note to *Berry v. American Central Ins. Co.*, 28 Am. St. Rep. 555; note to *Masson v. Bovet*, 43 Am. Dec. 655. A purchaser, to rescind a contract of sale, must put the vendor, or offer to put him, in the same situation he was in before the delivery of the property: Note to *Babcock v. Case*, 100 Am. Dec. 657.

KLEIN v. STATE.

[9 INDIANA APPEALS, 365.]

ASSAULT—WHAT IS NOT.—There is no assault without an actual attempt to do physical violence coupled with a present ability to carry it into execution. Therefore, a person who stands on the opposite side of even a very narrow street from another, and points an unloaded pistol, or a pistol not shown by any evidence to have been loaded, at the other, and threatens to use it upon him, is not guilty of an assault, as the element of present ability is lacking.

ASSAULT—APPEAL—DUTY TO REVERSE JUDGMENT.—If there is, in the record on appeal, no evidence upon which a conviction for an assault may be legitimately based, it is the duty of the appellate court to reverse the judgment.

C. A. Korbly and W. O. Ford, for the appellant.

A. G. Smith, attorney general, for the state.

365 REINHARD, J. The appellant and one Pat Duffy were jointly prosecuted, by information, for an assault and battery with intent to commit murder.

A jury trial resulted in the acquittal of Duffy, and the conviction of Klein of an assault, for which a fine of fifty dollars was assessed against him.

It is insisted on behalf of the appellant that the evidence was wholly insufficient to warrant the conviction, and this is practically conceded by the counsel for the state.

The case is, in some of its aspects, at least, a remarkable one. The information was based upon an affidavit by the alleged injured party, John W. Thomas, in which he swore that Klein and Duffy, "feloniously and with premeditated malice," made an assault upon him (Thomas), "with dangerous and deadly weapons, to wit, a pistol and a very large knife," and with which weapons they (Klein and Duffy) "did then and there feloniously, and in a rude, insolent, and angry manner touch, cut, stab, and wound, and injure" said Thomas, "with intent, then and there, and

thereby, feloniously, purposely, and with premeditated malice, to kill and murder" him.

³⁶⁶ On the trial, Thomas was a witness for the state, and testified concerning the entire occurrence, but notwithstanding the solemn and positive declarations made in his affidavit, he utterly failed to state a single instance of either shooting, cutting, wounding, or even touching of Thomas by Klein or Duffy. The utmost that can be extracted from his testimony, as contained in the record, which tends in the remotest degree to support the grave charge preferred by him, under the solemnity of an oath, is that Duffy brandished a knife, and Klein drew a pistol from his pocket and pointed it toward Thomas, at the same time uttering threats and violent and abusive language against Thomas and his companion, one Johnson.

But, notwithstanding the apparent discrepancy in the oaths of Thomas, if there was any evidence from which the jury might properly conclude that an assault was perpetrated upon him, even though such evidence consisted solely of the unsupported statement of Thomas at the trial, we would not be authorized to disturb the judgment. If, however, there is in the record no evidence upon which a conviction for an assault could legitimately be based, then it becomes our duty to reverse.

It appears from the evidence that, upon the occasion of this difficulty, the appellant and Duffy were giving vent to their political enthusiasm by way of indulging in what they called a "jollification" over the result of the general election of 1892, in which the party with which they affiliated had been victorious. In their journey of the streets and sidewalks of the city of Madison, their hats bedecked with conspicuous party emblems, and holding in their hand some small pieces of bones, designated by the witnesses as "rattles," these defendants reached a place where Thomas and Johnson were standing on a sidewalk. On their approach, the ³⁶⁷ latter were heard to remark that if Klein and Duffy came that way, they (Thomas and Johnson) would defend themselves. The unseemly noises and exultations of Klein and Duffy, and the "shaking of the rattles" toward the faces of Thomas and Johnson, who, it seems, were of opposite political persuasion to the former, so exasperated Johnson as to cause him to strike Klein upon the side of his head with the open hand, from the effects of which blow Klein either staggered or fell from the sidewalk out into the street. Klein, apparently much incensed by this act, turned and walked away from the place of the difficulty, uttering threats and violent language

against Johnson and Thomas, and in a few minutes thereafter returned and approached them again until he reached a point almost directly opposite to where they were still standing engaged in a quarrel with Duffy. Klein, it appears, indulged in more threats and epithets, but did not come nearer to his antagonists than the side of the street opposite to Johnson and Thomas, and here he stood for some time, holding his hand in one of his pockets as if about to draw a weapon. In this connection Thomas and Johnson testified that Klein actually drew a pistol from his pocket and pointed it toward Thomas, upon which the latter "dodged" behind the boiler of an engine, near which he and Johnson were standing.

One other witness testified that Klein drew something from his pocket, which the witness took to be a blackhandled pistol, but other witnesses, with equal opportunities for observing the occurrence, stated that Klein had no pistol drawn or pointed, one witness giving it as his impression that the article he held in his hand was a tobacco pipe.

Assuming, as we must, that there was sufficient evidence for the conclusion that Klein drew a pistol and ³⁶⁸ pointed it at Thomas, with threats to use it upon him, there was still a fatal lack of evidence to establish an assault. There was not a scintilla of evidence that the weapon was loaded and capable of inflicting bodily harm, or that the parties were in such proximity to each other that any attempt of Klein to injure Thomas could have succeeded, but for the latter's act in "dodging" behind the boiler, or the intervention of some influence other than the voluntary desistance of Klein.

Johnson's testimony shows that Klein was on the opposite side of the street from him and Thomas when the weapon was drawn.

The criminal code defines an assault to be an unlawful attempt, coupled with the present ability, to commit a violent injury: Rev. Stats. 1894, sec. 1983.

Under this statute, it has been held by the supreme court that, to constitute an assault, there must be some effort to do physical violence, and that a mere purpose, however fully and forcibly expressed, is not sufficient, if unaccompanied by an actual attempt to carry it into execution: *Cutler v. State*, 59 Ind. 300.

Though there is, upon the subject of present ability, some conflict in the earlier cases, in this state it is now settled that, unless the attempt and present ability to commit the violence concur, there is no assault within the meaning of the statute: *Howard v. State*, 67 Ind. 401.

A person standing on the opposite side of even a very narrow street from another, pointing an unloaded pistol, or a pistol not shown by any evidence to have been loaded, at the other, and threatening to use it upon him, may be guilty of an offense under section 2068 of the Revised Statutes of 1894, but that offense is not an assault, neither is it embraced in the charge contained in the affidavit and information.

369 The appellant's alleged act in connection with the pistol is the one manifestly relied upon in the court below for a conviction, and it does not, in the view of the evidence most favorable to the state, amount to an assault.

The appellant's motion for a new trial should have been sustained.

Judgment reversed.

ASSAULT—DEFINITION.—To constitute an assault there must be an intentional attempt to do injury to the person of another by violence, and such attempt must be coupled with the present ability to do the injury attempted. To point an empty gun at another, at a distance of from thirty to seventy yards, whereby such other is put in fear, and flees, is not an assault with a dangerous weapon: *State v. Godfrey*, 17 Or. 300; 11 Am. St. Rep. 830, and note.

CHICAGO, ST. LOUIS & PITTSBURGH RAILROAD Co. v. CHAMPION.

[9 INDIANA APPEALS, 510.]

DEFINITIONS—"KICKED."—In railroad language, a car is "kicked" by the locomotive when it is put in motion by a push from the locomotive and caused to go under the influence of the momentum thus acquired.

EVIDENCE—TESTS OR EXPERIMENTS.—When experiments or tests are shown to have been made under essentially the same conditions, evidence of the result of such experiments or tests is admissible to prove a fact; but, unless this foundation is laid, it is not error to exclude it.

APPEAL—EXCLUDING OFFERED EVIDENCE—REVIEW. A party who wishes to avail himself of the exclusion of testimony must ask a pertinent question of the witness on the stand, and, if objection is made, state to the court what the witness will testify to in answer to the question, and, if the court sustains the objection, reserve an exception.

MASTER AND SERVANT—COEMPLOYEES—ASSUMPTION OF RISKS.—If a master has exercised reasonable care in the employment of competent servants, the employé assumes the risk arising out of the negligence of such coemployés engaged in the same line of business.

MASTER AND SERVANT—COEMPLOYEES—NONASSUMPTION OF RISKS.—If a master knowingly employs and retains in his service an incompetent servant, an employé who enters his service, in the same line of business, in ignorance of such incompetency, and who, in the exercise of ordinary care, could not discover such incompetency, does not assume the risk arising out of the negligence of the incompetent coemployé.

INSTRUCTIONS—GOOD IN PART—BAD IN PART.—The fact that part of an instruction is correct does not cure that part which is defective, and, if an instruction contains two distinct propositions, one of which is erroneous, there is no error in refusing to give the entire instruction as asked.

MASTER AND SERVANT—INSTRUCTION PROPERLY REFUSED.—If the jury, in an action against a railroad company for personal injuries, has been substantially instructed that the plaintiff must prove the material allegations of his complaint, it is not error to refuse to give the following instruction: "Among the risks assumed by the employé is that arising out of the negligence of a coemployé engaged in the same service. The railroad company is presumed to have discharged its duty to its employé, and when an employé brings an action to recover damages for an injury received in the service of the company, the burden is on the employé to overcome this presumption." The first part is too narrow—not sufficiently comprehensive; and the second part is already covered.

MASTER AND SERVANT—INSTRUCTION PROPERLY REFUSED.—It is not error to refuse to give the following instruction: "If you find from the evidence, that in the reasonable and careful operation of railroads there is no way in which a reasonably careful and intelligent man can acquire the experience necessary to render him a skillful and competent yard brakeman, except by actual service in that capacity, and that in the exercise of ordinary care, in the reasonable and careful operation of railroads, it is necessary to employ and put into the service as yard brakemen men who have had no former experience as such, then I instruct you that where a man enters the employ of a railroad company as a yard brakeman, he impliedly assumes the risks of accident caused by the inexperience of his fellow yard brakemen in that service." The instruction is faulty, because it entirely ignores the question of a servant's knowledge as to the necessity for the employment of inexperienced and incompetent coservants in the same service.

INSTRUCTIONS—FORM AND ACCURACY.—A court is not bound to give an instruction unless it is correct as written, and may refuse to give it, if it is not expressed in proper terms.

MASTER AND SERVANT—INCOMPETENT SERVANTS—RIGHTS OF COEMPLOYEES.—If the master finds it necessary, as he may at times, to employ and retain incompetent servants, he should either inform their coemployés of that fact, or give them a reasonable opportunity to acquire knowledge of such fact, before he can screen himself from the consequences of such incompetency.

APPEAL—EXCEPTIONS—MISCONDUCT OF COUNSEL.—In order to save any question in relation to the misconduct of counsel during the progress of the trial, the court must be called upon to correct the injury done; if the court refuses to do so, the injured party may then except, and thus save the question involved for the consideration of the appellate court.

APPEAL—INCOMPETENT EVIDENCE—MOTION TO STRIKE.—If testimony is partly competent and partly incompetent, a motion must be made, and acted upon, to strike out the incompetent testimony, and that part only, in order to present any question for review on appeal.

MOTIONS—TO STRIKE OUT EVIDENCE.—If evidence is admitted without objection, a subsequent motion to strike it out comes too late.

APPEAL—OBJECTIONS TO EVIDENCE MUST BE SPECIFIC.—An objection to the admissibility of evidence should be specific, especially to raise any question on appeal.

S. O. Pickens and C. W. Moores, for the appellant.

G. W. Cooper, J. E. McCullough, and L. P. Harlan, for the appellee.

511 DAVIS, C. J. Appellee, in the court below, recovered damages in the sum of two thousand two hundred and fifty dollars on account of personal injuries.

The case in brief, in behalf of appellee, may be stated as follows: He was in the employe of appellant as a switchman, or yard brakeman, in its yards near the city of Indianapolis—it being a part of his duty to couple cars. One Leonard was also in the employ of appellant as a brakeman. Leonard was inexperienced, incompetent, and negligent, of which facts appellant had knowledge at the time it took him into, and during all the time it retained him in, its service, but the appellee had no knowledge thereof, never having worked with Leonard before the time of the injury. In railroad language, a heavily loaded car had been “kicked” by the locomotive (put in motion by a push from the locomotive and caused to go under the influence of the momentum thus acquired) down the sidetrack, to be coupled to another car standing thereon. The sidetrack was down grade six inches in one hundred **512** feet. Leonard was riding the car thus “kicked,” and the brakes thereon were set. As it approached the standing car, which was loaded with lumber projecting over the end, the appellee went between the cars, and under the lumber, to enter the link and make the coupling. Through his negligence—his lack of experience and competency—Leonard suddenly released the brakes on the moving car, and thereby caused the same to quickly spring forward, catching appellee’s hand between the drawbars, without any fault or negligence on his part.

On this theory of the case, counsel for appellant earnestly contends that there are several prejudicial errors disclosed by the record.

The first question we will consider brings in review the action of the trial court in refusing to allow appellant to prove on the trial the result of a certain test or experiment made by appellant. The purpose in proving such test was, if such proof had been permitted, to show that if said Leonard was inexperienced, incompetent, and negligent, in manner and form as charged in the com-

plaint, such act of negligence on his part could not have been the proximate cause of appellee's injury. It is insisted that the evidence so offered was worth something at least, as tending to prove that the injury could not have been, in the nature of things, the result of such alleged act of negligence on the part of Leonard.

The offer referred to was made in the manner following, that is to say, the witness, Henry Smith, testified that he had been in the service of appellant as switchman in the yards for three months, and that, about one month before the trial, he was present when a test was made with reference to letting down a car—on the track where the accident in question occurred more than one year prior to that time—and having it coupled to another car.

513 The witness was then asked this question: "What kind of a car was used in letting it down on the siding?"

Objection was made by counsel for appellee, and counsel for appellant then said: "May it please the court, we propose to show by this witness that about one month ago, three weeks or a month ago, a test was made on siding No. 2, the siding on which this accident took place, at about the same place at which it took place, to wit, about three or four carlengths west of the connection of that siding with the other track, at that point, by letting a P. R. R. gondola car of the same kind as the one that was being let down at the time when this plaintiff received his injury, and having it coupled on to a stationary car standing on the track at about the same place the car was standing when he undertook to make the coupling and was injured; that on this P. R. R. car, on the occasion of the test, was Mr. Leonard, the same brakeman who was on the car at the time of the accident, and that the car was running at a speed of about three miles an hour with the brakes set on it; and that when within about eight or ten or twelve inches of the car on which it was to be coupled, the brake was let off by Mr. Leonard, the brakeman, and that, upon the letting off of that brake, it did not show an increase of the speed of the car; and, in addition to that, we propose to show that it was on a cold day, and that the car was kicked back by an engine from about the place where the car was kicked on the occasion when the accident occurred."

No other question was asked the witness. The offer, we presume, was so made in response to the question hereinbefore set out.

The court sustained the objection of counsel for appellee, 514 and excluded the testimony so offered, to which ruling appellant objected.

It is urged by the learned counsel for appellant that, under the circumstances disclosed in this case, the authorities sustain the proposition that when experiments are shown to have been made under essentially the same conditions, the courts will hold that evidence of the result of such experiments is admissible: *Lake Erie etc. R. R. Co. v. Mugg*, 132 Ind. 168; *Eidt v. Cutter*, 127 Mass. 522; *Commonwealth v. Piper*, 120 Mass. 185; *Lincoln v. Taunton etc. Mfg. Co.*, 9 Allen, 181; *Sullivan v. Commonwealth*, 93 Pa. St. 284; *Smith v. State*, 2 Ohio St. 512; *Chicago etc. R. R. Co. v. Spilker*, 134 Ind. 380. See, also, as bearing on the question, *Medsker v. Pogue*, 1 Ind. App. 197; *Cleveland etc. Ry. Co. v. Wynant*, 114 Ind. 525; 5 Am. St. Rep. 644; *Ramsey v. Rushville etc. Gravel Road Co.*, 81 Ind. 394; *Best on Evidence*, secs. 251, 252, 506, 507, 644; 1 *Greenleaf on Evidence*, 15th ed., secs. 52, 53, 488; 7 Am. & Eng. Ency. of Law, 58; *Hawks v. Inhabitants of Charlemont*, 110 Mass. 110; *Clark v. Willett*, 35 Cal. 534.

The appellant did introduce evidence of expert witnesses, as it had the right to do, tending to show that the velocity or speed of a car would not be suddenly and materially increased (that is to say, that a car would not spring or jump forward), upon the release of the brake, as it was claimed by and in behalf of appellee to have done on the occasion in question.

But, so far as the offer under consideration is concerned, the difficulty is, if the law was conceded to be as contended for by counsel for appellant—and as to this question we express no opinion—that neither the evidence nor the statement accompanying the offer, in the case in hand, shows that the essential conditions at the ⁵¹⁵ experiment were the same as those at the injury. There was neither evidence nor statement that the track or car was in essentially the same condition, or whether the brake was tightly or loosely set, or whether the car was kicked hard or easy. If it appeared that the track and car were, on the two occasions, substantially the same; that the brake was set in the same manner; that the car was kicked with the same force; and that in all other respects the conditions were essentially the same, and the offer to prove the result of such experiment was made in response to a proper and pertinent question, this court would be required to enter upon the consideration of, and to decide, the interesting and important question so ably discussed by learned counsel for the respective parties, both in oral argument and in the exhaustive briefs filed in the case; but without further discussion it will suffice to say that if the offer was in other respects properly made, there was no error in the ruling of the trial court in

excluding the evidence, because of the failure to show, or offer to show, that the test or experiment was made under substantially the same conditions as existed at the time the injury occurred.

On the question as to what is necessary in order to present in this court for review the ruling of the trial court in excluding offered evidence, see *Toledo etc. R. R. Co. v. Jackson*, 5 Ind. App. 547 (554); *Kern v. Bridwell*, 119 Ind. 226; 12 Am. St. Rep. 409; *Gipe v. Cummins*, 116 Ind. 511.

"It has long been the settled rule in this state that the exclusion of testimony can only be made available by asking a pertinent question of a witness on the stand, and, if objection is made, stating to the court what the witness will testify to in answer to said question, and if the court sustains the objection, reserving an exception": *Toledo etc. R. R. Co. v. Jackson*, 5 Ind. App. 547.

It is next insisted that the court erred in refusing to ⁵¹⁶ give two instructions asked by appellant. In this connection we will briefly refer to the instructions given. The court fully and explicitly instructed the jury that, in order to entitle appellee to recover, it was incumbent on him to prove, by a preponderance of the evidence, that he was in appellant's employ; that while acting in the scope of his employment, and without fault on his part, he was injured by reason of the negligence of Leonard, a coemployé; that Leonard was inexperienced and incompetent; that appellant employed and retained said Leonard with full knowledge of his inexperience and incompetency; that appellee did not know, and could not, by the exercise of ordinary care on his part, have discovered, Leonard's incompetency prior to the time he was injured.

We quote the following from the instructions: "As a general rule, when a person enters into the employ of a railroad company, he is held to assume all the risks incident to the kind of service in which he engages, including the risks of accidents by reason of the negligence of his coemployés in the employ of the same company; and for injuries resulting to him by reason of the negligence of any of his coemployés, the railroad company is not liable. This general rule, however, is based upon the assumption that the railroad company has discharged its duty to its employé in the employment or retaining in its employ such coemployé. If it has not, but has been guilty of negligence in this respect, then the general rule above stated is subject to qualifications, which I will endeavor to explain in defining more particularly the duty of the defendant to the plaintiff."

And Judge Howe then proceeded at length to define the duty of appellant, in the course of which he said: "While the defendant, in relation to the plaintiff, was not bound to guarantee the absolute fitness of Leonard ⁵¹⁷ as a brakeman, it was its duty, nevertheless, to exercise reasonable and ordinary diligence."

With reference to whether or not he was competent and fit for the service in which he was engaged—but as the instructions given are conceded to be correct, it is not necessary to set them out in full, or to consider them further than to say that they fully and clearly state the law applicable to the case, and the theory on which it was tried, unless the instructions refused, to which counsel have called our attention, should have been given in addition.

The first reads as follows: "2. Among the risks assumed by the employé is that arising out of the negligence of a coemployé engaged in the same service. The railroad company is presumed to have discharged its duty to its employé, and when an employé brings an action to recover damages for an injury received in the service of the company, the burden is on the employé to overcome this presumption."

It is elementary that when the master has exercised reasonable care, as stated and defined by the court in the instructions given, in the employment of competent servants, the employé assumes the risk arising out of the negligence of such coemployés engaged in the same line of business. It is also elementary that when the master knowingly employs and retains in his service an incompetent servant, an employé who enters his service, in the same line of business, in ignorance of such incompetency, and who, in the exercise of ordinary care, could not discover such incompetency, does not assume the risk arising out of the negligence of the incompetent coemployé.

These principles are so familiar that the citation of authorities is hardly necessary: See *Griffin v. Ohio etc Ry. Co.*, 124 Ind. 327; *Evansville etc. R. R. Co. v. Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458; 7 Am. & Eng. Ency. of Law, ⁵¹⁸ 844; *Ohio etc. Ry. Co. v. Collarn*, 73 Ind. 261; 38 Am. Rep. 134; *Wood on Master and Servant*, 2d ed., sec. 349.

In view of these principles, the first part of the instruction quoted is too narrow—not sufficiently comprehensive—as applied to the evidence to which it is evidently directed. The fact that the instruction, in part at least, is correct as a general statement of the law, does not cure the defect in that part wherein the jury are unqualifiedly and unconditionally told, in substance

and effect, that appellee assumed the risk arising out of the alleged negligence of the incompetent coemployé: Louisville etc. Ry. Co. v. Shanks, 132 Ind. 395; Goodwine v. State, 5 Ind. App. 63; Howlett v. Dilts, 4 Ind. App. 23.

When this instruction is construed in the light of the instructions given, the correctness of which is not questioned, its effect, if given, could only have been to confuse and mislead the jury.

It should, in this connection, be borne in mind, as we have before shown, that the court instructed the jury, clearly and unequivocally, that before appellee could recover, it was incumbent on him to prove, by a preponderance of the evidence, that Leonard was inexperienced and incompetent; that appellant employed and retained him in its service with full knowledge of his inexperience and incompetency; and that appellee did not know, and could not, by the exercise of ordinary care, have discovered Leonard's incompetency prior to the time he was injured.

In view of these instructions, if instruction number 2, under consideration, was otherwise correct, as an abstract proposition of law, on what theory should the court have said to the jury that "among the risks assumed by the employé is that arising out of negligence of a coemployé engaged in the same line of service"?

⁵¹⁹ If appellee was bound to prove that appellant employed and retained an inexperienced and incompetent coservant engaged in the same line of service in which he was employed (for the company for the first time on the occasion on which he was injured), and that he did not know, and could not, by the exercise of reasonable care, have discovered, Leonard's inexperience and incompetency, before he could, in any event, recover in the action, what pertinency could the first part of the instruction have?

Under such circumstances, appellee certainly did not assume the risks arising out of the negligence of Leonard. The tenor and effect of this part of the instruction is, that notwithstanding the fact that appellant may, with full knowledge of the inexperience and incompetency of Leonard, have employed and retained him in its service, and that appellee did not know, and could not, by the exercise of reasonable care, have discovered, the inexperience and incompetency of Leonard, yet he assumed the risks arising out of the negligence of his said coemployé. If it could be said that he assumed the risk under such circumstances, then, as a matter of course, appellee was not entitled to recover for injuries sustained on account of the alleged negligence of his coemployé, and the only logical conclusion would be that the appellant should have recovered in the action.

This instruction, as we have before observed, contains two distinct propositions, and if either of these propositions is erroneous, as applied to the case, the familiar rule is, that there was no error in refusing to give the entire instruction as asked.

In conclusion, however, on this branch of the case, we will add a few words concerning the second part of the instruction. The proposition therein contained, so far as applicable to the case, if conceded to be correct, ⁵²⁰ is, in our judgment, substantially covered by the other instructions given. As we understand the instructions given, they proceed upon the theory that appellant was presumed to have discharged its duty in all respects toward appellee, and that the burden rested on him to show that such duty had not been performed. When the facts which he was required to prove were established, they overcame the presumptions in favor of appellant.

It is next insisted that the court erred in refusing to give the following instruction: "11. If you find from the evidence that, in the reasonable and careful operation of railroads there is no way in which a reasonably careful and intelligent man can acquire the experience necessary to render him a skillful and competent yard brakeman, except by actual service in that capacity, and that in the exercise of ordinary care, in the reasonable and careful operation of railroads, it is necessary to employ and put into the service as yard brakemen men who have had no former experience as such, then I instruct you that when a man enters the employ of a railroad company as a yard brakeman, he impliedly assumes the risks of accident caused by the inexperience of his fellow yard brakeman in that service."

The principle enunciated in this instruction goes to the foundation of the cause of action stated in the complaint. This instruction lays down the broad general proposition that if it ever becomes necessary for a master to take into his employ an inexperienced and incompetent yard brakeman, then it is the law, in all cases, that the coservant assumes the risks arising from the negligence of such inexperienced and incompetent yard brakeman.

On the contrary, the law, as we understand it, is that appellee had the right to assume that appellant had exercised ⁵²¹ reasonable care in the employment of competent brakemen, and that if the company found it necessary, in the reasonable and careful operation of its railroad, to employ inexperienced and incompetent brakemen, he would be informed of such fact, or, at least, be given a reasonable opportunity to learn such fact before being

placed in a perilous position: *Evansville etc. R. R. Co. v. Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458; Wood on Master and Servant, 2d ed., sec. 349.

The rule that an employe, on the presumption that the master had discharged his duty, assumes all the risks ordinarily incident to the employment in which he engages, is, as before stated, elementary, but when it becomes necessary, in the operation of a railroad, to employ an inexperienced and incompetent brakeman, his coemployés, in the absence of knowledge, or an opportunity to acquire such knowledge, of his inexperience and incompetency, cannot be said to have assumed the risks of accident caused by the inexperience and incompetency of such servant: 7 Am. & Eng. Ency. of Law, 844, and authorities hereinbefore cited.

Moreover, the instruction entirely ignores the question as to whether appellee had knowledge of any necessity for employing such inexperienced and incompetent brakemen in the same service in which he was engaged. It occurs to us that in any view which might be taken of the question the instruction is defective on account of such omission. If this is true, there was no error in any event in refusing to give the instruction.

"The rule that the court is not bound to give an instruction unless it is correct as it is written is well settled, and, under this rule, it has been often held that unless the instruction as asked is expressed in proper terms, the court may refuse to give it": *Rogers v. Leyden*, 127 Ind. 50.

If this instruction is correct, then there was no breach ⁵²² of duty on the part of appellant in employing and retaining in its service a brakeman, with full knowledge of his inexperience and incompetency, and placing him on the moving car in question, to operate the brake and perform such other duties as might devolve upon him, in an attempt to make the coupling, without any knowledge, or opportunity on the part of appellee to learn, of such inexperience or incompetency.

The reasons for the fellow-servant rule are fully discussed by Judge Hackney in the recent case of *New Pittsburgh Coal etc. Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327, and the non-liability of the master for damages sustained by one servant on account of the negligence of his coemployé is based on the theory that he has employed skillful and diligent servants, and that he should not be held responsible for the consequences of their subsequent unfaithfulness, unless he continues them with knowledge of such unfaithfulness. It follows, therefore, that if the master finds it necessary, as he may at times, to employ and retain in-

competent servants, he should either inform their coemployés of that fact, or give them a reasonable opportunity to acquire knowledge of such fact, before he can screen himself from the consequences of such incompetency: See, also, *Pennsylvania Co. v. Long*, 94 Ind. 250 (256); *Indianapolis etc. Ry. Co. v. Johnson*, 102 Ind. 352; *Pittsburgh etc. Ry. Co. v. Adams*, 105 Ind. 151.

In our opinion, the instructions given by the learned judge who presided at the trial in the court below covered the case in every phase, and fairly and clearly presented the law applicable and pertinent thereto to the jury, and that there was no error in refusing to give the instructions asked.

It is next urged that appellant's motion for a new trial should have been granted on account of the alleged misconduct ⁵²³ of appellee's counsel in his closing argument to the jury. Whether the statement complained of goes beyond the line of legitimate argument, we need not determine. It appears that, upon the making of the statement, counsel for appellant interrupted him and objected and excepted to the statement, and that thereupon the court stated to counsel, in the presence of the jury, that he should keep within the record; and that nothing further was said or done by the court or counsel, except appellee's counsel said to the jury that he desired to keep within the record. There was nothing said or done by appellant's counsel to indicate that he was not entirely satisfied with the ruling of the court then and there made. No exception was taken to the court's ruling, and no motion was made asking the court to go further in the premises.

"It is now settled that in order to save any question in relation to the misconduct of counsel during the progress of the trial, the court must be called upon to correct the injury done; if the court refuses to do so, the injured party may except, and thus save the question involved for the consideration of this court": *Staser v. Hogan*, 120 Ind. 207 (222); *Indianapolis Journal etc. Co. v. Pugh*, 6 Ind. App. 570; *Maybin v. Webster*, 8 Ind. App. 547.

It is next insisted that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. The evidence was conflicting as to whether the alleged negligence and carelessness of Leonard in suddenly loosening the brake of the moving car when near the other car—at the time and in the manner claimed by and in behalf of appellee—caused the car to unexpectedly increase its speed or to jump forward, thereby catching appellee's hand when he was engaged in his attempt to make the coupling. Counsel for appellant ⁵²⁴ contend that appellee's theory was

impossible and absurd; that the act of Leonard in suddenly loosening the brake on the moving car could not, in the nature of things, have been the proximate cause of the injuries sustained by appellee; that the moving car could not, under the circumstances, have increased its speed or sprung forward; that such a theory is contrary to the laws of force and motion; that appellee evidently miscalculated either the speed of the moving car or the time in which he could make the coupling; that the accident was purely accidental, such as is likely to happen at any time in that business; and that in no event can the misfortune be charged to the alleged careless act of Leonard.

We will not undertake to epitomize the entire argument so forcibly made on this branch of the case, and will only say there is ample evidence in the record tending to support every point in issue which was incumbent on appellee to prove. The question as to the credibility and weight of the evidence—the probability as to whether the accident occurred in the manner stated—was for the jury, and this court cannot, under the well-recognized rule so often enunciated in this state, disturb the verdict of the jury on the evidence.

On the trial, counsel for appellee asked the witness, Calvin T. Mann, to state what facts, if any, he had observed in the conduct of Leonard affecting the question as to whether he was a man of skill in the discharge of the duties in which he was engaged. If the testimony sought to be elicited by the witness was competent, his previous examination discloses that he was qualified to testify on the subject. The answers were not, in some respects, responsive to the questions. Objection was made to the questions, but no motion was made to strike ⁵²⁵ out the answers, or any part thereof, but the court, on his own motion, struck out a part of one of the answers.

"It is quite clear that part, at least, of the testimony of the witness was competent, and as the objection does not separate the competent from the incompetent, there was no error in overruling it": *McGuffey v. McClain*, 130 Ind. 327 (331), and authorities cited.

The questions, so far as they sought to elicit the facts which the witness had observed in relation to the manner in which Leonard discharged his duties, the character of those duties and what was necessary to be done in discharge thereof, were not, so far as any objection has been urged thereto, incompetent, irrelevant, or immaterial, and, so far as the answers were not responsive to the questions asked, no question has been properly saved

or presented for review by this court: *Howlett v. Scott*, 100 Ind. 485.

This witness was asked, without objection, to state what preliminary training or practice, if any, was usual and necessary to enable one to perform the duties of a switchman in a yard with safety and skill. The answer of the witness was responsive to the question, and afterward counsel for appellant moved the court to strike out such answer, on the ground that it was immaterial, incompetent, and improper, and did not tend to prove any issue in the case. There was no error in this ruling: See *Falvey v. Jackson*, 132 Ind. 176.

Where evidence is admitted without objection, a subsequent motion to strike it out comes too late: *Brown v. Owen*, 94 Ind. 31.

The witness Shea was allowed to describe to the jury what he saw in relation to the manner in which Leonard discharged his duties for appellant near the time of the accident. The only objection to which our attention has ⁵²⁶ been called that was made to this testimony in the court below was a general one.

In the language of Judge Hackney, in a recent case: "Unless the objection to offered evidence be sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom in this court": *Swaim v. Swaim*, 134 Ind. 596.

The objection made in this case presents no question for our consideration: *Ohio etc. Ry. Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638; *Clark etc. Tp. v. Brookshire*, 114 Ind. 437 (444); *Pennsylvania Co. v. Horton*, 132 Ind. 189.

We have examined all the questions discussed by counsel, and find no error in the record.

Judgment affirmed.

Reinhard, J., did not participate in the decision of this case.

ON PETITION FOR A REHEARING.

DAVIS, C. J. The learned counsel for appellant, in a strong and earnest brief, insists that a rehearing should be granted on the question arising out of the refusal of the trial court to give the eleventh instruction asked by appellant.

Counsel urges "that the opinion upon this question is unsound in reason, and is in the face of, and against, the elementary rules which everywhere prevail," and, further, that our conclusion "arises out of a radical misapprehension of the doctrine of this

instruction." If counsel is correct in his contention, the appellant is entitled to a rehearing.

The recognized ability of counsel, and the vigorous attack made by him on the position of the court, in connection ⁵²⁷ with his assertion that "I have never, since my call to the bar, felt my position upon a legal proposition which had not heretofore been settled so absolutely impregnable," together with his statement that "I might the better endure the chagrin of my defeat," if "the opinion upon this question was based upon sound reason," have prompted us to again carefully consider the instruction.

The principle which underlies this instruction is based on the proposition that should the jury find, from the evidence, that, in the reasonable and careful operation of railroads, it is necessary to employ and put into the service as yard brakeman inexperienced men, "then there could be no breach of duty on the part of appellant in employing such inexperienced person," without reference to whether appellee had any notice or knowledge of such necessity, or whether he had any knowledge or opportunity to learn of such inexperience of his coemployé, for the reason, as contended by counsel, that appellee must be held to know that such inexperienced men were likely to be employed in that line of service; and that when he entered into that service, he assumed all the risks growing out of such inexperience and incompetency.

Counsel urges that, in the very nature of things, there must be a beginning point for employés in the train service of railways, and that the beginner at that point is without experience; "that the lowest grade of service in the operation of railroad trains is that of yard brakeman, at which appellee and his coservant, Leonard, were engaged at the time of the accident in question; that the only way in which a person can acquire competency as a yard brakeman is by actual experience in that work," and, therefore, when appellee entered the service of appellant he assumed all the risks incident to ⁵²⁸ the subsequent employment of such inexperienced and incompetent yard brakemen as Leonard; and that the injuries sustained by appellee, when engaged in the hazardous business of attempting to make the coupling, by reason of the inexperience and incompetency of Leonard on the first occasion that they ever worked together, without any previous knowledge or opportunity to acquire knowledge concerning him, must be regarded as the result of a casual accident, and must rest entirely on appellee.

In other words, the contention, as we understand it, resolves itself into this, that in the absence of actual knowledge appellee

was bound to take notice, when he entered that service, of the fact that it was necessary for the company to employ and put into service as yard brakemen inexperienced and incompetent men; that whether he knew of such necessity was immaterial, and, also, it was immaterial whether he had any warning or knowledge as to the incompetency of Leonard, or an opportunity to acquire such knowledge; that, regardless of these questions, appellant had the right to employ an inexperienced and incompetent yard brakeman to act in the same line of service with him; that under these circumstances, appellee was bound, on the one hand, to perform the act in which he was engaged when injured, without any reliance on the competency of those assigned to assist him; and, on the other hand, he must be held to have assumed all the risks growing out of the carelessness and negligence of such inexperienced and incompetent coemployé.

The risks assumed by the servant are such as are open alike to the knowledge and observation of both the master and the servant, and the rule has no application when the master and servant are not, in this respect, on an equality.

520 Measured by this rule, we are of the opinion that the eleventh instruction does not fully and correctly state the law. It certainly ignores any knowledge or opportunity to acquire knowledge on the part of appellee as to the probability or necessity for placing him in a hazardous position with an inexperienced and incompetent fellow-servant.

If the instruction proceeded on the theory that appellee entered into the service in which he was engaged without knowledge, or that he continued in such service after he had an opportunity to learn that it was necessary, in the reasonable and careful operation of the road, to employ inexperienced and incompetent coemployés to assist him in the hazardous work in which he was engaged, a different question would be presented.

The petition for a rehearing is overruled.

MR. JUSTICE ROSS DISSENTED and delivered the following opinion: "I cannot concur in the views of the majority of the court in saying that instruction number 2, which the appellant requested to be given, 'is too narrow—not sufficiently comprehensive—as applied to the evidence to which it is evidently directed.'

"It is so well settled that I hardly need cite authorities in support of the proposition that an instruction, in order to be good, need not cover the entire case, but that, if construed in conjunction with the other instructions given, it states the law correctly, it is sufficient: *Louisville etc. Ry. Co. v. Grantham*, 104 Ind. 353; *Lehman v. Hawks*, 121 Ind. 541; *Conway v. Vizzard*, 122 Ind. 266.

"And it is equally well settled that if a party desires special in-

struction upon any particular branch of the case, it is his duty to prepare and submit to the court such instruction as he may desire given: *Burgett v. Burgett*, 43 Ind. 78; *Louisville etc. Ry. Co. v. Grantham*, 104 Ind. 353; *Conrad v. Kinzle*, 105 Ind. 281; *Du Souchet v. Dutcher*, 113 Ind. 249.

"And if the instructions so tendered are applicable to the issues and the evidence in the cause, and are not covered by other instructions given by the court, it is error to refuse to give them, if, taken and construed in conjunction with the instructions given by the court, they state the law correctly.

"The same rule applies in determining the sufficiency of an instruction asked and refused as obtains in determining the correctness of an instruction given.

"Applying the rule to this instruction, we have the proposition plainly presented: Does it, when taken in connection with the instructions given, correctly state the law as applicable to the issues and evidence in this case? By the instructions given, the jury had already been told that where the master knowingly employs or knowingly keeps in his service an incompetent employé, he is liable to a coemployé for injuries resulting from the incompetency of such servant, and it was therefore unnecessary to incorporate that element in the instruction asked. Had the court given the instruction asked, and the appellee appeared here as the appellant, asking this court to reverse the judgment, on account of the giving of this instruction, because 'too narrow,' the court would hold that the instruction, considered in connection with the other instructions given, states the law correctly.

"The instruction, however, had another office to perform, which was the principal, and perhaps the only, one for which it was asked, and that was to instruct the jury that the law raises the presumption that the appellant had performed its duty in the employment of its servants; and that the appellee must overcome that presumption, by a preponderance of the evidence, before he was entitled to recover.

"That the law raises such presumption, and that the burden was upon the appellee to overcome such presumption, by proving a duty and a breach thereof, are undisputed; hence, the appellant was entitled to have the jury so instructed: *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Hard v. Vermont etc. R. R. Co.*, 32 Vt. 473; *Gravelle v. Minneapolis etc. Ry. Co.*, 10 Fed. Rep. 711; *McDermott v. Hannibal etc. R. R. Co.*, 87 Mo. 285; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; 4 Am. Rep. 364; *Wood's Law of Master and Servant*, secs. 346, 419; 3 *Wood's Railway Law*, sec. 376; *McKinney on Fellow Servants*, sec. 89, and cases cited.

"The presumption is, that the master has performed his duty. This presumption the employé must overcome, for it stands, until overthrown, as a *prima facie* case. It must, therefore, be held that the appellant discharged his duty, unless the contrary has been affirmatively shown': *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212.

"None of the instructions given by the court cover this branch of the case, unless, as the majority of the court hold, that a general instruction that the plaintiff must prove the material allegations of

his complaint is all that a party is entitled to ask, and inasmuch as the writer thinks this instruction was no more than the appellant was entitled to have given, and states the law correctly, and was applicable to the facts in this case, it was error to refuse it.

"The refusal of the trial court to give the eleventh instruction asked by the appellant presents a question of law of vital importance to the employer, as well as the employé. The question presented is, whether or not the master, by the employment of men lacking in experience, becomes liable for injuries resulting to a coemployee through the want of skill of such inexperienced servants.

"It is a fact that cannot be successfully disputed that, in the operation of railroads, as well as many other kinds of business, new and inexperienced men must, from necessity, be employed when men of experience cannot be procured. And, in almost every line of employment, the employé must, at some time, be inexperienced.

"Is the master guilty of negligence in making such employments? No more can a man ignorant of the construction or mechanism of a locomotive engine, or the means and manner of its operation, or of the running and management of any complicated piece of machinery, be expected to be able to construct and operate the one, or to run and manage the other, than that the mind of an infant, without training, culture, and experience, should at once become that of a fully developed adult. There is, and must always be, a beginning to everything. And we know that man becomes proficient only from experience. From these premises, it naturally follows that every man, in adopting a calling, must at first be inexperienced. In the management and operation of large mills and factories, and in the running of railroads, where thousands upon thousands of men are employed, it is absolutely necessary to employ, at all times, more or less inexperienced employés. Such employés are not, however, put to work in places, and to perform duties, requiring great skill and experience, but are placed in such places, and to perform such duties, as require little or no skill, and where the inexperienced may learn and in time become experienced and skilled. One entering the service of another, knowing that he must, by experience, acquire knowledge and skill, must, and does, assume the risks incident to such service; not alone those arising from his own inexperience, but also those arising from the inexperience of those engaged with him in the same service, and who are so placed with him for the purpose of acquiring knowledge and experience.

"The instruction under consideration, it seems to me, meets every requirement of the law, for the court was simply asked to instruct the jury that if, 'in the reasonable and careful operation' of its railroad, there was no way by which a careful and intelligent man could acquire the experience necessary to render him a competent yard brakeman, except by actual service in that capacity; and that, in such operation of its railroad, it was necessary for the appellant to employ in that service men who had had no former experience as yard brakemen, then the appellee, when he entered appellant's employ, assumed the risks incident to the employment, including those arising from the inexperience of his coemployés who were working with him and getting experience in the same manner as he was.

"If it is negligence per se to employ an inexperienced employé, we need pursue this inquiry no further, but, if not then upon what hypothesis can the master be held liable?

"As a general proposition, it is stated that the master owes it as a duty to the servant to furnish him reasonably safe machinery, tools, and appliances with which, and a reasonably safe place where, to work. And it is also said that he owes it as a duty to one servant to exercise reasonable care to select coservants who are careful and competent. While proper as general statements of the law, their application is varied and limited, for they cannot apply where the work to be performed is such that reasonably safe machinery, tools, and appliances cannot be furnished, or the place where the work is to be done is necessarily an unsafe and dangerous place to work. But they are applicable where the master can furnish machinery, tools, and appliances of the kind which he uses in his business, which are reasonably perfect in their construction and make. The law does not attempt to impose upon him the duty of furnishing machinery, tools, and appliances, in the use of which, or a place where, in the performance of his duties, the servant cannot be injured.

"As McBride, J., in a very recent case, says: 'The term, "safe place to work," as thus used, is, of course, necessarily relative. It does not mean a place absolutely free from danger, as some vocations, from their very nature, involve the constant encountering of danger': Louisville etc. Ry. Co. v. Hanning, 131 Ind. 528; 31 Am. St. Rep. 443.

"Neither does the law require the master to warrant that a servant will be careful and prudent in the performance of his duties, and not injure a fellow-servant. The most that is required of the master is, that he shall use reasonable and proper care in the selection of his servants, selecting those only whom he believes to be competent to properly perform the duties required of them. The fact that an injury results to one servant from the carelessness of a fellow-servant is not, of itself, sufficient to impute negligence on the part of the master, either in the selection of the servant whose negligence caused the injury, or in his retention: Louisville etc. R. R. Co. v. Allen, 78 Ala. 494, and cases cited; Wood on Master and Servant, sec. 419, and cases cited in note 1.

"The majority of the court confuse the term, 'inexperienced servant' with the term 'incompetent servant.' They are not synonymous terms. A servant may be inexperienced, and yet not incompetent. The evidence in this case does not establish the fact that an inexperienced person is incompetent to act in the capacity of, and to perform the duties required of, the servant complained of.

"The duty imposed by the law is, that a master shall be reasonably prudent in the selection of his servants, so that one servant may not be exposed to dangers other than such as naturally arise from the undertaking. If, in the reasonable and careful operation of a railroad, it is necessary to employ inexperienced persons to perform certain duties, and the company exercises reasonable care in the selection of such persons, it has done all that the law requires of it, and those entering such employment assume the risks

of accident caused by the inexperience of such employes, for the reason that such risks are an incident of the service.

"The instruction under consideration simply defines the risks thus assumed, and should have been given. To announce a different rule is to overthrow the well-settled principle established not only in this state, but in every other state of the Union, except those states where there are special statutes, that a servant entering the employ of a master impliedly assumes all the risks naturally incident to the service.

"For these reasons I am compelled to dissent from the views expressed in the opinion of the majority of the court.

"The judgment should be reversed, with instructions to grant appellant a new trial."

Experiments as Evidence.

General Rule.—There has been, until within recent years, some hesitation in receiving evidence of experiments or demonstrations; but the rule is now established that evidence of the results of tests or experiments is admissible if based upon conditions similar to those existing in the case on trial. In all cases of this sort, very much must necessarily be left to the discretion of the trial court, but the exercise of its discretion will not be interfered with where it has not been abused. From the liability to misconception and error, there can be no doubt that it is essential that the experiments or demonstrations should be made under similar conditions and like circumstances. When this is shown as a foundation for the introduction of experiments as evidence, they ought to be admitted, and the court's exercise of discretion in admitting them ought not to be interfered with in either civil or criminal cases: *Smith v. State*, 2 Ohio St. 511; *Leonard v. Southern Pacific Co.*, 21 Or. 555; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9; *Byers v. Railroad*, 94 Tenn. 345; *Sullivan v. Commonwealth*, 93 Pa. St. 284; *Eidt v. Cutter*, 127 Mass. 522; *Boyd v. State*, 14 Lea, 161; *Brooke v. Chicago etc. Ry. Co.*, 81 Iowa, 504; *Farmers' etc. Bank v. Young*, 36 Iowa, 44; *National Cash Register Co. v. Blumenthal*, 85 Mich. 464; *Stockwell v. C. C. & D. R. Co.*, 43 Iowa, 470; *Williams v. Taunton*, 125 Mass. 34; *McLain v. State*, 30 Tex. App. 482; 28 Am. St. Rep. 934; *Wilson v. State* (Tex. Crim. App.), June 27, 1896; *State v. Isaacson* (S. Dak.), December 16, 1895; *Commonwealth v. Bielsford*, 161 Mass. 61. If the evidence upon the turning point of a case is very conflicting, and a proper foundation has been laid for the introduction of a test or experiment to elucidate the question at issue, the court's action in rejecting such evidence has been held good ground for a reversal and a new trial: *Byers v. Railroad*, 94 Tenn. 345. In *Stockwell v. C. C. & D. R. Co.*, 43 Iowa, 470, where an action was brought against a railway company for damages for the burning of a lumberyard, alleged to have been set on fire by sparks from the defendant's engine, it was pleaded that the engine was fed with coal and emitted sparks only when steam was used, and that for some distance from the yard the grade was such that steam was not used. The jury, during the trial, inspected the ground, and the possibility of running a train as alleged was prac-

tically demonstrated. In holding that the experiment was without prejudice to the plaintiff, the court said: "All that the jurors could possibly have learned by the experiment was, that it was practicable for a train to run from Rock Cut to a point beyond plaintiff's mill and lumberyard without the use of steam. This fact the evidence established beyond dispute. There could have resulted, therefore, no possible prejudice to plaintiff. Conceding that the experiment was improper, it was innocent in its effects. We cannot punish defendants for the unlawful act of their employes that wrought injury to no one. In the view, therefore, that no possible prejudice was wrought plaintiff in the trial, by the act complained of, it afforded no ground for disturbing the verdict. We are not prepared to hold that the experiment itself was not proper, and unauthorized by the law. The jury were, by the consent of the parties and the order of the court, in a position where they could satisfy themselves upon a question of fact which they were required to determine, namely, the practicability of a train running without steam on the part of the railroad indicated. The truth could be unerringly reached by the experiment. Even did the evidence leave the question in uncertainty, they ought to have used the means at hand to arrive at the truth. The question involved is a physical fact. Its solution by the experiment would leave no chance for error in judgment or opinion. Why not employ the experiment to reach the truth, the end and aim of all trials at law? The case is not unlike many we could state where common sense, and doubtless the rules of law, would permit experiments before the jury for the purpose of determining a disputed fact. Suppose experts should differ as to the effect of the union of two chemical bodies; what objection could exist to an experiment before the jury to determine the true result? Suppose a question arose in a case as to the weight of a gold coin, the witnesses of the parties giving conflicting evidence on the subject. Why not weigh it in the presence of the jury? Or suppose an alteration in a deed can only be determined by the use of artificial assistance to the eye. Why should not jurors be permitted to use such aids to enable them to decide the case in accord with the very truth? But the questions here presented we do not determine. We suggest these thoughts to show that there are arguments based upon the high considerations of justice and truth in support of the propriety of the alleged experiment, if made fairly by the jury, and not in disobedience to the directions of the court governing their conduct, while in charge of the deputy sheriff. The district court regarded the experiment in question as misbehavior on the part of defendant, sufficient to require the verdict to be set aside, and upon this ground alone was the order to that effect made." The order granting the new trial was considered to be based upon insufficient cause, and the judgment of the court below was, therefore, reversed: *Stockwell v. C. C. & D. R. Co.*, 43 Iowa, 470, 476.

If it sought to introduce in evidence the result of experiments or tests, without an offer to introduce the other necessary evidence to make it admissible, or, if offered, there is a failure to show that the conditions under which they were made were not similar to

those existing in the case on trial, there is no error in excluding it. Experiments, to be admissible, must be based on conditions similar to those existing in the case on trial, and, unless the conditions are affirmatively shown to be such, the result of experiments is not admissible in either civil or criminal cases: See the principal case; *Foot v. Woodworth*, 66 Vt. 216; *Leonard v. Southern Pac. Co.*, 21 Or. 555; *Kinney v. Folkert*, 84 Mich. 616; *Yates v. People*, 38 Ill. 527; *Lake Erie etc. R. R. Co. v. Mugg*, 132 Ind. 168; *Ramsey v. Rushville etc. Road Co.*, 81 Ind. 394; *Tesney v. State*, 77 Ala. 33; *Hawkes v. Charlemont*, 110 Mass. 110; *Commonwealth v. Piper*, 120 Mass. 185; *Libby v. Scherman*, 146 Ill. 540; 37 Am. St. Rep. 191; *Miller v. State*, 107 Ala. 40; *Evans v. State (Ala.)*, February 6, 1896.

The fact that an experiment or test was ex parte, and such as could be made only by one of the parties, goes not to its competency, but to its weight. Thus, in a suit against a railroad company for personal injuries resulting in death, caused by being struck by a train, it is competent for the defendant to prove, by one of its engineers, an ex parte test, made subsequently to the accident, for the purpose of showing that the train that caused the death could not have been stopped after the person killed could have been seen upon the track, when it appears that the test was made at the same place, and under conditions that were, so far as practicable, identical with those surrounding the accident. The fact that the test was made by the railroad company, and could be made only by it, simply affects the weight of the evidence, a matter of which the jury must determine: *Byers v. Railroad*, 94 Tenn. 345, 354; *Mississippi etc. R. R. Co. v. Ayres*, 16 Lea, 725. On the issue as to whether a railroad accident could have been avoided by stopping the train, after the party injured could have been seen by the engineer in charge, tests made with similar trains under similar circumstances are admissible in evidence even without notice to the injured party: *Burg v. Chicago etc. Ry. Co.*, 90 Iowa, 106; 48 Am. St. Rep. 419; *Byers v. Railroad*, 94 Tenn. 345. So, the testimony of physicians, who attended a deceased person soon after he was shot, as to an experiment made by them to determine the relative positions of the deceased and the accused when the fatal shot was fired, is not rendered inadmissible by the fact that the experiment was made in the absence of, and without notice to, the accused. This objection goes to the weight of the evidence, not its admissibility: *Moore v. State*, 96 Tenn. 209.

Permitting experiments or tests before the jury, whether in or out of the courtroom, rests largely in the discretion of the court: *United States v. Ball*, 163 U. S. 662; *Commonwealth v. Brelsford*, 161 Mass. 61; *Heath v. State*, 93 Ga. 446; *State v. Lindoen*, 87 Iowa, 702; *United States v. Reid*, 42 Fed. Rep. 134; *People v. Levine*, 85 Cal. 39; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9; *National Cash Reg. Co. v. Blumenthal*, 85 Mich. 464; *Osborne v. Detroit*, 32 Fed. Rep. 36; *Hatfield v. St. Paul etc. R. R. Co.*, 33 Minn. 130; 53 Am. Rep. 14; *Smith v. St. Paul etc. Ry. Co.*, 32 Minn. 1; 50 Am. Rep. 550.

The jury cannot, of course, make experiments for themselves, especially in a criminal case, as they must act, under their oaths, upon the evidence as it is produced before them by the respective

parties. If, upon a trial for murder, a pistol, which has not been properly identified as the one by means of which the deceased was killed, is sent out to the jury without the knowledge of the prisoner, his counsel, or the court, and the jury experiment with it for the purpose of judging whether, under the circumstances, the deceased could have shot himself with that weapon, and the trial results in a verdict of guilty, a new trial will be granted: *Yates v. People*, 38 Ill. 527. If the life of an individual is at stake upon an indictment for murder, the court cannot permit a verdict to stand which has been obtained, not by calm, deliberate examination of the proof, but by uncertain experiments, such as sending the constable out of the room and talking to him through the door, with a view of testing the transmission of sounds, and running to ascertain whether the tracks would be shorter than the shoes with which they were made. In speaking of the test as to voice, the court said: "A different intonation of voice, a difference in the structure of the rooms, would destroy its virtue as a test; and, besides, they had to take the word of the constable as to the fact whether they were heard": *Jim v. State*, 4 Humph. 288. So, in his argument to the jury on the trial of a felony, the defendant's counsel said in regard to a question of footprints that the jury might try for themselves whether such wornout boots as the witnesses for the prosecution described would make such tracks as they described. Some of the jury, without leave, made the experiment out of court, and this was held sufficient to justify a reversal of a judgment of conviction and to authorize a new trial: *State v. Sanders*, 68 Mo. 202; 30 Am. Rep. 782. But the misconduct of jurors may be waived, as, where some of them see a horse, alleged to have been injured, as they are passing into court, and stop to examine the animal. If this act is discussed when the jurors assemble, and the plaintiff's counsel, who takes part in the discussion, makes no demand to have the jury discharged, and a new panel called, and does not make any objection to proceeding with the trial, he thereby waives his right to take advantage of the conduct of the jurors: *Whitcher v. Peacham*, 52 Vt. 242.

In criminal cases, a defendant cannot be compelled to give evidence against himself, as this would violate his constitutional right, but evidence of the result of experiments or tests may frequently be admitted without violating the constitutional guaranty. While evidence of marks or footprints has been held to be admissible in criminal cases: *Hodge v. State*, 97 Ala. 37; 38 Am. St. Rep. 145; evidence that a witness forcibly placed the defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, has been held to be inadmissible, as a defendant cannot be compelled to criminate himself, either by acts or words: *Day v. State*, 63 Ga. 667; *Cooper v. State*, 86 Ala. 610; 11 Am. St. Rep. 84. So, on an accusation of murder, it being claimed that certain footprints were those of the prisoner, the prosecuting attorney brought a pan of mud into court and placed it in front of the jury, and having proved that the mud in the pan was about as soft as that where the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection, the court instructed

the prisoner that it was optional with him whether he would comply. The prisoner refused, and the court instructed the jury that his refusal was not to be taken against him. The prisoner being convicted, the appellate court held that he was entitled to a new trial: *Stokes v. States*, 5 Baxt. 619; 30 Am. Rep. 72. But if a prisoner voluntarily assists in making a test, he cannot complain of evidence as to the result. For example, an officer, who had arrested a prisoner charged with larceny, directed him to put his foot in a track found near where the larceny was committed, which he did, and testified as to the result of the comparison. It was held that the evidence was not procured by duress and was admissible: *State v. Graham*, 74 N. C. 646; 21 Am. Rep. 493. And on the trial of an indictment for murder, it was held no error for the prosecution to be allowed to prove that the examining magistrate had directed the prisoner to make his footprints in an ash-heap; that he did so; and that they corresponded with footprints found at the scene of the crime: *Walker v. State*, 7 Tex. App. 245; 32 Am. Rep. 595. A party, who denies a signature before the court to be his own, may be required, on cross-examination, to write in the presence of the jury for the purpose of comparison: *Bradford v. People*, 22 Col. 157; but if the disputed writing is so faded out that it cannot be traced, and cannot be seen by the jury, but only described to them, it is not a case for such an order: *Smith v. King*, 62 Conn. 515. If the evidence in a prosecution for murder tends to show that the person who committed it wore a certain pair of rubber boots at the time, and the defendant testifies that he cannot get the boots upon his feet, and makes extraordinary efforts, apparently, to put them on in the presence of the jury, it is not error to allow a shoemaker to measure the defendant's feet and the boots and then testify that a foot of defendant's size could wear the boots; nor is it improper to call other witnesses to put the boots on in the presence of the jury, and allow the shoemaker, after measuring their feet, to testify that he finds them as large as defendant's: *State v. Nordstrom*, 7 Wash. 506.

Illustrative Civil Cases.—After a witness, competent as an expert, has testified that, by experiments upon certain land, the drainage of remaining land by a filter basin on the land can be determined, he may be asked if the level has been determined by experiment, at which water stands under soil, generally, and may state the results of experiments made by him in his laboratory in proving that fact: *Williams v. Taunton*, 125 Mass. 34. So, if the thermometer by which an inspection of oil was made is introduced in evidence, it not error to also admit the certificate of the experts, who tested the thermometer before its use, which accompanied it, and which directed the variations to be made from the face reading to secure accuracy: *Hatcher v. Dunn* (Iowa), April 10, 1896.

In an action for injury to the plaintiff's house and fence, where the question in controversy, and upon which both parties introduce the testimony of experts, is whether the injury was caused by fumes and gases from the defendant's copperas works, or by emanations from a sewer near the premises, the defendant has no ground of exception where the plaintiff's experts are allowed to give the

grounds and reasons of their opinions, including the details of experiments made by them elsewhere than on the premises in question, under conditions and circumstances which, as they testify, are as nearly as possible like those surrounding the plaintiff's house, in the absence of the sewer: *Eidt v. Cutter*, 127 Mass. 522. So, in an action against a railroad company to recover damages for personal injuries received in a railway accident, after the defendant's station agent where the accident occurred has testified that he held such position before the accident, and afterward, up to the time of trial, and did not know of any change in the switch in question having been made, it is competent for one of the plaintiff's attorneys, where the shoe worn by the injured party is before the jury at the time, to testify as to the result of his measurements of the distances between the rails at the switch, fourteen months after the accident, and of experiments made by him in placing his foot between the rails, and showing where the foot could be caught and where not: *Brooke v. Chicago etc. Ry. Co.*, 81 Iowa, 504.

The jury may be shown by experiment the principle upon which a thing works. Thus, where a person was injured while emptying a defective coal bucket in unloading coal from the hold of a steamer at a dock, the court does not err in permitting an experiment, in the presence of the jury, with a correct model of the bucket, for the purpose of showing how the bucket operated when in use, and to illustrate how the accident could have happened, when no prejudice can result therefrom: *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9. So, in a suit to recover the price of a cash register, where the vendee claims the right to rescind his order for its shipment because it fails to register correctly, the court does not err in allowing the machine to be received in evidence, and in permitting a witness, who took the order, to operate the register before the jury, to explain the principle upon which it works, and to show the manner in which it registers the cash received, where the machine is identified, and there is testimony in the case tending to show that the register is in the same condition that it was in when returned by the defendant: *National Cash Register Co. v. Blumenthal*, 85 Mich. 464. An expert witness who testifies that certain writings, made with the same ink, are apparently different in color, should be permitted to illustrate his testimony before the jury by showing the effect of using a blotting pad, which, in the opinion of the expert, causes the apparent difference in color: *Farmers' etc. Bank v. Young*, 36 Iowa, 44. If, in a particular case, the things used for the purpose of the demonstration are similar in size, material, and position, and are operated under conditions similar to the thing sought to be demonstrated, experiments are admissible. This is well illustrated in *Leonard v. Southern Pac. Co.*, 21 Or. 553, a railroad accident case. The defendant claimed that the accident was due to the displacement of a rail wrongfully loosened from the track, and thrown diagonally across the track by some evil-disposed person; and, in support of that contention, introduced the rail in court, which showed upon the outside of its bottom flange a scar which defendant claimed appeared to have been made by collision of the pony-truck wheel in front of the engine coming in con-

tract with the flange of the rail as it lay diagonally across the track. The plaintiff, in rebuttal, produced in court a wheel made to run on rails, and an iron rail, and requested the witness to show to the jury the manner in which the wheel would come in contact with the rail, under the circumstances claimed by the defendant. The section of rail introduced by the plaintiff was the same in size, dimension, measurement, and weight as the rail introduced by the defendant, and the court personally measured the wheel, and ordered that the record be made to show that it was a wheel with flange and trend made to run on rails like a locomotive engine wheel, and that it was twenty-six inches in diameter, including the flange. The only difference between the wheels was that the pony-truck wheel was thirty-three inches in diameter, including the flange, but both were used for similar purposes and rolled upon similar tracks. The bill of exceptions showed that the witness, McCoy, placed the section of rail across defendant's rail as claimed by its theory the rail was placed by the alleged evil-disposed person, and then rolled the flanged wheel toward and against it on the defendant's rail, and claimed to demonstrate, in the presence of the jury, that a wheel thus approaching a crossed rail could only strike it on the ball or upper part, and not on the flange or bottom part, where the scar appeared. He also testified that the larger the diameter of the approaching wheel the further it would be from striking the flange of the cross-rail, and that there were no marks or scars on the ball of defendant's rail. "It seems to us, as counsel contend," said the court, "that a flanged wheel, standing perpendicular with the rail upon which it is placed and rolled forward, will strike another rail crossing this one upon which it is rolling in precisely the same manner that it would were it attached to the end of an axle. Under the circumstances, we are not prepared to say that there was any error."

Evidence of experiments is not admissible where the conditions are not the same. Thus, in an action for damages on account of the condition of certain jars due, as alleged, to their improper burning in the process of manufacture, but where the defendant joins issue by contending that the ruinous condition of the jars is due to their having been put up and stored by the plaintiff for three or four years in a dirty and greasy condition, a piece of white paper which one of plaintiff's witnesses had rubbed around on the inside of some of the jars, in examining them, for the purpose of finding out whether they were greasy or not, is not admissible, until it is shown that the jars to which it was applied were then in substantially the same condition in regard to being dirty and greasy as they were when packed: *Foot v. Woodworth*, 66 Vt. 216. So, in an action to recover damages for removing stones from a river as a result of which the river washed the plaintiff's land away, evidence that the removal of stones at another place on the river produced the same effect which it was alleged that it produced at the place in question, is inadmissible, if it is not shown that all the conditions of the events were the same. It is not enough for witnesses to testify that the two places are similar in situation: *Hawks v. Charlemont*, 110 Mass. 110. And, in a case of negligence, the re-

refusal of the court to permit the defendants to run, in the presence of the jury, a "blower," used in a planing mill where the accident occurred, and which "blower" has been examined by the jury, is not an abuse of discretion, where it appears that the machine has been altered since the plaintiff was injured by putting his arm into it when in operation: *Kinney v. Folkerts*, 84 Mich. 616. So, in an action for damages for death caused to a railroad yard switchman by a wrongful act, in leaving a strong and sharp piece of rail, called a "sliver," upon a rail on a sidetrack of the yard, after evidence of statements made by the deceased that, at the time of the injury, his boot froze to the rail, and that he was unable to pull it away, the court may properly refuse to permit a witness to testify that, after the statements were made by the deceased, in his hearing, he experimented and found that the weather had the same effect on his boot, it not being shown that the experiment was made under the same conditions that existed when the injury took place: *Lake Erie etc. R. R. Co. v. Mugg*, 132 Ind. 168. On an issue as to whether a check has been raised in amount, it is error to admit in evidence a check which bears evident signs of having been altered as a result of experiments which have been made thereon for the purpose of showing that an alteration could not be made without detection. "An unsuccessful effort by one person to forge a name or raise a check is not competent evidence that another person did not succeed": *Birmingham Nat. Bank v. Bradley* (Ala.), November 28, 1895. Experiments outside of the issues in the case should not be admitted: *Ramsey v. Rushville etc. Road Co.*, 81 Ind. 394; *Libby v. Scherman*, 146 Ill. 540; 37 Am. St. Rep. 191. A suit was instituted to restrain proceedings at law to recover for work and labor in constructing a sewer, on the ground of fraud on the part of the defendant in equity in improperly obtaining possession of an estimate in writing, and by chemical process removing the figures indicating the price. The document in question having been deposited with the clerk of records, in pursuance of an order for production, the plaintiff moved for liberty to subject it to chemical tests, for the purpose of the trial at law; but, upon an undertaking by the defendant to produce it to be stamped at the trial at law, the court refused to make any order: *Twentyman v. Barnes*, 2 De Gex & S. 225.

Illustrative Criminal Cases.—On the issue as to whether words alleged to have been spoken by the defendant could have been heard by the witness who testifies thereto, evidence of an experiment made under similar circumstances is admissible: *Wilson v. State* (Tex. Crim. App.), June 27, 1896. On the trial of an indictment for malicious shooting, after the state has examined several witnesses, who were not present at the shooting to prove experiments and observations subsequently made by them, at the same place, for the purpose of proving by inference from such experiments and observations, that the prosecuting witness might, or could, have seen and known the defendant under the circumstances and as related by him, it is competent for the defense to prove similar experiments, with different results, made in another place, but under like circumstances: *Smith v. State*, 2 Ohio St. 511. On a

prosecution for maliciously exposing poison, which caused the death of a horse, evidence as to what the owner of the horse and prosecuting witness did when the horse died is admissible. He may testify that he cut the horse open, took out the contents of his stomach, and administered some of such contents to a hen, and that the hen died in ten or twelve minutes from the effects thereof: *State v. Isaacson* (S. Dak.), December 16, 1895. On a trial for burglary, a witness may testify that he measured the foot-tracks found at the place where the burglary was committed; that he also examined the shoe that defendant had on just after the burglary; and that upon placing the shoe in the track, he found that it fitted exactly: *McLain v. State*, 30 Tex. App. 482; 28 Am. St. Rep. 934. Experts may testify as to the results of experiments, based upon facts established by the evidence, whether made before or during the trial: *Boyd v. State*, 14 Lea, 161. The testimony of a physician called as an expert to show the effect of powder marks, where a pistol is fired at short range, and the cloth or muslin used in his experiments are admissible in evidence on the trial of a prisoner for murder by means of a pistol: *Sullivan v. Commonwealth*, 93 Pa. St. 284. Upon the trial of a complaint for keeping and maintaining a liquor nuisance, a certificate by the state assayer of the result of his analysis of certain beer is admissible in evidence for the purpose of identifying the beer so analyzed as that taken from the defendant's premises. The fact that samples of liquor were taken illegally from the defendant's premises by police officers does not render evidence that they were found by analysis to contain more than one per cent of alcohol incompetent at such trial: *Commonwealth v. Brelsford*, 161 Mass. 61.

If the conditions are dissimilar the same rule applies as in civil cases, namely, that evidence of experiments is not admissible. In *Tesney v. State*, 77 Ala. 33, upon an indictment for murder, it is held that, for the purpose of showing the distance between the parties when the deceased fired a pistol at the defendant, as indicated by the marks of powder on the clothes, or the want of such marks, it is not permissible to exhibit to the jury a coat similar to that worn by the defendant at the time, and show the effect of a single experiment in firing at it, as the results of such experiments are "as variant as the manner of loading the pistols." But, it is a matter of common knowledge that the muzzle of a pistol must be very close to clothing, when fired, to scorch it, and there can be no possible injury done to the defendant by allowing one who has, since the killing, made experiments to ascertain at what distance the powder from a pistol will scorch clothing, to testify to a fact which is already known to the jury: *Miller v. State*, 107 Ala. 40. In a prosecution for murder, an expert witness cannot testify that, as an experiment, he fired a bullet through a plank, to ascertain the size of the hole made as compared with the bullet: *Evans v. State* (Ala.), February 6, 1896. On the trial of an indictment for murder, a witness testified that he had made certain experiments upon a dynamometer, an instrument to measure the force of blows and the weight of falling bodies, by striking it with a bat of substantially the same form and weight as that with which, as

the government contended, the murder was committed. It was held that the court, in its discretion, might properly reject such evidence, as tending to mislead the jury, unless the experiments were shown to have been made under conditions the same as those existing in the case on trial: *Commonwealth v. Piper*, 120 Mass. 185. Evidence that bloodhounds of the same breed, and trained by the same man, as those used to track the defendant in a criminal case, after being put upon the track of a human being, left the trail to track a sheep which they overhauled and killed, is inadmissible, as the test by comparison is not sufficiently certain to determine the reliability of the dogs employed in the criminal case by reference to the qualities of the other dogs: *Simpson v. State* (Ala.), June 18, 1896.

Cases Illustrative of Court's Discretion.—An application to allow the jury to witness experiments with cars upon a railway track outside of the courtroom, for the purpose of showing the nature of an alleged collision, is addressed to the discretion of the court, and no error is committed in refusing it, when the case is not one within the provisions of the statute allowing a view by the jury: *Smith v. St. Paul etc. Ry. Co.*, 32 Minn. 1; 50 Am. Rep. 550. The presiding judge is not obliged to allow the power of vision of a witness under cross-examination to be tested by requiring him to go to the window and look at an object on the street, which object is not visible to the judge and jury from their positions in the courtroom: *Heath v. State*, 93 Ga. 446. So, in a case where the plaintiff claims to have been paralyzed by a fall on a sidewalk, it is not error for the court to permit her medical attendant, though he has not been sworn, to demonstrate the plaintiff's loss of feeling, by sticking a pin into that side of him which he claims is paralyzed: *Osborne v. Detroit*, 32 Fed. Rep. 36. And on the trial of an action for personal injuries, the uncontradicted proof showing that since receiving them the plaintiff walked lame, the court commits no error in refusing to compel him to walk across the courtroom in presence of the jury: *Hatfield v. St. Paul etc. R. R. Co.*, 33 Minn. 130; 53 Am. Rep. 14. An expert witness may be permitted to make illustrations, before the jury, upon a blackboard for the purpose of explaining his testimony and rendering it more intelligible: *McKay v. Lasher*, 121 N. Y. 477.

So, in criminal cases. At the trial of a complaint for keeping and maintaining a liquor nuisance, the defendant has no ground of exception to the refusal of the trial judge to permit samples of beer, taken from the defendant's premises, to be tasted by the jury, for the purpose of determining whether it is or is not intoxicating: *Commonwealth v. Brelsford*, 161 Mass. 61. The court may properly refuse to permit an experiment where there is nothing in it to enlighten the jury. Thus, if a defendant is accused of the crime of keeping for sale and selling intoxicating liquors in violation of law, and one of his witnesses has testified to the ingredients contained in the liquor, and explained the process of its manufacture, it is not error for the court to permit him to put the ingredients together, for the purpose of showing the "composition" of the liquor in question: *State v. Lindoen*, 87 Iowa, 702. The admission of evi-

dence of an experiment to support the theory of the prosecution respecting the guilt of the defendant, if applicable to the facts in proof, is entirely in the discretion of the court; and, as proof of the result of experiments is equally as open to the defendant as the prosecution, the court is not bound to suspend a trial to try an experiment over again, in the presence of the jury, as the defendant, if he desires, may show any different result by proof of other experiments: *People v. Levine*, 85 Cal. 39. If a party, having contrived a scheme to defraud the public, employs the mails of the United States in the prosecution of that scheme, and he is indicted for thus soliciting money, upon the representation that he is able, by an unknown power, to answer sealed letters addressed to spirit friends, he will not be permitted to give a test or exhibition of his unknown power in open court: *United States v. Ried*, 42 Fed. Rep. 134. So, upon a trial for murder by shooting, in different parts of the body, with buckshot, it is within the discretion of the court, after the introduction of conflicting evidence upon the question as to whether a gun found in the defendant's possession would scatter buckshot to either grant or refuse a request to permit the gun to be taken out and shot off, in the presence of a deputy marshal, to test how it threw shot, and the court commits no error in declining to allow it: *United States v. Ball*, 163 U. S. 662, 673.

GRAND RAPIDS & INDIANA RAILROAD Co. v. DIETHER.

[10 INDIANA APPEALS, 206.]

CARRIERS—FREIGHT—WHEN EARNED.—A common carrier receiving goods for carriage without requiring prepayment of freight charges is not entitled to demand such charges until its duty of carriage has been performed, either by delivery or an offer to deliver at the place of destination.

CARRIERS—CONNECTING—FREIGHT CHARGES, WHEN EARNED.—If a carrier receives goods to be delivered to a connecting carrier without demanding prepayment of freight charges, it cannot demand payment of such charges until it has carried the goods to the end of its line and is ready to deliver them to the succeeding carrier, or can show a good excuse for its not being done.

CARRIERS—TERMINATION OF LIABILITY—REFUSAL OF CONNECTING CARRIER TO RECEIVE GOODS—NOTICE.—The refusal of a connecting carrier to receive goods and assume the freight charges accrued, without notice thereof to the shipper or consignee, does not relieve the original carrier from any further attempt to deliver, or the performance of other duties on its part, nor terminate its liability as a carrier.

CARRIERS—WHEN BECOME WAREHOUSEMEN.—Until a carrier's liability as carrier is terminated by its performance of all duties as such, its rights as a warehouseman cannot begin.

NEW TRIAL—WANT OF EVIDENCE.—The insufficiency of evidence to sustain answers to interrogatories which could in no event control the general verdict, is not ground for a new trial for want of evidence.

TENDER.—MONEY PAID INTO COURT on a tender need not be the identical money with which the original tender was made,

A. A. Chapin, for the appellant.

T. E. Ellison, for the appellee.

207 GAVIN, J. This was an action brought by appellees to recover the possession of a carload of lumber alleged to have been wrongfully detained by appellant. The only questions presented arise upon the motion for a new trial.

On July 10, 1891, a carload of lumber was shipped from Eagle Mills, Arkansas, directed to appellees, at Fort Wayne, Indiana, Ft. W., C. & L. delivery. A bill of lading was issued to the shippers, and a waybill was forwarded with the car showing the destination to be Fort Wayne, Ind., Ft. W., C & L. delivery, by which was meant the station of the Lake Shore and Michigan Southern Railway Company at Fort Wayne, which was used by the Fort Wayne, Chicago, and Louisville Railway Company. After passing through the hands of several carriers, the car was delivered to appellant, at Winchester, together with the waybill, and was hauled by it to its yards in Fort Wayne, where it arrived July 21, 1891. The terminus of appellant's road was at a Y, about one and one-half miles from its station, and about one mile from the Lake Shore & Michigan Southern depot, the destination of the car named in the waybill.

According to the usual mode of doing business, the appellant would put the car upon this Y, whence it would be taken by the connecting line. On July 22d, the appellant notified appellees of the arrival of the lumber, with the amount of charges, sixty-nine dollars and forty-eight cents, and that the goods would remain at the station at appellees' risk, subject to charges for storage after twenty-four hours. Three or four days after giving this notice, appellant called up the Lake Shore & Michigan Southern agent by telephone, and asked him if he would accept the car. He refused to accept the car and pay or assume the freight charges already incurred. Appellant made no further or other effort to deliver the car to the connecting carrier, nor was there any further communication **208** between appellant and appellees until the tender and demand, except as indicated by the following evidence:

"Q. (To Mr. Diether). Did you ever talk over the telephone with Mr. Clisbee [appellant's agent] about this car? A. Yes.

"Q. Did you ask about the car, or say anything to him about the car, or say anything to him except about putting the car over on the other road? A. He telephoned me, and asked if we would pay the freight and take the car. I told him that if he would put the car over there, I said we would take care of it and pay the freight.

"Q. What did he say in answer? A. He said he had instructions from the general freight agent not to deliver the car until the freight was paid. This was about two weeks after the arrival of the car."

Of this conversation, Mr. Clisbee had no recollection. About August 26th appellees tendered to appellant the freight charges and demanded the lumber, but their demand was refused, appellant claiming an additional one dollar per day for use of car, or demurrage.

A number of questions arise in different ways, but the vital question is, whether or not appellant had performed its duty in full prior to the tender and demand. If it had not, or fails to show a good excuse for its nonperformance, then it was in the wrong in claiming storage, even if, under proper circumstances, such a charge may be made and sustained by a lien on the goods.

Without stopping to determine whether or not a lien is allowed for storage charges, in the absence of a contract, and without stopping to inquire whether the goods were received under the bill of lading, we assume the duty of the appellant to have been simply to safely carry ²⁰⁹ the lumber to the end of its line, and there deliver it to a connecting carrier to be forwarded to its final point of destination. This obligation rested upon it without any special contract: *Hutchinson on Carriers*, secs. 102 a, 149, 149 a; 2 *Redfield on Railways*, sec. 180; 2 *Am. & Eng. Ency. of Law*, 867; *McDonald v. Western R. R. Corp.*, 34 N. Y. 497; *Lawrence v. Winona etc. R. R. Co.*, 15 Minn. 390; 2 *Am. Rep.* 130.

The appellant, as a common carrier, was entitled to demand payment of its charges in advance, but, by accepting the goods for carriage without requiring prepayment, this right was waived: *Hutchinson on Carriers*, sec. 469.

A common carrier, which has received goods for carriage without requiring prepayment, does not then become entitled to demand its freight charges until its duty has been performed, either by delivery or an offer to deliver at the place of destination: *Hutchinson on Carriers*, sec. 469; *Holliday v. Coe*, 3 Ind. 26; *Rogers v. West*, 9 Ind. 400; 2 *Redfield on Railways*, sec. 188, pars. 1, 33.

The utmost, then, that could have been rightfully claimed by appellant was, that its charges should be paid when it had carried the goods to the end of its line and was ready to deliver them to the succeeding carrier. Until this was done, or at least a good excuse shown for its not being done, appellant was not entitled to demand payment of its charges from anyone.

Whether or not, having received these goods as a connecting carrier for shipment to a point beyond its line, without demanding payment in advance, it thereby waived any right to demand its charges until the final point of destination was reached, and should have asked of the succeeding carrier that it should collect its charges ²¹⁰ rather than to have demanded an absolute assumption of them, we do not find it necessary to determine.

The notice given to appellees on July 22d was given before appellant had made any attempt to deliver the goods to the succeeding carrier, and without having carried them to the end of appellant's line. Appellant was, therefore, not entitled to charge storage by reason of the failure of appellees to pay the charges at that time or to receive the goods at the place where they then were, and there was no default upon the part of appellees by reason of their failure to comply with the requirements of that notice. When, then, if ever, did the appellees become in fault?

According to the evidence of appellant, this notice was the only communication between the parties until the tender and demand were made. Counsel for the appellant, in his argument, assumes that appellees had wrongfully refused to pay. For this we are unable to find any support in the evidence.

That appellant never did place the car upon the Y at the end of its line where it could have been received and carried forward by the connecting carrier is undisputed. For its nonperformance of that which was essential to justify a demand for the payment of their charges, no excuse is offered by the evidence, save the fact that the connecting line, when asked about receiving this car, refused to receive it and assume charges. This refusal alone was not sufficient to excuse the appellant from any further attempt at performance, and to authorize it to treat the contract as fully performed upon its part and its duty as carrier terminated.

No notice of this refusal was given to appellees. There was not even an offer by appellant to put the car upon the Y if appellees would pay their charges.

The evidence of Diether, that the agent asked him by ²¹¹ telephone if they would take that car and pay the freight, cannot be construed as an offer to deliver at the Y if they would pay the freight. Diether was under no obligation to pay the freight and take the car at the appellant's station, where it then was. This conversation gave no intimation to appellees that appellant was willing to move the car a single foot from the place where it was then standing. Had the car been placed upon the Y, and appel-

lees notified of that fact, and that the car would not be forwarded without payment of charges accrued, or if the evidence even showed that appellees had been notified of the connecting carrier's refusal to receive the car upon the terms offered, quite a different question would be presented.

We are called upon to deal simply with the case brought before us by the record, and, as to that, it is sufficient to say that the facts show neither performance nor excuse for nonperformance of its duty by appellant. Its duty as a carrier had not been fulfilled when the demand and tender were made; until its liability as a carrier terminated, its rights as a warehouseman would not begin: *Pittsburgh etc. Ry. Co. v. Nash*, 43 Ind. 423.

Appellees were entitled to notice of the succeeding carrier's refusal to accept the goods: *Hutchinson on Carriers*, sec. 103 a.

These views of the law applicable to the facts in this case render it unnecessary for us to take up in detail the consideration of the various propositions advanced by appellant's learned and ingenious counsel. Neither is it necessary to consider each instruction given or refused, for with the law and the facts as we have found them to be, any errors in the instructions complained of could not but be harmless, and therefore no cause for reversal: *Rev. Stats. 1894*, sec. 670; *Lafayette v. Ashby*, 8 Ind. App. 214.

212 As a general rule, the insufficiency of the evidence to sustain answers to interrogatories which could in no event control the general verdict will not justify the court in granting a new trial for want of evidence: *Staser v. Hogan*, 120 Ind. 207 (228); *Chicago etc. R. R. Co. v. Kennington*, 123 Ind. 409.

It is further contended that the court erred in permitting the money to be paid into court as a tender, for the reason that the money paid in was not the identical money tendered. In this there was no error: *Colby v. Stevens*, 38 N. H. 191; *Michigan etc. R. R. Co. v. Dunham*, 30 Mich. 128; *Curtiss v. Greenbanks*, 24 Vt. 536.

In *Evansville etc. R. R. Co. v. Marsh*, 57 Ind. 505, it is held that in an action such as this it is necessary to plaintiff's recovery that he should follow up his tender by paying the "amount of the lien tendered into court."

This was done in this case.

Judgment affirmed.

ON PETITION FOR A REHEARING.

GAVIN, J. After a re-examination of the original opinion in this case, there would not seem to be a very wide difference between the theory of the law upon which the case is there decided

and the views expressed by counsel in their petition for rehearing, although we did not then, and do not now, deem it necessary to decide some of the questions so ably presented by appellant.

The learned counsel says: "I concede that the appellees were entitled to notice that their lumber had arrived, and that it was not forwarded, and the reason why such was not the case, if they did not know it already. The reason of this is, that the owner may be enabled to protect himself from loss."

²¹³ The only source from which counsel claim this information to have been shown to be possessed by Diether is from his conversation with Clisbee, set out in the original opinion. We are unable to construe this conversation to convey to appellees knowledge of the connecting carrier's refusal to receive the car and pay the freight, which fact alone would have justified their demand for the payment of their freight at that time.

Attention is called to one or two slight inaccuracies in the statement of facts. Granting them to exist, they are such as could not in the slightest degree affect the result in the cause.

As to the damages recovered in the court below, since the appellees offered to remit ten dollars thereof, but the court seems to have overlooked it, we have concluded to order a credit upon the judgment for that amount as of the date thereof.

Upon this condition, the petition for rehearing is overruled, at the costs of appellant.

CARRIERS—FREIGHT—WHEN EARNED.—Freight is not earned except by the performance of the voyage and the delivery of the goods at the place of destination, unless the contract provides for the payment of freight *pro rata itineris*: *China Mut. Ins. Co. v. Force*, 142 N. Y. 90; 40 Am. St. Rep. 576, and note. This subject is fully treated in the extended note to *Crawford v. Williams*, 60 Am. Dec. 149-154.

CARRIERS—LIABILITY.—Where property delivered to a carrier, consigned to a place beyond its route, is at the end of such route received by another carrier for transportation to the place of destination, it becomes answerable to the owner for any negligence or nonfeasance in completing the carriage, whether there is an express contract or not: *Cavallaro v. Texas etc. Ry. Co.*, 110 Cal. 348; 52 Am. St. Rep. 94, and note.

CARRIERS—WHEN LIABLE AS WAREHOUSEMEN.—If the owner of goods shipped over a railroad permits them to remain at the depot of their destination for an unreasonable time, the liability of the railroad company as carrier is thereby terminated, and it becomes liable only as warehouseman: *Union Pac. Ry. Co. v. Mayer*, 40 Kan. 184; 10 Am. St. Rep. 183, and note; notes to *Gregg v. Illinois Cent. R. R. Co.*, 37 Am. St. Rep. 247, and *Lancaster Mills v. Merchants' Cotton Press Co.*, 24 Am. St. Rep. 613.

REID v. EVANSVILLE & TERRE HAUTE RAILROAD CO.

[10 INDIANA APPEALS, 385.]

CARRIERS—WHEN INSURERS OF GOODS.—Railroads that undertake to carry freight for hire are insurers of the goods, and in the absence of any stipulation in the contract of carriage, are exempt from liability only when the failure to deliver occurs through the act of God or the public enemy.

CARRIERS—LIMITATIONS OF LIABILITY—BURDEN OF PROOF—FIRE.—A carrier may restrict its liability by special contract, although it cannot thus exonerate itself from the consequences of its own negligence, and when the loss happens from one of the excepted causes, the burden is on the owner of the goods shipped to prove the negligence of the carrier. Fire is a casualty against which a carrier may protect itself by special contract.

CARRIER'S DELAY IN FORWARDING—LOSS BY FIRE—NEGLIGENCE—PROXIMATE CAUSE.—If a railroad company, specially contracting against loss by fire, negligently delays to forward the goods, and they are destroyed by fire communicated from a burning building, while standing upon the railroad track, the company is not liable for the loss, unless it is shown that its negligence caused the fire, and that such negligence was the proximate cause of the loss.

NEGLIGENCE.—PROXIMATE CAUSE IS THAT CAUSE which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred. The cause must be efficient; it is not every intervening agency that shields the wrongdoer from responsibility when injury results from his wrongful act.

NEGLIGENCE—PROXIMATE CAUSE.—If injury is attributable to two causes, both proximate, one the result of negligence and the other not, and the injury would not have occurred but for the negligent act, the party guilty of the negligent act is liable.

NEGLIGENCE—PROXIMATE CAUSE.—If the injury complained of followed in unbroken sequence, without an efficient intervening cause, even though the wrongdoer could not have foreseen the particular result, he is liable, if he could reasonably have anticipated some injurious consequences, but it is otherwise if there was an intervening efficient cause in itself sufficient to break the causal connection between the original wrong and the injury.

NEGLIGENCE—PROXIMATE CAUSE.—If an injury results from the negligent act or omission of a wrongdoer, such act or omission is deemed the proximate cause, unless the consequences are so unnatural and unusual that they could not, by the highest practical care, have been foreseen, and provided against.

J. S. Bays, for the appellant.

J. E. Inglehart, E. Taylor, and J. T. Hays, for the appellee.

386 REINHARD, J. This action was instituted by the appellant against the appellee to recover the value of a carload of flour, which, it was alleged in the complaint, was delivered by the appellant to the appellee and received by the latter as a common carrier for shipment, but was, by the negligent delay of the appellee in transporting the same, destroyed by fire. The com-

plaint was in two paragraphs, each declaring upon the contract contained in the bill of lading.

³⁸⁷ Upon issues joined, the cause was tried by a jury, and a special verdict was returned, upon which, over appellant's objection and exception, and over his motion for judgment in his favor, the court rendered judgment for the appellee.

The principal question presented for our consideration and determination is, whether, upon the facts found, the appellee or the appellant was entitled to a judgment.

The first paragraph of the complaint, after setting out the contract, the delivery and loading of the flour upon the car, the favorable condition of the road, and other facts from which it appeared that it was the duty of the appellee to transport the goods not later than the twenty-fifth day of September, 1891, charges, "that said company, without the knowledge or consent of plaintiff, and without fault on his part, carelessly and negligently permitted said car to remain upon their sidetrack or switch in said town of Sullivan until the morning of the twenty-sixth day of September, 1891, when the same was totally destroyed by fire communicated to it by burning buildings standing near said track; . . . that by reason of defendant's carelessly and negligently leaving said car of flour standing exposed upon its track until it was destroyed by fire, plaintiff has been damaged in the sum of one thousand dollars."

There is nothing in this paragraph to show when or how the fire originated, or that it was by the fault or negligence of the appellee. Nor is it averred in this paragraph that the car containing the flour was, by the negligence of appellee, left in a position in which it was exposed to the hazard of the fire, and that the danger was such as must have been anticipated or apprehended.

Assuming that negligence in forwarding is properly averred, we think this constitutes the gist of the action, there being no direct averment of a failure to deliver, and the bill of lading containing a stipulation to ³⁸⁸ the effect that the company should not be liable for damages by fire.

The second paragraph charges, besides a failure to deliver, the negligent delay of appellee to forward the goods, and also negligence in failing to remove the car to a place without the range of the fire after the same had broken out, and the destruction of the flour by reason of the negligence alleged.

A copy of the bill of lading, containing, of course, the same stipulation of appellee's nonliability for damages from fire, is filed as an exhibit with the second paragraph also.

Assuming that all questions discussed in the appellant's brief are properly presented, we proceed to determine whether the facts found disclose any liability for which the appellant is entitled to recover.

Railroad companies that undertake to carry freight for hire are insurers of the goods which they engage to transport, and, in the absence of any stipulation in the contract of carriage, they are exempt from liability only when the failure to deliver occurs through the act of God or the public enemy. As we said in another case: "The carrier is an insurer of the goods. All the presumptions are against it until it has shown that by some act of the owner, or some unavoidable accident, it was prevented from performing its contract": *Toledo etc. R. R. Co. v. Tapp*, 6 Ind. App. 304.

A carrier, may, however, restrict its liability by special contract, but it cannot thus exonerate itself from the consequences of its own negligence. But when, in such a case, negligence is relied upon by the owner, and it is shown that the loss happened from one of the excepted causes, the burden is on the owner to prove the negligence. Fire, not occurring through the carrier's fault, is a casualty against which it may protect itself ³⁸⁹ by contract, and hence, when there is such a contract, and it is shown that the injury resulted from fire, it devolves upon the owner to show that the damages occasioned by the fire are attributable to the negligent act of the carrier: *Indianapolis etc. Ry. Co. v. Forsythe*, 4 Ind. App. 326; *Transportation Co. v. Downer*, 11 Wall. 129; *Cochran v. Dinsmore*, 49 N. Y. 249; *Whitworth v. Erie Ry. Co.*, 45 N. Y. Supr. Ct. 602; *Little Rock etc. Ry. Co. v. Talbot*, 39 Ark. 523; 18 Am. & Eng. R. R. Cas. 602, *Hutchinson on Carriers*, 2d ed., 259 a.

The author just named says: "Where the loss happens from an accepted cause, as from fire, the burden of proving the carrier's negligence is, by weight of authority, upon the plaintiff."

We assume that it is disclosed by the special verdict, that the conditions were such as required the appellee to forward the carload of flour, and that the failure to do so was negligence. If, therefore, this negligence was the proximate cause of the destruction of the goods, the appellant has shown a liability on the part of appellee, for which the latter must respond in damages. It is contended, however, by appellee's counsel, that such delay was not the proximate cause of the loss, and that there is, therefore, no liability.

As we have shown, the action is upon the contract, and if the complaint proceeded upon the theory of a breach in the failure

to deliver the goods as stipulated, a prima facie case would be made against the company. But the complaint goes further, and ascribes the loss to the negligence of the appellee in delaying the transportation, and the consequent destruction of the goods by fire. This allegation must be proved as fully as it is laid.

It appears from the facts found that a fire occurred on the morning of September 26, 1891, in some old building, or warehouse, situated about fifty feet from where ³⁹⁰ the car in question was standing on the switch of appellee's track, which fire spread to the car and destroyed appellant's flour therein contained. It further appears that the building was filled with baled hay and other combustible material; but how the fire originated, whether by spontaneous combustion or from the sparks of a locomotive engine of the appellee, or whether it was the act of an incendiary, the verdict does not disclose. Nor is there anything in the special verdict showing that the appellee might, by reasonable exertions, have saved the appellant's goods from destruction, after the fire broke out, by removing the car beyond its reach.

Whether a cause is proximate or remote, from a legal point of view, is a question the solution of which is often fraught with much difficulty. In a standard work of much merit, proximate cause is defined as "that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred": 16 Am. & Eng. Ency. of Law, 436.

It has often been held by our supreme court, and the doctrine is in full accord with our views, that it is not every intervening agency that shields the wrongdoer from responsibility where an injury results from his wrongful act: *Billman v. Indianapolis etc. R. R. Co.*, 76 Ind. 166; 40 Am. Rep. 230; *Crawfordsville v. Smith*, 79 Ind. 308; 41 Am. Rep. 612; *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 346; 49 Am. Rep. 168; *Louisville etc. Ry. Co. v. Nitsche*, 126 Ind. 229; 22 Am. St. Rep. 582; *Ohio etc. Ry. Co. v. Trowbridge*, 126 Ind. 391.

It has also been decided by this court that where an injury is attributable to two causes, both proximate, one the result of negligence and the other not, and the injury would not have occurred but for the negligent act, the party who is guilty of the negligent act or omission will be held liable: *Grimes v. Louisville etc. Ry.* ³⁹¹ *Co.*, 3 Ind. App. 573; *Board etc. v. Sisson*, 2 Ind. App. 311.

This is but another mode of stating the rule that "where an injury is the combined result of the negligence of the defendant,

and an accident for which neither the plaintiff nor the defendant is responsible, the defendant must pay damages, unless the injury would have happened if he had not been negligent": 2 Thompson on Negligence, sec. 1085.

The point must not be lost sight of, however, that where two causes combine to produce an injury, both must be proximate, or, to speak more properly, perhaps, the negligent cause must be proximate to create liability, whether the innocent one is so or not.

The only conclusion we now wish to deduce from the foregoing proposition is, that whether the act complained of was, in legal contemplation, the proximate or remote cause of the injury does not depend entirely upon its having been the "mediate or immediate source of such injury, as proximity, in point of time, is not necessarily decisive of the question as to what was the proximate cause.

On the other hand, it must be admitted, we think, that the law is not so rigorous in its demands as to hold a wrongdoer responsible for every consequence flowing from his wrongful act; but it is only the usual and natural consequences for which he is answerable. If the injury be traceable, through the chain of natural causation, directly to the act complained of, no matter what may have been the intervening conditions or occasions, such act will be deemed the proximate cause.

As is well said by Agnew, J., in *Fleming v. Beck*, 48 Pa. St. 309 (313): "In strict logic, it may be said that he who is the cause of loss should be answerable for all the losses which flow from his causation. But in the ³⁹² practical workings of society the law finds, in this, as in a great variety of other matters, that the rule of logic is impracticable and unjust. The general conduct and the reflections of mankind are not founded upon nice casuistry. Things are thought and acted upon rather in a general way than upon long, laborious, extended, and trained investigation. Among the masses of mankind, conclusions are generally the results of hasty and partial reflection. Their understandings, therefore, must be construed in view of these facts; otherwise they would often be run into a chain of consequences wholly foreign to their intentions. In the ordinary callings and business of life, failures are frequent. Few, indeed, always come up to a proper standard of performance, whether in relation of time, quality, degree, or kind. To visit upon them all the consequences of failure, would set society upon edge, and fill the courts with useless and injurious litigation. It is impossible to compensate for all losses; and the law therefore aims at a just dis-

crimination, which will impose upon the party causing the proportion of them that a proper view of his acts and the attending circumstances would dictate."

In the case before us, the negligence relied upon is the delay of the appellee in forwarding the appellant's goods. The destruction of the appellant's flour was undoubtedly one of the consequences of the appellee's negligence. But it is not every consequence of such delay for which it will be held responsible. A passenger train may be late, according to its schedule time, in starting from a given station. The delay may be attributable to the negligence of the company's servants.

By reason of the delay in starting, a passenger on the train is injured by the accidental discharge of a gun in the hands of a bystander. This injury would not have occurred but for the lateness of the train in starting. ³⁹³ The delay in starting the train was negligence, but can it be said that the railroad company must, under these circumstances, answer in damages for the injury? If the company is not liable in the case supposed, it must be for the reason that the negligent delay in starting the train was not the proximate cause of the injury. It is not enough that such injury be one of the numerous links in the chain of consequences that may flow from the wrongful act. The result must be a natural one, and one that might have been reasonably anticipated.

In the supposed case there is not only an intervening agency, proximate in point of time, but it is such an agency as was sufficient to break the causal connection between the original act of misfeasance and the injury.

As we said in another case: "It is not every tortious act that makes the perpetrator liable in damages if injury occurs, even if such injury is, in some sense, produced or influenced by it. If, in any such case, some other power or force, beyond the control of the original actor, may be justly said to constitute the more direct cause, and the result following the primary cause was extraordinary, unusual, or unnatural, and the consequences for which damages are claimed were not such as might have been reasonably anticipated, the first cause will be considered too remote to be taken in law as the proximate or efficient one": *Davis v. Williams*, 4 Ind. App. 487.

Of course, we do not wish to be understood as deciding that the identical consequences must, in all cases, have been foreseen by the wrongdoer, in order to make him liable.

If the consequence complained of followed in unbroken sequence, without an intervening efficient cause, even though the

defendant could not have foreseen the particular result, he will be liable, if he could reasonably ³⁹⁴ have anticipated some injurious consequences. It is otherwise, however, where there is an intervening efficient cause, in itself sufficient to break the causal connection between the original wrong and the injury. On the subject of probable and remote cause, see Bishop on Noncontract Law, sec. 40-48, 454, 457.

In the case under consideration, the facts found specifically do not show that the injury occurred from any intervening cause that might have been reasonably anticipated or apprehended, any more than in the imaginary case of the injury to the passenger from the discharge of the gun. For aught that appears in the special verdict, the fire in the warehouse may have occurred from precisely such a cause as the one in the supposed case. Had it been shown that it originated either from sparks emitted by the appellee's locomotive, or from inflammable sources in the building, the case might be different, as such an occurrence might have been apprehended.

When it was shown that an injury from fire was a casualty for which the appellee, by its contract, was not liable, unless it occurred through the appellee's own negligence, the burden fell upon the appellant to show that the appellee's negligence caused the fire. The appellant having the burden of the issue upon this point, and there being no finding upon it, the presumption must attach that the fire originated from some cause other than the negligence of the appellee. The mere negligent omission of the appellee's duty in the transportation of the goods at an earlier period will not establish negligence in the origin of the fire.

What is the natural sequence of an act of negligence, has been the source of serious differences among judges and text-writers.

Upon the question as to whether a carrier is liable in damages who, by negligent delay, exposes goods in ³⁹⁵ transit to injury by the act of God or other cause for which he is not responsible, and which he could not naturally foresee, the courts of Pennsylvania, Massachusetts, Ohio, Iowa, Nebraska, and, perhaps, other state courts, as well as the supreme court of the United States, hold that in such cases no liability attaches, although the injury would not have occurred but for the delay; while in the courts of New York, New Hampshire, and Missouri the opposite doctrine is maintained: See Shearman and Redfield on Negligence, sec. 40, and cases cited.

The precise question here in dispute does not appear to have been decided by our supreme court.

The principle upon which we base our conclusion, however, has been repeatedly recognized by that tribunal, and nothing of a contrary nature has been declared. Thus, in *Alexander v. New Castle*, 115 Ind. 51, it was held that the municipality was not liable in damages for negligently leaving open a pit in a street into which one in charge of a prisoner was thrown by the latter, in an attempt to escape, and from which an injury was sustained, such negligence not being the proximate cause of the injury.

In *Kistner v. Indianapolis*, 100 Ind. 210, the action was for negligence on the part of the Union Railway Company in failing to provide and maintain suitable protection and safeguards at the point of crossing where the injury occurred, the deceased having been struck by a wagon endeavoring to avoid a moving train. It was held that the proximate cause of the decedent's death was the act of the driver of the wagon, and that the negligence of the Union Railway Company was not the proximate cause of such death: See, also, *Spencer v. Ohio etc. Ry. Co.*, 130 Ind. 181; *Pennsylvania Co. v.* ³⁹⁶ *Congdon*, 134 Ind. 226, 39 Am. St. Rep. 251, and the cases cited in *Davis v. Williams*, 4 Ind. App. 487.

We are referred, by the appellant's learned counsel, to the case of *Toledo etc. R. R. Co. v. Tapp*, 6 Ind. App. 304, as declaring a doctrine at variance with that here followed. But there is no analogy between the cases upon the question here involved. The case cited was an action for damages for the breach of the carrier's common-law duty in failing to forward and deliver the baggage of the plaintiff, who was a passenger. By reason of the refusal to deliver the baggage after it had arrived, it was destroyed by fire with the warehouse or depot in which it had been locked up against the protest of the passenger. There the action was not upon the contract of shipment. Had the carrier shown that the fire originated from the act of God or some other excusable cause, it would not have been liable. Its failure to establish this, or any other fact proving freedom from negligence, was held to justify the court in rendering judgment upon the special verdict of the jury, and properly so, we think; while in the case at bar, the plaintiff's failure to establish that the fire resulted from the negligence of the carrier must be held to authorize the court to render judgment in favor of the appellee.

We think the proper statement of the rule that should govern in such cases as this, and certainly as favorable as it could be made upon the appellant's case is, that if the injury resulted from the negligent act or omission of the defendant, such act or omission will be deemed the proximate cause, unless the consequences

were so unnatural and unusual that they could not, by the highest practical care, have been foreseen, and consequently provided against: *Louisville etc. Ry. Co. v. Lucas*, 119 Ind. 583.

Under the rule thus stated, the facts found fail to make ³⁹⁷ a case for the appellant. If the real cause of his loss, viz., the fire, was the result of negligence, he should pursue the remedy the law gives him against the culpable party. If the fire sprang from an innocent cause, and he has no remedy, the appellee should not, on this account, be made to suffer. While the rule may work a hardship in a particular case, this would be no justification for bending or relaxing it, and thus entailing greater hardships in other cases.

The court committed no error in rendering judgment upon the verdict in favor of the appellee.

Judgment affirmed.

CARRIERS—WHEN INSURERS OF GOODS.—The liability of a common carrier, except as lawfully limited by special contract, is that of an insurer against all losses, except those occasioned by the act of God, the public enemy, or the contributory negligence of the consignor: *Alabama etc. R. R. Co. v. Thomas*, 89 Ala. 294; 18 Am. St. Rep. 119; *Adams Exp. Co. v. Darnell*, 31 Ind. 20; 99 Am. Dec. 582, and note; *Lewis v. Ludwick*, 6 Cold. 368; 98 Am. Dec. 454, and note; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349, and note; *Bennett v. Byram*, 38 Miss. 17; 75 Am. Dec. 90, and note; *Welsh v. Pittsburg etc. R. R. Co.*, 10 Ohio St. 65; 75 Am. Dec. 490, and note.

CARRIERS—CONTRACTS LIMITING LIABILITY.—A common carrier may limit his liability by express contract, except as to gross negligence, fraud, or wilful wrong of himself or his servants; *Meuer v. Chicago etc. Ry. Co.*, 5 S. Dak. 568; 49 Am. St. Rep. 898, and note.

CARRIERS—LIMITING LIABILITY—BURDEN OF PROOF.—When there is proof of the fact of injury to goods during transportation, but the manner of its occurrence does not import negligence on the part of the carrier, he is not liable if his contract is for a limited liability only, unless there is proof of negligence as an inducing cause of the injury, and the burden of making such proof is on the shipper: *Buck v. Pennsylvania R. R. Co.*, 150 Pa. St. 170; 30 Am. St. Rep. 800. When a common carrier claims exemption from liability for injury to goods under a special contract, the burden of proof is upon him to show that any loss resulted from one or more of the excepted causes in the contract and without his fault: *Johnson v. Alabama etc. Ry. Co.*, 69 Miss. 191; 30 Am. St. Rep. 534, and note; *Terre Haute etc. R. R. Co. v. Sherwood*, 132 Ind. 129; 32 Am. St. Rep. 239, and note.

CARRIERS—NEGLIGENCE—LIABILITY FOR GOODS DESTROYED BY FIRE—DELAY IN FORWARDING.—This subject will be found treated in the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 838-840.

NEGLIGENCE—PROXIMATE CAUSE—WHAT IS.—To render negligence aggravated by no element of malice the proximate cause of an injury, it must be the natural and probable consequence of the negligence—such consequence as, under the surrounding circumstances, might and ought to have been seen by the wrongdoer: *Yoders v. Amwell Tp.*, 172 Pa. St. 447; 51 Am. St. Rep. 750, and

note. The consequence for which a negligent person is answerable must be the natural result of the alleged negligent act, or one which might reasonably have been anticipated: *Knox v. Eden Musee etc. Co.*, 148 N. Y. 441; 51 Am. St. Rep. 700, and note; see the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 808.

GRAY v. ELZROTH.

[10 INDIANA APPEALS, 587.]

SLANDER—WORDS IMPUTING ADULTERY.—In Indiana, it is by statute actionable slander to charge a woman with adultery.

SLANDER—EVIDENCE IN MITIGATION OF DAMAGES.—Rumors currently circulated and reported in the neighborhood where plaintiff lives are not admissible in evidence in mitigation of damages in an action for slander.

SLANDER—EVIDENCE IN MITIGATION OF DAMAGES.—In actions for slander, general rumors or general suspicions that plaintiff is guilty of the acts complained of, may be given in evidence in mitigation of damages, as bearing upon the value of plaintiff's character.

EVIDENCE—OBJECTIONS TO.—A proper question to which offered evidence would be responsive is essential to enable appellant to raise any question upon its admissibility.

SLANDER—IMPLIED MALICE—DAMAGES.—The speaking of the actionable words being shown, and their falsity admitted or proved, the law infers malice unless they were privileged, and the plaintiff then becomes entitled to compensatory damages at least, without regard to the existence of express malice, or malice in fact. If express malice is shown, plaintiff may recover punitive or exemplary damages.

SLANDER—PROOF OF WORDS CHARGED.—To sustain an action for slander it is not required to prove the charge to have been made in the precise words alleged in the complaint, but it is necessary to prove that defendant spoke the words in substance, or substantially as alleged. It is not enough to prove the speaking of similar or equivalent words.

NEW TRIAL—EXCEPTIONS TAKEN JOINTLY.—If an exception is taken to several acts of the court jointly, or, if several acts of the court are assigned, as a cause for a new trial jointly and not severally, all of the acts complained of must be erroneous, in order to sustain the exception, or cause for a new trial.

J. C. Nelson, Q. A. Myers, D. D. Dykeman, W. T. Wilson, and G. C. Taber, for the appellant.

M. D. Fansler and M. F. Mahoney, for the appellee.

587 GAVIN, J. The appellee sued appellant for slander. In her complaint, she alleges that he charged her with having committed adultery with himself, with being a prostitute, and also imputed adultery to her by charging that her husband was not the father of any of her five children. A general and special denial formed the issues.

⁵⁸⁸ It is by statute actionable slander to charge a woman with adultery: *Binford v. Young*, 115 Ind. 174; Rev. Stats. 1894, sec. 286.

Complaint is made of the rejection of appellant's offer to prove that for the last nine years "it has been currently circulated and reported in the neighborhood where this woman lived that these children are not the children of her husband, Elzroth."

Counsel seek to maintain the admissibility of this evidence as in mitigation by the ruling of the supreme court in *Blickenstaff v. Perrin*, 27 Ind. 527, where it is said: "General rumors, or a general suspicion that the party is guilty of the acts imputed, may be given in evidence in mitigation of damages, but evidence of mere reports, rumors, or suspicions is not admissible."

In that very case, where we find this general language upon which appellant relies, we find it also expressly decided that matter such as was here offered is not proper matter in mitigation. It was there held that the fact that it was, at the time of the speaking of the words, "currently reported in the neighborhood in which the plaintiff lived, and in adjacent parts of the country, that plaintiff had been in a house of bad reputation, to wit, a house of ill-fame in the city of Lafayette, in said state, which report had come to the ears of said defendant," and was by her repeated without malice, was not proper matter in litigation. Following the express decision of that case, there was no error in rejecting the offered evidence.

By another witness, Richard Coble, the appellant offered to prove that at the time of the alleged charge made in the complaint there was a general rumor, general suspicion in the neighborhood where this woman lived and had been for seven or eight years, that she was a prostitute, ⁵⁸⁹ a woman "guilty of associating with other men during the lifetime of her husband."

So far as the offer covers the rumor that she was a prostitute, it is unavailing, for the reason that such a fact is not called for by the question asked. A proper question to which the offered evidence would be responsive was essential to enable appellant to raise any question upon it: *Darnell v. Sallee*, 7 Ind. App. 581; authorities cited in *Benjamin v. McElwaine-Richards Co.*, 10 Ind. App. 76.

This leaves, then, available to the appellant that portion of the offer which relates to the report that she was "guilty of associating with other men during the lifetime of her husband." Whatever wrong, if any, was involved in this report was fully covered by, and included in, the evidence which had been already given

by this same witness, that her character for chastity had not been good in that neighborhood for the past eight or ten years.

Counsel have cited many authorities and discussed at length, and with much learning, the question as to whether evidence of general reports of the guilt of plaintiff as to the particular vice or crime charged is admissible in mitigation of damages, both upon the ground that it proves the plaintiff's character to be less valuable (being already smirched) and because it tends to rebut malice upon the part of the defendant. Upon these questions, we find both the authorities and text-books in much conflict and confusion. There is no principle upon which all can be harmonized.

In Odgers on Libel and Slander, second English edition, 312, 313, it is declared that, save in one or two exceptional cases, such evidence is inadmissible for any purpose. To the same effect is *Mahoney v. Belford*, 132 Mass. 393.

The text of Newell on Slander and Libel follows that of Odgers largely, but the numerous authorities collated ⁵⁹⁰ are divided, some being for and some against the proposition.

Townshend on Slander and Libel, section 411, says that some cases permit such evidence, but numerous decisions hold the contrary. In Folkard's *Starkie on Slander and Libel*, sections 714-719, it appears that the authorities preponderate slightly in favor of the admission of such evidence.

In some cases, the existence of a general report of plaintiff's guilt of the charge imputed has been admitted to rebut malice: *Calloway v. Middletown*, 2 A. K. Marsh. 372; 12 Am. Dec. 409; *Young v. Slemons*, 1 Wright, 124; B—— v. I——, 22 Wis. 372; 94 Am. Dec. 604. In the case last cited, the statement appears to be wholly unsupported as to this point, by the authority relied on to sustain it, viz: — *v. Moor*, 1 Maule & S. 285.

In a few cases, also, the existence of mere reports communicated to the defendant have been admitted to show the motive: *Galloway v. Courtney*, 10 Rich. 414; *Williams v. Greenwade*, 3 Dana, 432; *Kennedy v. Gregory*, 1 Binn. 85.

In our own state, all the authorities seem to be in accord that mere reports and rumors of guilt are not to be received, but that general rumors or reports of such guilt are admissible, but the ground of their admission is placed upon the fact that they throw light upon the character of the plaintiff and its value: *Sanders v. Johnson*, 6 Blackf. 50; 36 Am. Dec. 564; *Kelley v. Dillon*, 5 Ind. 426; *Blickenstaff v. Perrin*, 27 Ind. 527.

In *Kelley v. Dillon*, 5 Ind. 426, it is said: "In the cases of

Henson v. Veatch, 1 Blackf. 369, and Sanders v. Johnson, 6 Blackf. 50, 36 Am. Dec. 564, this court has distinctly drawn the line between rumors and suspicions, and general rumors and general suspicions. While the former have been held wholly inadmissible, ⁵⁹¹ the latter have been allowed, not to prove the truth of the words, but to show the character the plaintiff sustained at the time the words were spoken, for the purpose of measuring the damages."

In Blickenstaff v. Perrin, 27 Ind. 527, after stating that general rumors, etc., are allowable, while mere rumors, etc., are not, the court says: "The reason for the distinction is plain. If, before the speaking of the words complained of, there exists a general rumor or suspicion that the party is guilty of the criminal act charged against him, the character is already traduced, and the evidence is, in effect, the same as that of general bad character in reference to the crime imputed, which is only admissible when the charge has obtained general notoriety, and a general belief or suspicion of its truth is entertained. Here it was not alleged that the report referred to was general, nor that any belief or suspicion of its truth was entertained, even by those who heard it, and, therefore, it was not proper matter in mitigation."

Thus it is plain that in our state, evidence of these general rumors is received because such evidence is the same in kind and quality, at least, as proof of general bad character with reference to the vice or crime imputed.

While there is some authority to support the claim that such evidence may be heard to rebut malice, our own decisions, to which we have referred, and the weight of authority outside of our state, are to the effect that such evidence is received in mitigation simply to show the value of the character attacked, and because a slander will not inflict so much damage upon a character already disparaged and sullied as upon one pure and unsullied: Clark v. Brown, 116 Mass. 504; Mahoney v. Belford, 132 Mass. 393; Drown v. Allen, 91 Pa. St. 393; ⁵⁹² Wetherbee v. Marsh, 20 N. H. 561; 51 Am. Dec. 244; — v. Moor, 1 Maule & S. 285.

There was here no question of privilege, and where there is no confidential relation, no existing duty to speak, and no common interest, a private individual has no right to repeat a slanderous accusation merely because he has heard it: Burton v. Beasley, 88 Ind. 401; Branstetter v. Dorrough, 81 Ind. 527.

We are unable to say there was any harmful error in the court's refusal to permit a witness to answer the question, "Did you

hear the elder brother speak about it?" The only answer responsive to this question was "yes" or "no." Neither, standing alone, would have aided appellant in the least. The offer to prove included much more, but the additional matter is not available because not responsive to the question.

The speaking of the actionable words being shown, and their falsity admitted and proved, the law infers malice unless they were privileged: *Byrket v. Monohon*, 7 Blackf. 84; 41 Am. Dec. 212; *Burton v. Beasley*, 88 Ind. 401.

The plaintiff then becomes entitled to compensatory damages, at least, without regard to the existence of express malice or malice in fact: *Branstetter v. Dorrough*, 81 Ind. 527; *Belck v. Belck*, 97 Ind. 73.

If express malice also exists, then the plaintiff is allowed to recover punitive or exemplary damages as well. These damages are allowable only upon proof of express malice. Express malice, however, is abundantly and overwhelmingly established by the evidence of appellant himself. The character of the stories related by him to the near relatives of the appellee, and the fact that they were admitted to have been intended as a counter-irritant, or by way of reprisal, leave no room for us to doubt the existence of express malice upon his part. There was, therefore, no harmful error in the instruction complained ⁵⁹³ of, even if it did fail to limit the right to give punitive damages to cases where express malice had been proved: *Belck v. Belck*, 97 Ind. 73; *Meyer v. Bohlfig*, 44 Ind. 238; *De Pew v. Robinson*, 95 Ind. 109; *Casey v. Hulan*, 118 Ind. 590.

To sustain a complaint for slander, it is not required to prove the charge to have been made in the precise words alleged in the pleading, but it is necessary to prove that the defendant spoke the words, in substance, or substantially as alleged in the complaint; that is, the words themselves must be proved, or enough of them to substantially make out the charge included in some set of words counted on. It is not enough to prove the speaking of similar or equivalent words: *Wheeler v. Robb*, 1 Blackf. 330; 12 Am. Dec. 245; *Linville v. Earlywine*, 4 Blackf. 469; *Creelman v. Marks*, 7 Blackf. 281; *Iseley v. Lovejoy*, 8 Blackf. 462; *Tucker v. Call*, 45 Ind. 31; *Durrah v. Stillwell*, 59 Ind. 139; *McCallister v. Mount*, 73 Ind. 559.

The fifth cause for new trial is: "The court erred in refusing to give the jury the first instruction as asked by the defendant, and in modifying said instruction, and in giving said instruction as modified."

It is a well-established rule that where an exception is taken to several acts of the court jointly, or where several acts of the court are assigned as a cause for new trial jointly, and not severally, all of the acts complained of must be erroneous in order to sustain the exception or cause for new trial: *Cincinnati etc. R. R. Co. v. Madden*, 134 Ind. 462; *Kackley v. Evansville etc. R. R. Co.*, 7 Ind. App. 169; *King v. Easton*, 135 Ind. 353; *Louisville etc. Ry. Co. v. Renicker*, 8 Ind. App. 404.

The first instruction asked by appellant disregarded the rule that enables the plaintiff to recover by proving the words charged in his complaint substantially, although ⁵⁹⁴ not exactly. This instruction was, therefore, rightly refused, and the error assigned is not well taken.

The record fails to show any exception to the refusal to give the third instruction asked. The tenth instruction asked was properly refused for the same reason as the first.

The thirteenth was not strictly accurate as asked. It contains this statement: "Other words of similar import will not sustain this action, and if such be the proof, your verdict must be for the defendant." The conclusion drawn does not necessarily follow. Other words of similar import might have been proven, and the substance of the charge might also have been proven. In fact, this is exactly what did occur on this trial. Unless an instruction accurately states the law, there is no error in refusing it: *Over v. Schiffling*, 102 Ind. 191.

It must be admitted that there is some confusion in the instructions given, but we find no question saved upon them which will justify a reversal of the judgment. We have read the evidence with considerable care, and are strongly of the opinion that the punishment of the appellant was richly deserved.

Judgment affirmed.

SLANDER—CHARGING ADULTERY.—Words imputing adultery to a married woman are actionable by statute, but not at common law: *Smalley v. Anderson*, 2 T. B. Mon. 56; 15 Am. Dec. 121; *Elliot v. Aillsberry*, 2 Bibb. 473; 5 Am. Dec. 631. An imputation that a woman is unchaste is actionable in itself: *Barnett v. Ward*, 36 Ohio St. 107; 38 Am. Rep. 561; *Alfele v. Wright*, 17 Ohio St. 238; 93 Am. Dec. 615. Words charging an unmarried woman with fornication are actionable per se: *Kelley v. Flaherty*, 16 R. I. 234; 27 Am. St. Rep. 739, and note.

SLANDER—EVIDENCE OF CURRENT RUMORS IN MITIGATION OF DAMAGES.—A defendant may prove that, when the slanderous words were spoken, there was a general report current to the same effect as the words spoken: *Wetherbee v. Marsh*, 20 N. H. 561; 51 Am. Dec. 244, and note; *Farr v. Rasco*, 9 Mich. 353; 80 Am. Dec. 88, and note. In an action for slander, statements by others than the defendant about the matter respecting which the slanderous

words were spoken are admissible in evidence to show want of actual malice: *Callahan v. Ingram*, 122 Mo. 355; 43 Am. St. Rep. 583. In actions for slander, general reports of the truth of the charges are not admissible for any purpose: *Pease v. Shippen*, 80 Pa. St. 513; 21 Am. Rep. 116. See, also, the note to *Anthony v. Shepens*, 13 Am. Dec. 499, 500.

SLANDER—IMPLIED MALICE.—Under the Louisiana law, malice may be implied from any kind or form of words slanderous in their nature: *Tarleton v. Legarde*, 46 La. Ann. 1368; 49 Am. St. Rep. 353, and note. In actions for slander, if actionable words, not privileged, are proved, malice is inferred: *Estes v. Antrobus*, 1 Mo. 197; 13 Am. Dec. 497; *Jellison v. Goodwin*, 43 Me. 287; 69 Am. Dec. 62, and note; *Mousler v. Harding*, 33 Ind. 176; 5 Am. Rep. 195.

SLANDER—VARIANCE.—In slander, the plaintiff need only prove the words alleged substantially as laid. He need not prove the precise words: *Posnett v. Marble*, 62 Vt. 481; 22 Am. St. Rep. 126; *Herst v. Ringwalt*, 3 Yeates, 508; 2 Am. Dec. 392; *Desmond v. Brown*, 29 Iowa, 53; 4 Am. Rep. 194; *Bundy v. Hart*, 46 Mo. 460; 2 Am. Rep. 525. In an action for slander, the language laid in the declaration must be proved, or at least so much as fully sustains the charge. Equivalent words in meaning will not be sufficient: *Baker v. Young*, 44 Ill. 42; 92 Am. Dec. 149. and note.

CASES
IN THE
SUPREME COURT
OF
KENTUCKY.

CHESAPEAKE ETC. RAILWAY COMPANY *v.* OSBORNE.

[97 KENTUCKY, 112.]

RAILWAYS—EXCURSION TRAINS, LIABILITY FOR WRONGS OF PERSONS IN CHARGE OF.—A railway corporation cannot relieve itself from liability by placing its road, trainmen, and cars under the control of a stranger. Therefore, if a passenger is wrongfully ejected from a train, the corporation cannot escape liability therefor by proving that the train had been hired for an excursion, and was not in charge nor under the control of the corporation at the time the wrong was done.

VERDICT, WHEN NOT EXCESSIVE.—A verdict for one thousand dollars for being wrongfully ejected from a railway car while it was in motion is not so large as to necessarily indicate that it was due to prejudice or passion.

Wadsworth & Cochran, for the appellant.

Thomas H. Paynter, for the appellee.

113 GUFFY, J. This is an appeal taken from a judgment of the Greenup circuit court rendered in the action of David Osborne against the appellant, Chesapeake & Ohio Railway Company. It appears that appellee, some time prior to the 11th of July, 1891, bought of the ticket agent of appellant, at Russell, Kentucky, a ticket to Ashland, and that soon afterward a train of cars reached Russell, and appellant, with the ticket stuck in his hat, boarded the cars, or at least got upon the steps, and was by one Steward ejected from the car by force, and, as appellee claims, while the car was in motion, and that **114** he was thereby injured, mortified, and humiliated; and to recover damages for the injuries instituted suit in said court. A trial resulted in a verdict and judgment in favor of plaintiff for one thousand dollars. Appellant filed grounds and moved the court for new trial, which motion was overruled, and the defendant has appealed.

The defendant in the court below denied its liability for the injury, if any was sustained. The substance of the answer was, that it had let I. W. Steward have the train and trainhands, including the conductor, for the purpose of running an excursion train to Kanawha Falls, and that the appellant was in no wise responsible for the acts of Steward, and that appellee had no right to ride on that train.

Public policy and the law alike forbid that a railway company shall be allowed to place its road, trainhands, and cars in the hands of, or under the control of, a stranger for such purpose as is claimed in this action, and thus evade liability for the wrongs done by such person.

Appellant sets out a number of grounds for new trial, nine in all. Inasmuch as defendant finally procured the attendance of the principal witness whose testimony was so much desired, the refusal of the court to continue the case did not interfere with the substantial rights of the defendant. The admission of the testimony of Carner and Hill, although erroneous, did not affect, as we think, the substantial rights of the defendant, especially as the same was afterward withdrawn.

Instructions 1 and 2 given by the court were as favorable to defendant as it was entitled to, and the same may be said as to instructions 3 and 4. Instructions 5, 6, 7, and 8 are not in this record, and under the well-known rule of law they must be held to have been properly refused. It does ¹¹⁵ not appear that the verdict is so excessive as to show that it was the result of passion or prejudice. The other grounds need not be further noticed. It seems to us that the instructions, taken altogether, were not prejudicial to the substantial rights of defendant. All the issues of fact involved in this case were, under proper instructions, submitted to the jury, and the jury, being the judges as to the facts proven and the credibility of the witnesses, found for the plaintiff, and we do not feel authorized to disturb the verdict so found.

Judgment affirmed.

Judge Paynter not sitting.

RAILROADS—LIABILITY FOR WRONGFUL ACTS OF PERSONS IN CHARGE OF EXCURSION TRAIN.—The fact that a carrier of passengers hires its train or steamboat manned by its own crew, under its pay, to the managers of an excursion does not relieve it from liability for injuries to an excursionist, caused by the negligence or wrongful acts of its servants, unless it delegated to such managers the exclusive right to discharge its servants and hire others, although the contract of carriage is between the managers

and the excursionists and the liability of the carrier is not affected by the fact that the train or boat is chartered to run between points not upon the carrier's regular lines: *White v. Norfolk etc. R. R. Co.*, 115 N. C. 631; 44 Am. St. Rep. 489, and note.

PURSIFULL v. PINEVILLE BANKING COMPANY.

[97 KENTUCKY, 154.]

PRINCIPAL AND SURETY—BANK, RELEASE BY.—If a bank at which a note is payable and to which it belongs had, when it became due, moneys of the maker on deposit more than sufficient to pay it, and, instead of applying the moneys to such payment, permitted them to be drawn out by the maker, who subsequently became insolvent, his surety on the note is thereby released.

BANKS, OFFSET, RIGHT OF.—A bank having money on general deposit has the right to offset against it a matured note belonging to it and made by the depositor.

W. J. Weller and N. B. Hays, for the appellant.

Warren Montfort, for the appellee.

155 EASTIN, J. This action was brought December 12, 1893, in the Bell circuit court, by appellee, as assignee of the Pineville Banking Company, against appellant and one Hurst, on a note executed by them December 23, 1889, and payable thirty days thereafter to the order of said banking company, and negotiable and payable at said bank. This note was discounted at and was held and owned by said bank at the time of its maturity, January 23, 1890.

Appellant filed an answer in the court below, in which he alleged, among other things, that he was merely a surety and that his codefendant, Hurst, was the principal in said note, and that these facts, as well as the fact that he had received no part of the proceeds of said discount, were well known to the bank at the time. Said answer further alleges that, at the time said note matured, and prior thereto, and for some time thereafter, the principal therein was a depositor with, and had to his credit as a general deposit in said bank a large sum of money, much more than sufficient to pay said note, that the bank had a lien thereon for the payment of said note, but, without the knowledge or consent of appellant, released its said lien and permitted Hurst, the principal in said note, to withdraw the whole of said deposit, leaving the note unpaid; that it did not, at the maturity of said note, or at any other time, notify appellant that the note was unpaid, and that he, knowing that Hurst had this large de-

posit in the bank at and after the maturity of the note, supposed it had been paid until this suit was brought against him thereon nearly four years thereafter. The answer further alleges that Hurst has, in the meantime, ¹⁵⁶ become and is wholly insolvent, and that if he shall be compelled to pay said note by reason of the bank having released its lien on said deposit, he will now be entirely without remedy against his principal.

To this answer appellee filed a general demurrer, which was sustained by the court, and thereupon, at the same term of court, appellant offered to file and tendered an amended answer in which, after reiterating the statements of his original answer, he also charges that this note, being made negotiable and payable at the bank, was, in effect, an order from Hurst on said bank to appropriate and apply from his deposit therein a sufficient sum to pay the note at maturity; that the bank was thereby made his agent to pay the same, and that, by the negligence of said bank, this application was not made, and the note not paid. It further pleads and relies upon the failure of the bank to apply to the payment of the note other deposits made by Hurst after the maturity of the note and when his insolvency was known to the bank.

To the filing of this amended answer appellee objected and insisted on his demurrer to the answer as offered to be amended, and the court sustained the objection and refused to allow the amended answer to be filed. Appellant declined to plead further, the petition was taken for confessed, a judgment for the amount of the note and interest was entered against him, and from that judgment he prosecutes this appeal.

In view of this statement from the record, and of the action of the court below in sustaining the demurrer to the original answer and refusing to allow the amended answer to be filed, we think there is but one question to be considered by this court.

That question is, whether or not, in this state, the surety ¹⁵⁷ on a negotiable note, made payable at, and discounted to and owned by, a bank which holds, on general deposit for the principal in the note, at the maturity thereof, a sum more than sufficient to pay the same, is discharged from liability thereon, by reason of the failure of such bank to apply to the payment of the note a sufficient sum from this unappropriated deposit, and by reason of its permitting the entire deposit to be checked out, for other purposes, by the principal, who afterward becomes insolvent?

This question has never been settled by any adjudication of this court, and we are aware that the decisions of the courts of

other states are not in entire harmony, and that there is some contrariety of opinion among the textwriters on the subject.

In considering the proposition, it is well for us to remember that this bank was the absolute owner of this note and not a mere collecting agent to look after the proper presentment of the note, and to demand payment in behalf of another. The bank was the creditor of Hurst, the principal in the note, to the amount thereof, and was his debtor in the amount of the deposit then standing to Hurst's credit in the bank.

As to the right of the bank, under the doctrine of setoff, to have applied, to the payment of this note, from Hurst's unappropriated deposit, enough money to pay the same, by simply charging the note to his account, there seems to be no difference of opinion, and it is only as to the duty of the bank in this respect as between it and the surety on the note, that the authorities differ.

As to this, Mr. Morse, in his text-book, says: "If a note payable at a bank is sent there for collection, and the bank fails to apply an unappropriated deposit of the maker to its payment, the indorser is discharged. When a creditor ¹⁵⁸ has within his control the means of paying the debt out of property of the debtor properly applicable to the purpose, and does not use the opportunity, but gives up the property, the surety is discharged": 2 Morse on Banks and Banking, 3d ed., sec. 562.

A similar doctrine is laid down in some of the decisions of the state courts, particularly in the cases from Pennsylvania, in one of which the learned judge, after referring to the well-recognized principles that the relation between the bank and its depositor is simply one of debtor and creditor, and that the bank has the right to apply an unappropriated general deposit to the payment of a matured note held by it against its depositor, which right it may waive unless the rights of third parties have intervened, propounds the following query which seems to us very aptly to illustrate the situation in this case, to wit: "If I am the holder of A's note indorsed by C, and when the note matures I am indebted to A in an amount equal to or exceeding the note, can I have the note protested and hold C as indorser? It is true A's note is not technically paid, but the right to setoff exists, and surely C may show, in relief of his obligation as surety, that I am really the debtor instead of the creditor of A. If this is so between individuals, why is it not so between a bank and individuals?" *Commercial Nat. Bank v. Henninger*, 105 Pa. St. 502.

Counsel for appellee, however, in support of their contention, that the conduct of the bank in this case, as set forth in the answer and admitted by the demurrer, did not operate as a discharge of the surety, rely mainly upon the cases of *National Mahaiwe Bank v. Peck*, 127 Mass. 302, 34 Am. Rep. 368, and *Second Nat. Bank v. Hill*, 76 Ind. 223; 40 Am. Rep. 239.

As to the former, the case from Massachusetts, it is sufficient ¹⁵⁹ to say that it is clearly distinguishable from this case. There the bank held two notes of B., one of which was executed by him in his official capacity, as treasurer of a town, and the other was executed by him individually. B. kept only a personal account with the bank. The note executed by him in his official capacity was indorsed by P., who, a few days after the maturity of that note, presented to the bank the check of B. on his individual account, and demanded that it be applied to the payment of the official note on which P. was indorser. To this demand the bank answered that it had already applied B's deposit toward the payment of his individual note, which had also matured, though not until after the maturity of the official note. In the action which was brought against P. by the bank to enforce the collection of this official note which he had indorsed, it was shown that neither this note nor its proceeds ever went into or constituted any part of B's personal account in the bank, and it was accordingly held that the bank, as against the surety on this official note, had the right to charge up B's personal note, which had also matured, against his personal account, as it had already done before this demand was made upon it to pay the official note out of this account. The distinction between that case and this is apparent.

The case of *Second Nat. Bank v. Hill*, 76 Ind. 223, 40 Am. Rep. 239, relied on by counsel for appellee, does fully support the position for which they contend.

But in that case it is also held, in conformity with the well-settled doctrine on the subject, that a bank has the right, under the state of facts admitted in this case, to apply the deposit to the payment of its demand, if it chooses to do so. It is furthermore held in that case that a creditor may not release a collateral security given by the principal ¹⁶⁰ debtor, or a lien which it may hold on his property, without discharging the surety, and these propositions are, we believe, recognized as fundamental in all the cases. If the security be in the nature of a lien by pledge of collateral, or by mortgage, or under an execution against the principal debtor's property, then, in any such case, it would be admitted that a release by the creditor of such security would

discharge the surety, to the extent, at least, of the value of the security so surrendered.

Now, while it is true that the bank in this case had not, strictly speaking, a lien upon any money or property belonging to Hurst, and while the surety could not, perhaps, by paying this debt to the bank, have become entitled to demand of it repayment out of Hurst's deposit, which is laid down by some of the authorities as the true test, yet, it seems to us that this bank, by the voluntary surrender to the principal of money more than sufficient to pay this debt, and which it is conceded that it had a right to apply to that purpose, has been equally reckless of the interests of this surety as though it had surrendered a security on which it had a specific lien. As said by the text-writer, above quoted from, in criticising this case in 76 Indiana: "If the bank at the maturity of a note held by it holds funds that, by the scratch of a pen, it could apply upon the note, thus securing itself, it is difficult to see why neglecting so easy a means of security is not as improper as giving up collateral expressly designated for the purpose of securing the note": 2 Morse on Banks and Banking, 3d ed., sec. 563.

The right on part of this bank to retain a sufficiency of Hurst's deposit gave it the absolute control of an ample security for the payment of this debt. A lien by pledge could give no higher right to the security than this bank ¹⁶¹ had. It had the unquestioned right to actually appropriate and apply this money, which it owed to Hurst, to the payment of Hurst's debt to it. It matters not whether the right to the security has its origin in the doctrine of setoff or under a pledge as collateral. It is the extent of the right to the security, rather than the source from which that right springs, that should determine the question whether the creditor can voluntarily surrender the security without releasing the surety; and, having had in its hands a fund which it could, by mere exercise of its option to do so, have used for the satisfaction of this debt, and which, we may assume, the dictates of ordinary diligence and of prudent banking would have prompted it to thus use, this bank has, in our judgment, been guilty of bad faith toward the surety, who, according to the facts as they are admitted here, knew of this large deposit to the credit of his principal, who received no notice of the nonpayment of the note until nearly four years thereafter, and who assumed, as he had a right to do under these circumstances, that the note had been paid at maturity.

If the facts be as alleged in the answer and admitted by the

demurrer, and as we are bound, therefore, to assume them to be, this bank has shown such an utter disregard of, and such absolute indifference to, the interests of the surety, as to entitle him to a release from the liability which would have been satisfied by the principal, if the bank had simply chosen to have it satisfied, and had exercised its option in favor of, instead of against, the surety.

Wherefore, the judgment of the lower court sustaining the demurrer to the answer and rendering judgment against appellant is reversed, and the action is remanded for further proceedings consistent with this opinion.

BANKS—SETOFF AGAINST DEPOSITOR.—When a bank is a bona fide holder of a note at its maturity, and also holds funds of the maker, it is bound to consider the interests of the indorsers or sureties, and to apply such funds to the payment of the note. If it allows the maker to withdraw his funds after protest, causing the indorsers to lose thereby it is liable to them: *Mechanics' etc. Bank v. Seitz*, 150 Pa. St. 632; 30 Am. St. Rep. 853, and note. A bank holding a depositor's note past due, is entitled to set it off against the amount due him upon his deposit account, and is, therefore, under no obligation to pay his check drawn against such account, if it is exhausted before the check is presented by charging against it the amount of such note: *Bank v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St. 151; 40 Am. St. Rep. 660, and note. See, also, the extended note to *National Bank v. Smith*, 23 Am. Rep. 50.

SURETYSHIP—RELEASE OF SURETY BY BANK.—In an action by a bank against sureties on a promissory note discounted by it, it is no defense that before maturity the principal directed the bank to pay the note at maturity out of his general deposit in the bank, that the bank failed to do so, and subsequently allowed the principal to check the money out of the bank, although it knew of the suretyship at all times, and the deposit was sufficient to pay the note: *Second Nat. Bank v. Hill*, 76 Ind. 223; 40 Am. Rep. 239. See, also, the case of *National etc. Bank v. Peck*, 127 Mass. 298; 34 Am. Rep. 368.

HERR v. CENTRAL KENTUCKY LUNATIC ASYLUM.

[97 KENTUCKY, 458.]

SUITS AGAINST OFFICERS OF THE STATE.—If officers or agents of the state invade a private right in a mode not authorized by law, any person injured thereby is entitled, at least, to a preventive remedy, although the state may be affected by the proceeding.

STATE, INJUNCTION AGAINST OFFICERS OF.—Officers or agents of the state in charge of its insane asylum may be enjoined from interfering with the flow of a natural stream, and from throwing offal therein, whereby its waters become unfit for any purpose, and the air is rendered noxious and offensive.

Alfred Selligman, O'Neal & Pryor, and Phelps & Thum, for the appellant.

A. J. Carroll, Albert S. Brandeis, and John Barret, for the appellee.

⁴⁰⁰ LEWIS, J. Mary Herr and others brought this action against Central Kentucky Lunatic Asylum, created by statute a body politic, and in their petition state that they are, as was their intestate husband and father, owners, in possession of and reside upon a tract of land containing about three hundred acres, used as a farm and garden, through which flows a small watercourse called Goose creek; that adjacent to and above their land is a tract of about four hundred acres, acquired and held by defendant for use of the commonwealth, upon which have been erected, at expense of the state, buildings ⁴⁰¹ extensive enough to accommodate, and which do accommodate, about one thousand persons, adjudged lunatics, besides about one hundred attendants and servants; that defendant has wrongfully built across said creek two dams, making two artificial lakes or ponds, whereby the natural flow of water has been greatly diminished; that defendant dumps and causes to be carried through a sewer from said buildings into the creek, all slops, offal, and refuse matter of every kind, a large part, though, because of feeble flow of the creek, not all, of which passes through and upon the premises of plaintiffs, whereby water of the creek, formerly used for watering their animals and other farming purposes, has become unfit for any purpose, and the air rendered so noxious and offensive as to make their home unhealthy and untenable. Wherefore, they ask an injunction against defendant maintaining the alleged nuisance and abatement of it, including removal of the two dams.

But to the petition a general demurrer was sustained, upon the principal ground, as stated in opinion of the chancellor, and now urged in argument, that defendant corporation is but an arm of the state, and, consequently, cannot be sued without express legislative authority. In terms of the statute creating defendant a corporation, it is not only given power to sue, but made, without qualification, liable to be sued. And if an action for the cause stated in petition of plaintiffs cannot be maintained against it, we are at loss to know what character of default or wrong it could be sued for.

But it seems to us, independent of statutory liability, defendant is answerable for the wrong and injury complained of in the

same manner, and to the same extent, as one or more natural persons would be, occupying the same attitude, which is that of agent or officer of the state.

⁴⁶² As a necessary consequence of exemption of the state from suit without its consent, an action nominally against an officer, but really against the state, to enforce performance of its obligation in its political capacity, cannot be maintained. But if officers or agents of the state invade private right in a mode not authorized by the statute under which they claim to act, or if such statute is invalid, unquestionably the person injured has, at least, a preventive remedy, although the state may be affected by the proceeding, yet not a party to it.

As early as the case of *Osborne v. Bank of United States*, 9 Wheat. 738, in which an injunction was sought against officers acting under statute of a state, the rule was thus stated by Chief Justice Marshall: "If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is, that as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties. But if the person who is the real principal, the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him, could his principal be joined in the suit."

The doctrine there stated has in numerous cases been since approved and applied by the supreme court, and this court has never held differently. For exemption of the ⁴⁶³ state from suit without its consent was intended for its own protection; not at all to enable agents or officers to do with impunity injury to private rights.

To say a court of chancery could not enjoin them entering upon and appropriating, without compensation, land of a private person, though done under color of statutory power, and in interest of the state, would be, indeed, a startling proposition. Yet so using property of the state as to create a nuisance, whereby such private person is deprived of use and enjoyment of his

land, would be not less a wrong and injury than forcibly ousting him of possession and lawlessly taking and appropriating it. For while holding and controlling property of the state, its officers and agents can no more than a private person disregard the maxim, "*sic utere tuo ut alienum non laedas.*" It cannot be that in such case a person injured would be wholly without remedy merely because the wrongdoers are agents or officers holding and controlling property of the state.

The case of *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 44 Am. St. Rep. 243, recently decided by the court, is not like this, because there damages for a personal injury were sued for against, not the employee who committed the assault, but against the corporation, agent of the state, controlling the institution, which, if recovered, would have been payable out of the trust fund. Here the remedy sought is injunction against continuance of a nuisance, and, as necessary consequence, abatement of it. And as the alleged wrong is such as to cause permanent mischief and continuous grievance, which cannot be otherwise, than by injunction, repaired or prevented; and as it is moreover alleged plaintiffs have and will continue to suffer injury to both their health and property unless the court grants the relief, a ⁴⁶⁴ *prima facie* cause of action is stated in their petition, and the chancellor erred in sustaining the demurrer.

Judgment is reversed and cause remanded for further proceedings consistent with this opinion.

STATES—SUITS AGAINST.—A sovereign cannot be sued except by its own consent: *Hunsaker v. Borden*, 5 Cal. 288; 63 Am. Dec. 130, and note; *United States v. Murdock*, 18 La. Ann. 305; 89 Am. Dec. 651. No one can sue a state except by its own consent: *Cornwall v. Commonwealth*, 82 Va. 644; 3 Am. St. Rep. 121; *Moore v. Tate*, 87 Tenn. 725; 10 Am. St. Rep. 712, and note. The rule which forbids suit against state officers because it is in effect a suit against the state applies only where the interest of the state is, through some property right or contract of hers, involved, or where her interest is in a suit brought or threatened by her officers in her own name to enforce some alleged claim of hers: *McWhorter v. Pensacola etc. R. R. Co.* 24 Fla. 417; 12 Am. St. Rep. 220. See, also, the note to *Orleans Nav. Co. v. Schooner Amella*, 12 Am. Dec. 517, 518.

CASON v. GRANT COUNTY DEPOSIT BANK.

[97 KENTUCKY, 487.]

NEGOTIABLE INSTRUMENTS, BLANKS IN, RIGHT OF HOLDER TO FILL UP.—If a promissory note is executed with a blank therein appropriate for designating a place of payment, and the holder subsequently fills up this blank so as to make the note payable at a specified bank, and negotiates it to an innocent holder, its enforcement cannot be resisted in his hands on the ground of an unauthorized and unlawful alteration thereof.

W. W. Dickerson, for the appellant.

George C. Drane, for the appellee.

⁴⁸⁸ PRYOR, C. J. Cason executed his note to G. W. Siddons for two hundred ⁴⁸⁹ dollars, payable in three months. The note, when executed, read as follows:

"Dolls. 200

Williamstown, Oct. 2, 1889.

"Three months after date I promise to pay to the order of G. W. Siddons, two hundred dollars, at value received.

"Due CHAPMAN CASON."

The blanks were filled by inserting the word "payable" before the word "at," and the words "Bank of Williamstown, Ky.," after the word "at," making the paper "payable at the Bank of Williamstown, Ky." With these blanks filled by the holder, he discounted the note before maturity at this bank, and, Cason refusing to pay, the bank instituted the present action upon the note and recovered a judgment. It is alleged that the note was executed by Cason to Siddons, and transferred to the plaintiff (the bank) by Siddons for a valuable consideration, whereby the plaintiff became the owner, etc.

Cason filed an answer that in effect is a special plea of non est factum, alleging that a blank in the paper was filled in by Siddons, or someone else, by inserting the word "payable" before the word "at," and the words "the bank of Williamstown, Ky.," after, so as to make the note read "payable at the Bank of Williamstown, Ky."; that this addition to the note was made without his authority or consent, and was wholly unauthorized by him. A demurrer was filed to the answer and sustained, on the ground, as is stated in the briefs, of the failure of the defendant to allege that the bank had notice of the infirmity of the paper when it became the owner. The case was brought to the superior court on the question raised by the demurrer to the answer, there having been a judgment for the bank, and the court reversed the judgment below, upon the ground that the demurrer presented

⁴⁰⁰ a valid defense. On the return of the case to the lower court, the demurrer to the answer was overruled and a reply filed by the bank averring in substance that it discounted the paper in good faith at the instance of Siddons before maturity, without any notice of the paper's infirmity, or that the blanks had been filled up by Siddons, or anyone else, and that the paper, when discounted, was perfect as to date, amount, and where payable, that it is an innocent holder for value, etc. A demurrer was interposed to this answer and overruled, and, it appearing that the paper had been discounted in good faith by the bank, with the blanks filled at the time, a judgment was again rendered for the bank. Cason then appealed to the superior court for the second time, and that court held that the question at issue had been settled by its decision on the first appeal, in which it held the answer of Cason to be good, in the absence of an averment that the bank had notice of the alteration in the paper, and, the question being *res adjudicata*, the court below should have sustained the demurrer to the reply of the bank, in which the circumstances under which it became the owner are specifically alleged.

It is plain the bank had been given no opportunity of showing the manner in which it held the paper, or its condition at the time the discount was made, and while the answer may be good, because it is simply a plea of *non est factum*, and although specially pleaded, the burden was on the bank, after the defendant had shown the alteration, of showing that it became the owner for value and without notice of the paper's infirmity.

It, therefore, became necessary for the appellee, the bank, to plead facts of which it must have the knowledge, instead of requiring the defendant to present the bank's defense to the plea of *non est factum*. So, when the case went ⁴⁰¹ back with the demurrer overruled, the bank was compelled to reply, and the court could not have intended to say that the bank, although an innocent holder, was without any defense to the plea, although the reversal upon the second appeal would lead to this conclusion. The case, however, is now in this court on this second appeal, and the case must be considered as if this court had rendered the original opinion, or rather, this court must determine whether the opinion of the superior court on the first appeal, holding the answer good, precluded the bank from making the defense upon which the recovery was had. We adjudge not, for the reason already given. The bank, by its demurrer to the answer of Cason, admitted, because it had been so alleged in that

pleading, that after Cason had executed the paper and delivered it, it was, without his consent, fraudulently altered by the payee, or some other person unknown to him, by inserting the words "payable at bank of Williamstown." This admission made the answer good, and the exception to this doctrine, well recognized, must be pleaded by the holder, if innocent, for without the exception a want of notice constitutes no defense.

The exception is, "if the note have blanks left in it, filling the blanks is no alteration, but filling them contrary to agreement or authority of the party who left them is an alteration which can give the one who filled the blanks no rights against him who left them, though it may bind him who left the blank to other [innocent] holders for value": 2 Parsons on Bills and Notes, 566; Woolfolk v. Bank of America, 10 Bush. 504; Blakey v. Johnson, 13 Bush, 197; 26 Am. Rep. 254; Newell v. First Nat. Bank of Somerset, 13 Ky. L. Rep. 775.

Where one signs a paper in blank, or partly in blank, when so written, when signed and delivered, as to show upon its face that a blank is left to fill up as to amount, or where payable, there is an implied authority to the holder to fill up ⁴⁹² the blanks in accordance with the general character of the instrument, and, when this is done by the payee, it is not such an alteration as will invalidate the paper as to one who takes it for value without notice of its infirmity.

In this case, the paper had been discounted by the bank and placed upon the footing of a bill. It was taken as a complete instrument. Cason was in the bank and introduced Siddons, the payee, to its officers, and Siddons, no doubt, went to the bank for the purpose of discounting the paper. Cason, however, states the paper was not given for the purpose of being discounted, and there was no authority from him to fill up the blanks, and, at last, what the payor and payee understood in regard to the blanks, or the authority conferred upon the holder by an express agreement, is immaterial, as no such agreement is shown to have been made.

In the case of Cronkhite v. Nebeker, 81 Ind. 319, 42 Am. Rep. 127, where a note was executed in blank as to the place of payment, as in this case, it was held that no implied authority existed on the part of the holder to fill up the blank so as to make it negotiable. That case, it seems to us, is a departure from the well-recognized doctrine on the subject.

Mr. Daniel, in his work on Negotiable Instruments, says, "that when the drawer of a bill, or the maker of the note, has

himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it, or exciting the suspicions of a careful man, he will be liable upon it to any bona fide holder without notice when the opportunity which he has afforded has been embraced." He proceeds to state, where after the word "at" a blank was left, and it was filled and made payable at an unauthorized place, it was held that the word "at" implied that the blank space succeeding it might be filled ⁴⁰³ before the note should be delivered with a designated place of payment: 2 Daniel on Negotiable Instruments, secs. 1405, 1406.

In *Kitchen v. Place*, 41 Barb. 466, the blank space was left after the word "at" in a promissory note. The blank was filled designating the place of payment. It was held the holder had the implied authority to fill the blank.

In the case of *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573, the note was left blank after the word "at," no place of payment being inserted. The maker of the note delivered it to the payee upon the agreement that the note should not be negotiated, but the holder, violating the agreement, filled the blank and negotiated the paper. The court held the maker was liable to a bona fide holder for value: See, also, *Brown v. Reed*, 79 Pa. St. 370; 21 Am. Rep. 75.

Many cases might be cited analogous to the one before us sustaining the judgment below, and we have no doubt of the appellant's liability to the bank.

Judgment affirmed.

FILLING BLANKS—NEGOTIABLE INSTRUMENTS—PLACE OF PAYMENT.—The maker of a perfect note, non-negotiable because not stating a bank as the place of payment, does not, by leaving a blank in the body of it, give implied authority to the payee to insert the name of a bank, and such an insertion, unauthorized by the maker, will avoid the note in the hands of an innocent purchaser: *Cronkhite v. Nebeker*, 81 Ind. 319; 42 Am. Rep. 127, and note. The execution of a note, on its face payable at a bank, the place for the name of which is left blank at a town named, authorizes the payee, before the maturity of the note, to insert the name of a particular bank at such town in the blank space, so that whatever limitation of authority may have been imposed by the maker on the payee, the note will be negotiable and governed by the law merchant in the hands of a bona fide indorsee: *Gillaspie v. Kelley*, 41 Ind. 158; 13 Am. Rep. 318.

KIRKPATRICK v. BROWNFIELD.

[97 KENTUCKY, 558.]

ELIGIBILITY TO OFFICE MEANS qualified to take office at the time when the official term begins, and does not require such qualification to exist at the time of the election to such office.

Hobson & O'Meara, for the appellant.

I. W. Twyman and D. H. Smith, for the appellee.

560 HAZELRIGG, J. The appellant and appellee were rival candidates for the office of county court clerk, of Larue county, at the November election, 1894. Appellant received a majority of the votes cast, and was awarded a certificate of election by the canvassing board. Appellee contested his election upon **561** the ground that he had not, at the time of his election, procured from the proper officer a certificate of his qualification as required by law.

It was agreed that the appellant, on the eighth day of September, 1894, had obtained from the clerk of the Larue circuit court, a certificate showing his qualification, and that on the tenth day of November, 1894, he had procured from his circuit judge, a certificate stating that he had been examined by the clerk of the Metcalfe circuit court, under the supervision of the judge, and that the applicant was qualified for the office of county court clerk; the first certificate being issued before and the second after the election. The contesting board held the appellant to have been ineligible at the time of his election and hence not qualified to hold the office, which was, therefore, declared vacant. On appeal to the circuit court that finding was approved, and from that judgment Kirkpatrick prosecutes this appeal.

It is not contended that the certificate of September, 1894, has any efficacy, but it is insisted by the appellant that the requirements of the constitution were met upon the procurement of the certificate of the circuit judge after the election, and before the term began for which he was elected. The controlling provision of the constitution reads as follows: "No person shall be eligible to the offices mentioned in sections ninety-seven and ninety-nine, who is not, at the time of his election, twenty-four years of age (except clerks of county and circuit courts, who shall be twenty-one years of age), a citizen of Kentucky and who has not resided in the state two years, and one year next preceding his election in the county and district in which he is a candidate. No person shall be eligible to the office of commonwealth's attorney unless he shall have been a licensed practicing lawyer four years. No

person shall be eligible to the office ⁵⁶² of clerk unless he shall have procured from a judge of the court of appeals or a judge of a circuit court, a certificate that he has been examined by the clerk of his court under his supervision, and that he is qualified for the office for which he is a candidate": Const., sec. 100.

For the appellant it is said that so much of this section as refers to the age and residence of the candidate, relates to the time of the election, because it is so expressed; but that the rest of the section relates, not to the time of election, but to the time of holding the office. That the words, "eligible for the office," and "eligible to election," or "eligible when elected," are purposely used to convey different meanings. On the other hand, the appellee contends that the word "eligible" has a well-defined, legal signification, and the expression "eligible to the office," is but a brief and concise form of stating "capable of being legally chosen or elected to the office."

Each party appeals to his favorite lexicographer to support his contention in the use of the word "eligible," and it is evident that the construction of the section cannot be made to depend on the definition given by these learned compilers. The word is variously defined, as "proper to be chosen"; "legally qualified, as eligible to office," and we are thus left to ascertain in some other way the sense to be attached to the word as used in the section. Primarily, the word "eligible," from the latin, eligere, to elect, means capable of being elected, or if we may temporarily coin a word, eligible means "electible"; but the use of the word is not at all confined to this primary meaning, and if we attempt to substitute this meaning in the various sections of the constitution where the word is used, we reach quite absurd results, whereas, if we substitute the definition "legally qualified," as insisted on by the appellant, we obtain a consistent ⁵⁶³ and natural construction of all the sections. In section 114 we read: "No person shall be eligible to election as judge of the court of appeals," etc. In section 130 we read: "No person shall be eligible as judge of the circuit court who is less than thirty-five years of age when elected," etc. Manifestly, the word does not import in these sections more than that the person shall be "legally qualified," and because that legal qualification is required to exist at the time of the election other words were added to so indicate the purpose in view by the framers of the constitution. By section 93 certain officers are made ineligible to re-election, and by section 165 a notary public and officers of the militia are declared not ineligible to hold or exercise any office, etc. The framers of

the constitution, in these sections, used the word in the sense of legally "qualified" for office or qualified to hold office. Thus "No person shall be qualified for election as judge of the court of appeals, etc., or qualified as judge of the circuit court, who is less than thirty-five years of age when elected," etc. And so in numerous instances it is apparent that where eligibility is required, as of the date of the election, words are used to make the meaning indisputable. So in no less numerous instances, we find the words "eligible to the office," without additional words, relating to the time of election.

We think, therefore, that the words in themselves, as used in the constitution, mean "qualified for the office," not at the time of election, but at the time when the office is to be first assumed. Considering the care with which the constitution was prepared, and the scholarly distinction of many of its framers, we do not suppose that the same meaning is to be attached to the words "eligible to election" and "eligible to office," or "ineligible to re-election" or "ineligible to office."

⁵⁶⁴ Our conclusion, therefore, is that under the first part of the section under consideration, the words "eligible to the offices," mean "qualified for the offices," and except for the words "at the time of his election," the eligibility required of the candidate would relate to the time when he was about to hold or assume the office, and that the same words "eligible to the office," used in the latter part of the section, relate to the same time and are without words fixing the date of the eligibility at the time of the election.

This construction, it seems to us, is in accord with a general and manifest purpose on the part of the framers of the constitution. The changes of phraseology found in the various sections, was not, we think, the result of mere chance.

The words "office of clerk," mentioned in the last sentence of the section, embraced the offices of circuit and of county court clerks, and as descriptive of the particular office for which the applicant should obtain a certificate of qualification, the words, "for the office for which he is a candidate," were used. We think the words were used without an intention to indicate the time when the applicant for the office was to obtain his certificate. At best the use of this word would raise only a presumption that the certificate was to be procured before the election, and we should not allow such presumption to override what we conceive to be the general purpose in view by the use of the terms in controversy. To do so "would be to suppose," says Mr. Story, "that

the framers weighed only the force of single words as philologists and critics, and not whole clauses and objects as statesmen and practical reasoners."

While the provisions of the section under consideration are a substantial re-adoption of section 2, article 6, of the old constitution, there seems to have been no adjudication by the court affecting the question here involved.

⁵⁶⁵ In *Stevens v. Wyatt*, 16 B. Mon. 542, relied on by the appellee, Garrett was held ineligible by the lower court: 1. Because he had no certificate of qualification; and 2. Because he had not been a resident of Montgomery county for one year next preceding the election. And this court said: "As the facts respecting Garrett's ineligibility were agreed, no doubt is entertained of the propriety of the action of the board in refusing him a certificate of election."

There was an entire absence of any certificate obtained, either before or after the election, and manifestly, if Garrett had obtained his certificate after the election, or even before, the result would not have been different, as he was ineligible for another and conclusive reason. There was no controversy on Garrett's part, and the opinion makes no reference to the point now involved, nor was the argument of counsel so directed.

A few other cases from this court are referred to as touching the question, but throughout them all the question now in issue remained undetermined. Nor does the statute (sec. 1531, subsec. 8) providing for a new election in the event the person returned as elected is found not to have been legally qualified to receive the office at the time of the election, affect the question. Many of the tests of eligibility are to be applied under the various statutes as of the time of the election, and, if when the term begins, the person elected cannot qualify, a vacancy necessarily occurs, which may be filled as provided by law.

The Nevada case of *State v. Clarke*, 3 Nev. 570, sustains the appellee's contention as to the meaning of the word "eligible," holding it to signify, when used in statutory and constitutional clauses, such as we are considering, one "capable of being elected or chosen," and hence, the "eligibility" must relate to the time of the election.

⁵⁶⁶ To the same effect are the cases of *State v. McMillen*, 23 Neb. 385, and the Minnesota and California cases, as well as the earlier Indiana cases. But the Indiana court, in *Smith v. Moore*, 90 Ind. 294, reviewed its former decisions and adopted a different construction, saying that "legally qualified" is the meaning that

should be given to the word "eligible" as used in the section of the constitution under consideration.

To the same effect are the cases of *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489; *Privett v. Bickford*, 26 Kan. 52; 40 Am. Rep. 301, and *Demaree v. Scates* (1893), 50 Kan. 275; 34 Am. St. Rep. 113; where the whole question is discussed and authorities reviewed.

These cases discuss largely, and in some respects the conclusion is made to depend on, the etymology of the word "eligible," and in this respect we think the contention of the appellant is supported by the better argument. But what is more important than this, we believe the framers of the constitution had in view a difference in meaning when they provided in one clause for "eligibility for office" and in another "eligibility to election."

The judgment below is reversed for proceedings consistent with this opinion.

OFFICERS—ELIGIBILITY.—An alien elected to a public office is on, subsequently and before the time when he is required to qualify for the office, becoming a naturalized citizen entitled to hold such office and discharge the duties thereof, if there is no constitutional or statutory provision expressly requiring him to be qualified therefor at the time of his election: *State v. Van Beck*, 87 Iowa, 569; 43 Am. St. Rep. 397, and note. The meaning of the word "eligibility," when used in regard to the qualifications of candidates for public offices, includes capacity to hold as well as to be elected, and is no less applicable to appointive than to elective offices: *State v. Clarke*, 21 Nev. 333; 37 Am. St. Rep. 517, and note.

TITUS v. ROCHESTER GERMAN INSURANCE COMPANY.

[97 KENTUCKY, 567.]

INSURANCE, EQUITY, WHEN WILL SET ASIDE A COMPROMISE.—One who has been induced to accept in full satisfaction of a loss under a policy of insurance one-half of the amount due through fraud and imposition upon him and willful misrepresentation made by the agents of the insurer, he being, as they knew, ignorant of his legal rights under the contract, may maintain an equitable action to rescind such contract of satisfaction.

EQUITY.—IGNORANCE OF LAW AS A GROUND FOR RELIEF.—If ignorance of the law exists on one side, and that ignorance is known to, and taken advantage of by, the other, the former will be relieved, especially if the mistake was encouraged or induced by the misrepresentation of the party seeking to profit by it.

Simrall, Bodley & Doolan, for the appellant.

Gibson, Marshall & Lochre, for the appellee.

⁵⁶⁸ EASTIN, J. This equitable action was brought by appellant to rescind a contract made with appellee, by which, as alleged, he was induced to accept, in satisfaction of a loss under ⁵⁶⁹ a policy of insurance issued to him by appellee, an amount equal to one-half of that loss and to one-half of the amount of insurance named in the policy.

As grounds of rescission, the petition charges that appellant was ignorant of his legal rights under the policy, and that, through fraud and imposition practiced upon him by appellee's agents, and by willful misrepresentation made by them, as to his rights under the contract of insurance, he was induced to accept a part of his claim in satisfaction of the whole.

The chancellor sustained a general demurrer to the petition, and appellant declining to plead further, his petition was dismissed, from which ruling this appeal is prosecuted; so that the only question for consideration here is whether or not the facts alleged in the petition, and admitted by the demurrer, are sufficient in equity to entitle appellant to the relief sought.

The petition charges, in the fullest and strongest terms, appellant's ignorance of the rights and obligations of the parties under the policy of insurance, and full knowledge on part of appellee, both as to the rights of the parties and as to appellant's ignorance of them, as well as false and fraudulent misrepresentations made by appellee's agents for the purpose of deceiving, and which did deceive, appellant as to the validity of his claim under the policy. It charges, among other things, that appellee fully understood its liability to appellant for the full amount of his loss, that he was ignorant of the law governing his right and appellee's obligations, while appellee both knew his rights and knew that he was ignorant of them, and, with this knowledge and intending to deceive and defraud him, fraudulently represented to him that, by reason of an encumbrance on a part of the insured property, his entire claim under ⁵⁷⁰ the policy was forfeited; that these false representations were made to him by appellee for the purpose of deceiving and defrauding him, and that, by these false and fraudulent representations, and through ignorance of his legal rights, he was induced to accept the sum of four hundred dollars in satisfaction of a loss of eight hundred dollars, when, except for these fraudulent representations and his ignorance, he would not have done so.

These charges being admitted, it seems to us that the case presented involves something more than an effort to obtain relief purely on the ground of a mistake of law, or mere ignorance on part of appellant as to his legal rights under the contract of

insurance. It becomes, in addition to this, a case of actual fraud, where by fraudulent misrepresentations made for the purpose and with the intent to deceive, the known ignorance of one of the parties to the contract has been willfully taken advantage of, and he has thereby been induced to surrender a valid, subsisting right without consideration. It is true that the ignorance relied upon is an ignorance of law rather than of fact, and that this is not always, or perhaps generally, and when standing alone, available as a ground of relief against an executed contract, no matter how inequitable it may be. On this point the decisions of the courts of this country, as well as the English courts, are by no means uniform, but, in our opinion, the weight of authority and the decisions of this court would now forbid that a party, who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, and made it the more dense by his own false and fraudulent misrepresentations, but has willfully deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the ⁵⁷¹ general doctrine that a mere mistake of law affords no ground for relief.

This view seems to be upheld by many, if not all, of the modern text-writers, who are recognized as authority on the question.

Mr. Kerr, in his well-known work, in treating this subject says: "But if it appear that the mistake was induced or encouraged by the misrepresentation of the other party to the transaction, or was perceived by him and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake": Kerr on Fraud and Mistake, 399, 400.

And, in his work on Equity, Mr. Bispham lays down this doctrine, in even stronger and less uncertain terms. He says: "Where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved. More particularly will this be so if the mistake was encouraged or induced by misrepresentations of the other party": Bispham's Principles of Equity, sec. 188.

Under the admitted facts of this case and the circumstances surrounding and leading up to the mistake relied on here, it is clearly brought within the text above quoted; and many other authorities to the same effect, including reported cases in many of the states of this Union, might be cited, if it were deemed necessary.

We fully recognize the wisdom of that rule which always inclines the courts to uphold and enforce the validity of voluntary

compromises and adjustments between parties of their legal differences, when fairly arrived at. Nor would any mere ignorance of or mistake in the law governing any doubtful and disputed legal proposition, on part of either of the parties to the compromise, in the absence of evidence ⁵⁷² tending to show that he has been overreached or unfairly dealt with, or taken advantage of, and where supported by a good consideration, be sufficient, in our judgment, to justify the rescission of a compromise settlement, deliberately made between parties, standing upon an equal footing and with full knowledge of all the facts. If every mistake of law were sufficient to warrant the interference of the courts, then no compromise of a disputed legal proposition would be final, for, in every such case, one party or the other to the controversy is mistaken as to the law of the case.

Upon the record before us, there may be some question as to how far there was a controversy between these parties over any doubtful legal question that might have been litigated in court, or exactly what was the nature and extent of the same.

It is alleged in the petition that appellee claimed that all rights of appellant under his policy of insurance were forfeited, by reason of the existence of an encumbrance upon a part of the insured property; but it is further alleged that appellee, at the time the contract of insurance was made, "had full knowledge of the same, and having such knowledge, made the contract and issued the policy aforesaid." This allegation is admitted to be true, and, in the absence of anything further in the pleading, pertaining to this point, we are unable to see in this the basis of a doubtful disputed legal proposition which might have been litigated in the courts, or to know exactly what controversy was settled by the parties.

But, waiving the question as to the nature and extent of the controversy between appellant and appellee, and reverting to the character of the compromises which the courts will uphold, we now quote from another text-writer who uses this language, to wit: "Voluntary settlements are so ⁵⁷³ favored that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge or means of obtaining knowledge, concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily enter, must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been

brought before it for decision. Of course there must not only be no misrepresentation, imposition, or concealment; there must also be a full disclosure of all material facts within the knowledge of the parties, whether demanded or not by the others": Pomeroy's Equity Jurisprudence, sec. 850.

Under the authorities quoted it is manifest that the compromise contract sought to be rescinded here is within the control of a court of equity and may be set aside.

And now, referring to the decisions of this court and to the doctrine established in this state, it seems to us still clearer that the contract complained of, and which was made under the circumstances set forth in the petition and admitted by appellee, cannot be sustained.

In an exhaustive opinion in which the authorities were ably reveiued by Judge Robertson, after referring to the difficulty of determining, in every case, when a contract was, in fact, made under a mistake of law, it is said: "When it can be made perfectly evident, that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and when there has been no fair compromise of bona fide and doubtful claims, we do not doubt that the ⁵⁷⁴ agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality": Underwood v. Brockman, 4 Dana, 309; 29 Am. Dec. 407.

In the case of Ray v. Bank of Kentucky, 3 B. Mon. 510, 39 Am. Dec. 479, this court referred to and approved the above case and said: "Upon the whole we would remark that, whenever, by a clear and palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor, or conscience was not due and payable, and which in honor or good conscience ought not to be retained, it was and ought to be recovered back."

Both of these cases are cited with approval in the case of Louisville etc. R. R. Co. v. Hopkins County, 87 Ky. 613, and the doctrine laid down therein has not been departed from by this court.

It will be seen that the question of fraud did not enter into the decision of either of those cases, but that they are almost entirely based upon the fact that there was no good consideration to uphold the contracts, that it was not a fair compromise of bona fide and doubtful claims, and that the money was not in law, honor, or conscience payable, and ought not in honor or good conscience to be retained. If for these reasons a contract, made under a clear mistake of law, may be set aside, then how

much stronger reason is there for annulling the contract under consideration. Not only was this contract, according to this record as it comes before us, wholly without consideration, and not only was the money surrendered by appellant on his claim, not due in law, honor, or conscience, and surrendered only under a clear mistake of law, but it is further admitted by the demurrer that this contract was obtained, and that appellant was induced to surrender one-half of his claim, by the actual ⁵⁷⁵ false and fraudulent misrepresentation of appellee, knowingly made for the purpose of deceiving and defrauding appellant.

We are clearly of the opinion that the chancellor erred in sustaining the demurrer to the petition, and for the reasons indicated, his judgment dismissing appellant's petition is reversed and the action is remanded, with directions to set aside that order and to overrule the demurrer and give appellee leave to file an answer.

INSURANCE—SETTING ASIDE COMPROMISE.—When a life insurance company by its agent fraudulently represents to the executor of the insured, whose mental faculties are impaired, that it has discovered evidence sufficient to avoid the policy, and will contest and defeat it, and thus procures a settlement for a sum grossly inadequate, the settlement may be set aside and the balance due recovered: *McLean v. Equitable etc. Assur. Soc.*, 100 Ind. 127; 50 Am. Rep. 779.

EQUITY—IGNORANCE OR MISTAKE OF LAW AS A GROUND FOR RELIEF.—Mistakes of law may, in some cases, afford good cause for relief in equity: *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767, and note. Mere ignorance or mistake of law on the part of a party to a contract will not authorize a court of equity to set it aside: *Kleimann v. Gilselmann*, 114 Mo. 437; 35 Am. St. Rep. 761, and note. See, also, the note to *Trigg v. Read*, 42 Am. Dec. 467.

STEWART v. THOMSON.

[97 KENTUCKY, 575.]

EXEMPTION LAWS. SUITS FOR. BRINGING PROCEEDING IN ANOTHER STATE FOR PURPOSE OF AVOIDING.—If a debtor, having property exempt from execution by the laws of the state in which he and his creditor reside, goes temporarily into another state for a business purpose, to which such property is necessary, and therefore takes it with him, and his creditor resorts to the courts of that state for the purpose of subjecting such property to execution, it not being there exempt, and afterward sells it under execution in defiance of an injunction issued in the state of their domicile, he is liable to an action by the debtor to recover the value of the property.

EXEMPTION LAWS—CONFLICT OF.—If property of a debtor is seized under attachment or execution, its exemption from the writ must be determined by the laws of the state where the seizure is

made, and its release cannot be procured by establishing its exemption in the state where the debt was contracted and the debtor and creditor both reside, but this will not prevent the debtor from maintaining an action in the state of his residence against his creditor for resorting to the courts of the other state for the purpose of evading the exemption laws of the state of their residence.

Bennett & Bennett, for the appellant.

A. E. Cole & Sons, for the appellee.

⁵⁷⁷ GUFFY, J. This action was instituted in the Greenup circuit court by the appellant, Linsey T. Stewart, against the appellee, Volney E. Thomson. It is alleged, in substance, in the petition and amended petition, that the appellee, on January 31, 1894, brought suit on a note held by him against John Stewart and the appellant as surety in the court of Volney Row, a justice of the peace in Scioto county, in the state of Ohio, and sued out an attachment against appellant's property in said state, and caused the same to be levied upon a span of mules, harness, and a two-horse wagon, the property of appellant, and exempt from execution and attachment under the laws of Kentucky. That at the time of said levy, he had gone with them to Portsmouth, Ohio, temporarily, to haul a load of goods, going there in the morning intending to return in the evening. That appellee, knowing all the facts aforesaid, and with a fraudulent intent to cheat and defraud appellant out of his exemption under the laws of Kentucky, and with intent to subvert and annul the laws of Kentucky, procured the attachment and caused the levy to be made as aforesaid. That said mules were worth three hundred dollars. That at the time of the levy said property was claimed and held by him as exempt, under the laws of Kentucky; all of which was known to appellee, appellant being a citizen and resident within Kentucky with a family, and being his only team of work beasts, wagon, and harness, exempt by the laws of Kentucky. That appellee was then, and for years before had been, a citizen and resident of the commonwealth of Kentucky. That immediately after said levy, he returned to Kentucky and sued out an injunction against appellee, enjoining him from proceeding with a sale of said property, but appellee, in violation of said injunction, proceeded with his action and caused the sale of said mules in ⁵⁷⁸ the state of Ohio, on the 20th of February, 1894, and applied the proceeds to the payment of said debt, viz., the sum of two hundred and twelve dollars.

That appellant and appellee have been continuous residents and citizens of Greenup county, state of Kentucky, for years before the bringing of this action. That appellant has no property

in Kentucky, subject to execution, and this fact induced appellee to perpetrate this fraud upon his rights. That the levy and sale was a great fraud upon his rights, by which he has been damaged in the sum of five hundred dollars.

It appears that a demurrer was sustained to the petition, after which appellant filed an amended petition, in which it is averred that the said suit against him in Ohio was set for the 3d of February, 1894, and that he was there on that day for the sole and only purpose to demand from the officer and the defendant the restoration of said property as being his exempt property under the laws of Kentucky, and did, in the presence of appellee and said Row, make such demand from the constable, William H. Williams, who had possession of said property by virtue of the attachment, which demand was refused by the officer and by appellee. That he did not claim the property as exempt under the laws of Ohio, as stated in official return of the officer; that he did not put in any defense to appellee's suit in Ohio, or submit himself to its jurisdiction, and, upon refusal as aforesaid to restore him his property, he returned home to Kentucky and instituted suit in this court and sued out his injunction, which injunction was instituted the sixth day of February, 1894. Copy of the proceedings of the justice's court of Ohio and of the injunction are filed with petition.

A demurrer was sustained to the amended petition and petition as amended, and petition dismissed by the court. Appellant filed grounds and moved for new trial, which ⁵⁷⁹ motion was overruled by the court and appellant has appealed to this court.

Appellee suggests that appellant failed to show by proper averments that the mules in controversy were, by the laws of Kentucky exempt from execution, but we think the allegations are sufficient. The petition does not show that there is any other suit pending between the parties, hence the special demurrer cannot be sustained, but appellee insists that the judgment of the justice of the peace, directing the sale of the property and disallowing the exemption, is conclusive of appellant's right to recover in this action.

Courts of justices of the peace are courts of limited jurisdiction, and there is nothing in this record to show that the justice's court had jurisdiction of the sum claimed and recovered: *Wood v. Wood*, 78 Ky. 627. But appellant does not rely upon the want of jurisdiction in the justice's court; hence, we need not notice that question further.

The important question involved in this appeal is, whether or not a citizen of this state, who is an insolvent debtor, may go

into another state for the purposes incident to interstate commerce, social intercourse, or special business, without subjecting his property, exempt by the laws of this state, from execution and attachment, which he happens to take with him, to the payment of debts due another citizen of this state, who may be watchful enough to follow and attach such property, and the debtor have no redress. It seems to us that the law will not allow a creditor to so evade and annul the laws of his own state.

Exemption laws have no force beyond the territorial limits of the state enacting the same; hence a citizen of one state, when his property is levied on in another state, cannot plead with effect the laws of his own state, because the ⁵⁸⁰ general, if not universal, rule is, that exemptions are allowed only to citizens of the state enacting such law; hence, by the laws of Ohio, the appellant could not legally claim the benefit of the law of Kentucky, or any exemption law of Ohio.

If the contention of appellee is to prevail, it follows that any insolvent citizen of this state, who takes his property into another state for any purpose, or for any length of time, makes it subject to the demands of any creditor of this state, and the same may be said of any citizen of another state who might chance to come into this state with his property.

The exact question under consideration has never been passed upon by this court, so far as we are aware, but the supreme courts of some other states have considered the question. We concur in that part of the opinion of the superior court in *Byrne v. Sinnett*, 13 Ky. Law. Rep. 831, which says: "The weight of authority is, that an injunction will lie by a citizen to restrain another citizen from instituting or prosecuting a suit in a foreign country or state, where the plaintiff in such suit is fraudulently attempting to evade the laws of this state by subjecting to the payment of his debt property temporarily in the foreign state, when, under the law of this state, the property is exempt from seizure for his debt."

The supreme judicial court of Massachusetts in *Dehon v. Foster*, 4 Allen, 545, in an elaborate opinion, held that an injunction would lie to prevent a citizen of that state from subjecting by attachment a debt due in Pennsylvania to another citizen of Massachusetts, because the effect would be to give them an advantage over other creditors of the debtor, he having made an assignment.

Chief Justice Bigelow says in his opinion: "Inasmuch ⁵⁸¹ as the defendants in the present case are citizens of and residents in this commonwealth, there can be no doubt that the jurisdic-

tion of this court over them is plenary. . . . Nor is the validity of the foreign law or of the lien acquired under it in any manner called in question. . . . An act which is unlawful and contrary to equity gains no sanction or validity by the mere form or manner in which it is done; it is none the less a violation of the law because it is effected through the instrumentality of a process which is lawful in a foreign tribunal."

The same case was again appealed to the court after final hearing in the court below, and the injunction was made perpetual: *Dehon v. Foster*, 7 Allen, 57.

The supreme court of New York, in *Vail v. Knapp*, 49 Barb. 301, enjoined a citizen of New York from prosecuting a suit in the court of Vermont.

The supreme court of Georgia, in *Engel v. Scheuerman*, 40 Ga. 209, 2 Am. Rep. 573, sustained an injunction against Scheuerman, a citizen of Georgia, restraining him from collecting a judgment obtained against Engel in the state of New York.

The jurisdiction of the court of New York to render the judgment was not questioned, but it was claimed by Engel that he had been sued in Georgia for the same debt and judgment rendered for part of the claim, which judgment he had paid off, and that Scheuerman had led him to believe by word and act that the suit in New York then pending would be abandoned, but, instead of doing so, was about to collect the judgment in New York off of Engel and his securities. We quote as follows from the opinion delivered by Justice Warner: "The states of the American Union, except for all purposes as specified in the constitution of the United States, are, in legal contemplation, foreign to each other. The courts of one state or country cannot exercise any control ⁵⁸² or superintending authority over those of another state or country, but they have an undoubted authority to control all persons and things within their own territorial limits. In such cases, the courts do not pretend to direct or control the foreign court, but, without regard to the situation of the subject matter of the dispute, they consider the question between the parties and decree in personam: *Story's Equity Jurisprudence*, sec. 899. . . .

"In *Cranstown v. Johnson*, 3 Ves. Jr., 183, the master of the rolls said: 'I will lay down the rule as broad as this: This court will not permit him [the defendant] to avail himself of the law of any other country to do what would be gross injustice.' . . .

"This bill is not filed for the purpose of restraining the proceedings of the court of New York; the courts of this state have no jurisdiction to do that. Nor would the courts of this state

have jurisdiction to enjoin the enforcement of a judgment obtained in the courts of New York between citizens of that state, resident there. . . . There is a clear distinction as to the power and authority of a court of equity in this state to restrain by injunction the personal action of a citizen of this state. . . . In the language of the master of the rolls in *Cranstown v. Johnson*, 3 Ves. Jr., 183, this court will not permit the defendant to avail himself of the law of any other country to do what would be gross injustice."

The foregoing authorities establish clearly the power and duty of the courts to prevent citizens within their jurisdiction from evading the laws of such state by and through the machinery of the law or courts of a foreign state. In the case of *Snook v. Snetzer*, 25 Ohio St. 516, almost the exact question in this case was decided by the supreme court of Ohio. Snook was a creditor of Snetzer. The Baltimore ⁵⁸³ & Ohio Railroad Company owed Snetzer a debt in West Virginia, which was by the laws of Ohio exempt from garnishment or attachment. Snook instituted suit in West Virginia seeking to subject said indebtedness to the payment of his debt against Snetzer. Snetzer sued out an injunction in Ohio against Snook to enjoin him from proceeding with his suit in West Virginia. Snook disregarded the injunction, and prosecuted the West Virginia suit to judgment and collected the debt. Snetzer then sued Snook in the Ohio court to recover back the sum so subjected in the suit in West Virginia, and recovered judgment. Snook appealed to the supreme court of Ohio, which court, after a careful and thorough consideration of the case and the authorities, affirmed the judgment.

It seems to us, upon principle as well as authority that if the averments of appellant's petition are true, he is entitled to recover. The judgment of the court below is, therefore, reversed and cause remanded, with directions to overrule the demurrers and for further proceedings consistent with this opinion.

EXEMPTION LAWS—CONFLICT OF LAWS.—When the wages of a nonresident debtor, earned and payable in another state, are sought to be garnished in Illinois, the exemption law of that state and not the state of the debtor's domicile will control, in the absence of a statute to the contrary: *Wabash R. R. Co. v. Dougan*, 142 Ill. 248; 34 Am. St. Rep. 74, and note. Wages due and payable in this state to the employé of a railroad, resident and doing business here, and here exempt from execution, cannot be garnished in another state, so as to defeat the exemption laws of this state: *Illinois etc. R. R. Co. v. Smith*, 70 Miss. 341; 35 Am. St. Rep. 651, and note. See, also, the note to *Mumper v. Wilson*, 2 Am. St. Rep. 240.

INJUNCTIONS AGAINST VIOLATION OF EXEMPTION LAWS.
A creditor who, to avoid the exemption laws of the state, commences

a garnishment in another state, may be enjoined from further prosecuting such proceeding, and compelled to relinquish any moneys he may have already realized therefrom: *Griggs v. Docter*, 89 Wis. 161; 46 Am. St. Rep. 824, and note.

PAYTON v. McQUOWN.

[97 KENTUCKY, 757.]

PRACTICE—RELIEF FROM ORDER OF SUBMISSION.—A chancellor is justified in refusing to set aside an order for the submission of a cause for judgment, where the complainant had failed to reply to the defendant's answer, on the ground that the counsel for the complainant did not know of such answer when the order for submission was made, if such counsel could have known that fact by the exercise of ordinary diligence.

JUDGMENT, RELIEF FROM, NEGLIGENCE AS A BAR TO. An injunction will not be issued against a common-law judgment on the ground that the complainant had requested an attorney to prepare an answer for him, and, relying upon the attorney's promise to do so, had gone to another county under the supposition that the answer would be filed, and the cause continued to another term.

THE NEGLIGENCE OF AN ATTORNEY AT LAW is treated as the negligence of his client, and, therefore, does not constitute a ground for enjoining a judgment alleged to be due to it.

PRACTICE.—AN INJUNCTION CANNOT BE GRANTED BY A DEPUTY CLERK of a circuit court in Kentucky, though the statute gives authority to grant injunctions to any circuit judge or to the clerk of the court or a county judge, if the judge of the court be absent from the county.

PUBLIC OFFICER, WHEN MAY NOT ACT BY DEPUTY.—When an official duty is not ministerial, it cannot be performed by a deputy. Therefore, though the clerk of a court is authorized to grant injunctions, and the statute provides that any duty enjoined thereby upon a ministerial officer, and any act permitted to be done by him may be performed by his legal deputy, such statute relates only to the discharge of ministerial duties, and does not authorize a deputy to perform the duty of determining whether an injunction shall issue.

JUDICIAL DUTIES, WHAT ARE.—Where an inquiry to be made involves questions of law, as well as of fact, and fixes a legal right, and its decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial.

JUDICIAL FUNCTIONS.—THE POWER TO GRANT AN INJUNCTION, though vested in the clerk of a court, is judicial, and therefore cannot be exercised by a deputy.

Carr & Morriss, for the appellant.

Lewis McQuown, for the appellee.

758 EASTIN, J. This equitable action was brought by appellant, in the Barren circuit court, against appellee and the sheriff of Hart county, Kentucky, for the purpose of enjoining the **759** levy and collection of an execution then in the hands of said

sheriff, and which had been issued on a common-law judgment rendered by the said Barren circuit court in favor of appellee against appellant.

It is, in substance, alleged by appellant in his petition that he was employed by one Mary E. Burks, administratrix of John Burks, deceased, to aid her in collecting the assets and paying the debts of the estate of her intestate, and that, while so engaged, he accepted an order given on himself by the said administratrix to appellee, with the understanding that he was to pay it out of funds that he might collect for the estate of said intestate and not otherwise, and that the execution sought to be enjoined was issued on a judgment rendered in an action at law brought by appellee against him on this accepted order. It is further alleged that he had not, at the time said suit was brought, nor at any time after the acceptance of the order, any money or assets belonging to the estate of said Burks in his hands with which to pay said order, or any part thereof; that, upon being served with process in the action, he went to Glasgow and laid these facts, together with the fact that he was in no way individually liable on said claim, before a practicing attorney of that bar, whom he requested to prepare and file an answer for him in the action, and who promised and agreed to do so; that, supposing that this would be done, and supposing that the action would thereupon stand continued for that term, he then returned to his home in Hart county, Kentucky, but that, for some reason unknown to him, the said attorney failed to file the answer or make defense for him, and the appellee wrongfully and fraudulently took the judgment against him on which the execution sought to be enjoined was issued.

The petition further charges that Lewis McQuown, who, **760** as administrator of W. H. Botts, deceased, is appellee herein, and who recovered said judgment against appellant, is also the attorney for the estate of said John Burks, deceased, and, as such, has directed parties indebted to said estate not to pay their indebtedness to appellant, but to pay to another, and that, in consequence thereof, appellant will never be able to collect anything more belonging to said estate or to pay the demand of appellee, and concludes with the usual averment that, unless an injunction be issued, his individual property will be levied on and sold, and he will be subjected to great and irreparable loss and injury.

On the day on which this petition was filed, to wit, August 24, 1893, and without notice to appellant, an order of injunction was entered, and an injunction as prayed for was issued, restraining the sheriff from levying said execution on the property of appel-

lant, and from taking any further steps thereunder, until the further order of the court, which was in due time executed upon said sheriff.

At the succeeding term of the court, not, however, on the third day of the term, which commenced on the third Monday in November, but on the thirteenth day of December, 1893, appellee filed an answer controverting all the allegations of the petition and pleading affirmatively the facts attending the giving of the order on appellant by Mrs. Burks and its acceptance by appellant. That order, with the acceptance thereon, is made a part of the answer, and shows on its face that it was drawn on appellant and accepted by him individually, and without qualification as to the manner in which or the fund from which it was to be paid.

No motion was made to dissolve the injunction, no reply was filed or offered to be filed to this answer, no proof was taken by either party, but, at the next term of the court, to wit, on March 12, 1894, it appears, singularly enough, in ⁷⁶¹ view of the state of the record, that the action was submitted for judgment on motion of appellant. On the next day, March 13, 1894, appellant moved to set aside the order of submission, and, in support of that motion, filed the separate affidavits of the two attorneys who were representing him in the case. On the seventeenth day of March, the court below overruled this motion to set aside the submission, dismissed appellant's petition and dissolved the injunction, with damages at the rate of ten per cent on the amount of the execution enjoined and costs, and from that judgment this appeal is prosecuted.

The principal question to be considered is, whether or not the motion to set aside the order of submission was properly overruled. The statements of the affidavits of counsel filed in support of this motion practically amount to but little more than the statement of each of these gentlemen that he did not know that an answer had been filed at the time the order of submission was entered. It is true that one of these affiants says, "that if he was present in court on the day said answer was offered and filed, that he did not hear said motion; and said answer was not in the papers of said suit when the November term ended," but he does not say how he knows this, or that he ever inquired for or looked at the papers of the case to see whether or not an answer had been filed. The other affiant says that he was detained from court by sickness during several days of the November term, but that "in a few days after said last term," he looked through the papers in the suit, and that there was then no answer among them. This must have been in December, and he does not pretend ever

to have made any further investigation, though nothing further was done in the case until the twelfth day of March following, ⁷⁰² when the case was submitted for judgment, either on his motion or the motion of his partner.

Both affiants lay much stress on the fact that appellee's answer was due on the third day of the November term, and that no order was made extending the time for filing same. But it is not pretended that any agreement was made that one should be filed at a later day in the term, nor does it appear that appellant or his counsel were in any way led to believe that none would be filed, but, on the contrary, it does appear that this answer was filed, without objection, in open court, on the thirteenth day of December, at that same term of court.

One of appellant's counsel says in his affidavit that he is informed that his client is at that time at home with a sick wife, and this may account in some measure for the fact that, although counsel discovered on March 13th that the answer had been filed and the motion to set aside the order of submission was not considered until March 17th, yet no reply controverting the allegations of the answer was tendered or filed, and no proof offered to sustain the averments of the petition. But, however this may be, we are unable to find anything in either of these affidavits sufficient to explain or overcome the fact that this answer was allowed to remain in the record uncontroverted from December 13, 1893, or to rebut the conclusion that, by the exercise of ordinary diligence, counsel could and would have discovered this fact before they voluntarily entered the order of submission on March 12, 1894. Upon these considerations alone, it seems to us that the chancellor might, as he did, in the exercise of a reasonable discretion, have refused to set aside the order of submission.

But, in support of the action of the court below, in overruling this motion and dismissing the petition, another very ⁷⁰³ potent consideration is found in the fact that the grounds, as set forth in the petition on which this injunction was asked, are insufficient to justify it. We are aware that this could and perhaps should properly have been taken advantage of by a motion to dissolve the injunction, and that no such motion was made, but still it is not to be entirely excluded on this motion made after the entire case had been submitted for judgment.

This injunction was asked, as above stated, against a common-law judgment, on the ground that appellant had requested an attorney, to whom he had submitted the facts constituting his defense, to prepare an answer for him, that he had relied upon

this attorney's promise to do so and had gone to his home in another county, supposing that his answer would be filed and the case be continued, but that, for some reason unknown to him, the attorney had failed to file the answer. This, in our opinion, is wholly insufficient to entitle appellant to relief by injunction against a judgment by default rendered against him under such circumstances. Aside from the personal negligence thus confessed on part of appellant himself, in going off to another county and never looking after his case, in which, as we understand, the default judgment was not rendered till the second term after process was served, is the fact that the gross and unexplained negligence which he thus charges upon his attorney, instead of excusing him, is, under the law, to be treated as his own negligence.

This doctrine was laid down in one of the early decisions of this court, and, so far as we are aware, has not been materially modified or departed from.

In *Patterson v. Matthews*, 3 Bibb. 80, this court said: "It is a settled rule that a new trial ought not to be awarded on account of the neglect of the agent or attorney of the ⁷⁰⁴ parties applying for it; for such neglect is equivalent to the neglect of the party himself, and he may have a remedy over against his agent or attorney."

And, in considering this exact question, Mr. High lays down the rule in this language, to wit: "The negligence or improper conduct of an attorney employed to defend a suit at law, or his failure or neglect to defend the action, will not justify an injunction against the judgment": 1 High on Injunction, 3d ed., sec. 210.

This being the law, the question of the validity or invalidity of the defense which might have been made to the action becomes wholly immaterial, and it is, therefore, unnecessary to consider the question how far appellant could have availed himself of the defense; that it was understood that he was not to be individually bound on this accepted order, but was only to pay it out of funds collected for John Burks' estate, when, by the terms of the writing itself, the obligation was personal and unqualified. No matter what his defense may have been, having failed, either by his personal negligence or that of his attorney, to answer or make defense, he was not entitled to the relief sought in this action; and, although no motion was made to dissolve the injunction on this ground, yet it was a proper matter to be considered by the court below in disposing of the case as it did.

There is still another question pertaining more directly to the

validity of this order of injunction, and which might properly have been raised on a motion to dissolve, but which might also properly have been considered by the court on the hearing, and that is the fact that this injunction was granted by the deputy clerk of the Barren circuit court. The order is signed "Jas. B. Martin, C. B. C. C., by J. H. Bohannon, D. C."

⁷⁶⁵ Has a deputy clerk power to grant such an order? The clerk certainly has this power, under certain circumstances, as it is provided in section 273 of the Civil Code of Practice, that "the injunction may be granted at the commencement of the action, or at any time before judgment, by the court, or by any circuit judge, or by the clerk of the court, or the county judge, if the judge of the court be absent from the county; or by two justices of the peace, if the judge and the clerk of the court and the county judge be absent from the county." And, if the exercise of this power to grant injunctions were merely ministerial in its character, it would be conceded that the power thus conferred on the clerk might be exercised by his deputy. By section 678 of the Civil Code of Practice, it is provided that "any duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy." But this language, in our opinion, in referring to duties to be performed, and acts permitted to be done, by a ministerial officer, is intended to include only duties and acts which are ministerial only in character and such as are to be performed and done by the officer in his ministerial capacity. When, however, a ministerial officer, or one whose general duties are of that character, is clothed, in special cases, as may be done, with the power to perform acts in their nature judicial or quasi judicial, we do not think it was the purpose or intention of the legislature, by this section of the code, to authorize the performance of such acts by a deputy. The clerk of a court is, strictly speaking, a ministerial officer, but that this power of granting injunctions, conferred upon him by the section referred to is, in its nature, not purely ministerial, but is judicial or quasi judicial, seems to us manifest, and that it cannot be delegated, either by him or any of the other officers upon whom it is conferred, either to a special ⁷⁶⁶ or a regular deputy, seems equally manifest. It is not analogous to the power conferred upon him to issue attachments, which may be done by a deputy. There he is required to see that an affidavit in a special form, prescribed by law, is filed. But here, where an immediate order of injunction is asked for without notice, as was done in the case before us, it is expressly provided by

section 276 of the code, that it shall not be granted "unless the court or officer, to whom the application is made, shall be satisfied, by the affidavit of the applicant or by other evidence, that irreparable injury will result to the applicant if the injunction be not immediately granted." This requirement clearly demands investigation and consideration judicial in its character. He is to consider and determine, as a quasi judicial officer at least, the sufficiency of the application, in law and in fact, under the evidence presented, before granting the order.

In defining judicial power this court has said: "We regard it as an indisputable proposition that where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and where the decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial": *Commonwealth v. Jones*, 10 Bush, 749.

All the elements entering into this definition of judicial powers seem to us to exist in this power of granting injunctions. But the language of the section conferring this power, as well as the fact that it is conferred on no others except those whose functions and duties are strictly judicial, seems to us conclusive that this power is intrusted to the clerk personally, that it is in its nature judicial, and is one that cannot be delegated. By the language of the provision itself, the power is given to the clerk, and not to his ⁷⁶⁷ deputy; it certainly involves the exercise of discretion and judgment, and, under the general rule governing such powers, the person to whom they are delegated, and in whom the trust is reposed, cannot delegate or intrust their exercise to the judgment and discretion of another. In a certain contingency, the clerk may grant an injunction, and, if the judge, the clerk, and the county judge be absent from the county, then two justices of the peace may grant the injunction. If it had been contemplated that the deputy clerk, in any state of case, should have this power, the law would have conferred it, in the event of the absence of the clerk from the county, as it must be presumed that the clerk would leave a deputy in charge of his office, and would have said that, if the judge and the county judge and the clerk and all his deputies are absent from the county, then the two justices may act.

We cannot believe that it was ever intended to intrust so important a function, involving, as it necessarily does, the exercise of judicial discretion, to every deputy clerk in this commonwealth, many of whom are wholly without experience, and who, under

the laws of this state, may even be under the age of twenty-one years, and we think, therefore, that the injunction issued in this action was invalid, and should have been dissolved, for the additional reason that it was issued by a deputy clerk.

We are of the opinion that the court below properly dissolved appellant's injunction and dismissed the petition with damages and costs, and that judgment is affirmed.

Negligence as a Bar in Equity to Relief against Judgments.

There is no doubt of the general acceptance of the doctrine of the principal case, that one who has been negligent in the defense or prosecution of an action or suit which has resulted in a judgment against him, from which he seeks relief in equity, will be left without redress, if it be shown that, by proper diligence, he might have prevented the rendition of such judgment. The rule, in our opinion, has been too rigidly applied. It is true all litigants ought to be diligent, and their negligence, or that of their attorneys or other agents, should not be encouraged, and perhaps some penalty might justly be imposed therefor, but the penalty, if any, ought to be proportionate to the fault; and it ought not to be a sufficient answer in all cases to a claim for relief, based upon the most perfect equity, that the applicant has himself been guilty of a mere lack of diligence. In truth, there are instances in which persons against whom suit is brought, from their knowledge that there is no sort of claim against them, are not able to understand the necessity for defense, and therefore fail to appear in court at the proper time, and suffer default to be entered against them; and, while there are statutes in force in most of the states permitting them to apply to the court on motion to be relieved from judgments entered against them through their mistake, inadvertence, or excusable neglect, there are instances in which such statutes are not adequate for their protection. In this, and perhaps in other cases, where the equity of the party seeking to escape from the judgment is unquestionable, courts might, we think, create some exception to the general rule denying relief in all cases where the applicant is chargeable with negligence in not having properly presented his case to the consideration of the court in which the original judgment was rendered.

It is the duty of every litigant to enter his appearance in the court having jurisdiction of his cause within the time and in the manner prescribed by law, to present his cause of action or of defense by appropriate pleadings, to inform himself of the time and place of trial, to prepare for that trial by ascertaining the evidence in existence necessary to support his contention, and to rebut that of his adversary, to take proper measures to enable him to produce that evidence at the trial, to obtain continuances if from any cause he is unable to proceed to trial at the time appointed, to so conduct the trial that his cause shall be fully presented to the court, and, if he is denied the right to so present it, to take such exceptions as will permit his seeking a remedy by appeal, and, finally, if the cause is decided against him, and a right of appeal exists, to take, within the time and in the manner prescribed by law, the measures necessary for the full presentation of his cause upon such appeal.

General Rule.—It sometimes happens that a judgment is rendered against a litigant which is clearly inequitable and unconscionable. Accident, mistake, fraud, or other wrongful conduct of his adversary may have contributed to this result, and the circumstances may be such that he cannot obtain relief except in equity, and his equities may be of so persuasive a character that the courts would be anxious to afford him redress, had he been diligent on his part, but, if he has allowed himself to be put in an unfortunate position through his negligence or inattention with respect to any of his duties to which we have referred, equity will not interpose in his behalf: *Waldron v. Waldron*, 76 Ala. 285; *Tillis v. Prestwood*, 107 Ala. 618; *Champion v. Woods*, 79 Cal. 17; 12 Am. St. Rep. 126; *Stroup v. Sullivan*, 2 Ga. 275; 46 Am. Dec. 389; *Bellamy v. Woodson*, 4 Ga. 175; 48 Am. Dec. 221; *Ames v. Snider*, 55 Ill. 498; *Cairo etc. Ry. Co. v. Holbrook*, 92 Ill. 297; *Ratliff v. Stretch*, 130 Ind. 282; *English v. Aldrich*, 132 Ind. 500; 32 Am. St. Rep. 270; *Hollinger v. Reeme*, 138 Ind. 363; 46 Am. St. Rep. 402; *Landrum v. Farmer*, 7 Bush, 46; *Casey v. Gregory*, 13 B. Mon. 505; 56 Am. Dec. 581; *Amherst College v. Allen*, 165 Mass. 178; *Kelleher v. Boden*, 55 Mich. 295; *Yarborough v. Thompson*, 3 Smedes & M. 291; 41 Am. Dec. 626; *Jordan v. Thomas*, 34 Miss. 72; 69 Am. Dec. 387; *Ross v. Holloway*, 60 Miss. 553; *Norwegian etc. Co. v. Bollman*, 47 Neb. 187; *Parker v. Jones*, 5 Jones Eq. 276; 75 Am. Dec. 441; *Brenner v. Alexander*, 16 Or. 349; 8 Am. St. Rep. 301; *Prater v. Robinson*, 11 Heisk. 391; *Tompkins v. Drennen*, 56 Fed. Rep. 694; *Hendrickson v. Hinckley*, 17 How. 443; *Crim v. Handley*, 94 U. S. 652; *Freeman on Judgments*, secs. 486, 502, 503.

This rule is not restricted to the original parties to the action, but applies to such other persons as, during the progress of a cause, are brought before the court for any purpose which may result in a determination against them. Hence, if a person is garnished, and it becomes necessary for him to answer the process of garnishment, and to make some disclosure respecting his obligations to one of the parties, and through his negligence or inattention, either in making an imperfect or incorrect disclosure, or in failing to appear at all, he causes a judgment to be entered against him for a sum greater than that due, or, when nothing whatever is due, he will not be relieved in equity: *Stroup v. Sullivan*, 2 Ga. 275; 46 Am. Dec. 390; *Paynter v. Evans*, 7 B. Mon. 420; *Yarborough v. Thompson*, 3 Smedes & M. 291; 41 Am. Dec. 626; *Field v. McKinney*, 60 Miss. 763; *Freeman v. Miller*, 53 Tex. 372; *Anderson v. Oldham*, 82 Tex. 228; *Tillis v. Prestwood*, 107 Ala. 618.

Negligence in Suffering a Default.—The first step toward the diligence required of litigants is appearing before the court at the time and place designated in the process, and in such a manner as will prevent the entry of judgments against them by default. If, through negligence or inattention, this duty is omitted, and a judgment follows as a consequence thereof, though of an unconscionable character, no relief can be had against it in equity: *Hoey v. Jackson*, 31 Fla. 541. The duty of appearing in response to the process cannot be avoided through forgetfulness or misapprehension. There are many cases in which the failure to appear, if negligent at all, seemed to be excusable, if negligence admits of any excuse, and in which relief was denied in equity. Relief, therefore, will be denied if the

failure to appear was due to the not reading of the summons, and the belief that it was for a sum which the defendant admitted to be owing from him to the plaintiff, whereas it was for a much larger sum: *Slappey v. Hodge*, 99 Ala. 300; or to the sickness of counsel, the client knowing of the sickness, and taking no measures to procure other counsel to enter a proper plea: *Clark v. Ewing*, 93 Ill. 572; or to the failure of defendant to recollect that the process had been served on him: *Cullum v. Casey*, 1 Ala. 351; or to a reliance upon the promise of the officer who served the process to ascertain and inform defendant whether it was meant for him or for some other person of the same name: *Higgins v. Bullock*, 73 Ill. 205; or, to the fact that the defendant did not believe that any court would be held at that term, owing to the excitement in the country respecting the war: *George v. Tutt*, 36 Mo. 141; or to the failure of an attorney employed by the defendant to read the writ, and to his thereby being left in the belief that the cause was pending in another court: *Ayres v. Morehead*, 77 Va. 586; or to some misapprehension as to the employment of counsel, as where an attorney has been written or spoken to about attending to the case, but no effort had been made to ascertain whether he was doing so or not, and he had not been given such information as to the facts as would have enabled him to give the case proper attention: *Griffith v. Thompson*, 4 Gratt. 147; *Hill v. Bowyer*, 18 Gratt. 364; *Cabell v. Roberts*, 6 Rand. 580; *Shields v. McClung*, 6 W. Va. 79; *Barnhorst v. Armstrong*, 42 Fed. Rep. 2.

Negligence in Pleading.—Either at the time of appearing, or at some subsequent time fixed by law, by stipulation, or by an order of court, it is necessary for the defendant to file some pleading either denying the allegations of the plaintiff's complaint, or challenging their sufficiency, or alleging some matter in avoidance. A judgment resulting from a neglect to plead at all, or from the neglect to plead any known cause of action or matter of defense, will not be enjoined: *Bellamy v. Woodson*, 4 Ga. 175; 48 Am. Dec. 221; *Platt v. Sheffield*, 63 Ga. 627; *Ames v. Snider*, 55 Ill. 498; *Jordan v. Thomas*, 32 Miss. 72; 69 Am. Dec. 387; *Vilas v. Jones*, 1 N. Y. 274.

Neglect in Preparation for Trial.—The pleadings being in, the next duty of every litigant is to prepare for trial, and that preparation may consist: 1. Where he is not already fully informed upon the subject, of such examination and inquiry as will disclose all the facts pertinent to the litigation, and will discover the witnesses and other means of proof; and 2. Of the taking of the measures necessary to procure the attendance of witnesses or the production in court of such documentary and other evidence as may be material and competent. After a judgment has been entered against him, an unsuccessful litigant may seek relief therefrom in equity on the ground of evidence which he has discovered since the trial, or which, though known to him before the trial, could not have been produced thereat, or because he could not procure the attendance of witnesses who, if present, would have proved his cause of action or of defense. Either of these matters, in connection with circumstances showing the judgment recovered to be unjust and unconscionable, may entitle the plaintiff to relief, but as it was his duty to inform himself before the trial of all material facts respecting the litigation, and to take such measures as might enable him to prove those facts at the trial, any

want of diligence in either of these respects is fatal to his subsequent application for relief in equity. It is not sufficient that he has, since the trial, discovered evidence which might have changed the result and of which, until such discovery, he was wholly ignorant, or that he may now procure the attendance of some witness or procure some other means of proof which were not produced at the trial. He must, in either case, to entitle himself to relief, satisfy the court that his not discovering the evidence prior to the trial, or his not producing the witness or other means of proof at the trial, was not due to any want of diligence on his part, or on that of his attorneys, or other agents: *McCollum v. Prewitt*, 37 Ala. 573; *Fisher v. Greene*, 5 Col. 541; *Palmer v. Bethard*, 66 Ill. 529; *Tallman v. Becker*, 85 Ill. 183; *Kirby v. Pascault*, 53 Md. 531; *Robb v. Halsey*, 11 Smedes & M. 140; *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Stillwell v. Carpenter*, 59 N. Y. 414; *Wells v. Wall*, 1 Or. 295; *Henderson v. Mitchell*, 1 Ball, Eq. 113; 21 Am. Dec. 526; *Turley v. Taylor*, 6 Baxt. 376; *Akers v. Akers*, 83 Va. 633; *Hevener v. McClung*, 22 W. Va. 81; *Bloss v. Hull*, 27 W. Va. 503; *Freeman on Judgments*, sec. 506.

Negligence in Not Attending the Trial.—It is also the duty of every litigant to ascertain when his case will be called for trial, and to be present thereat, if his presence is necessary. Every omission of this duty is negligence, and no relief in equity can be had from a judgment resulting therefrom. It is not sufficient that the party seeking relief was absent from the state at the time of the trial, or under some misapprehension with respect thereto, or had been led to believe that the trial would not take place, unless he gave to his business such attention as it deserved, and exercised a reasonable diligence to ascertain whether or not the belief under which he acted was well founded: *Mastick v. Thorp*, 29 Cal. 441; *Combs v. Choven*, 89 Ga. 179; *Albro v. Dayton*, 28 Ill. 325; *Bardonski v. Bardonski*, 144 Ill. 284; *White v. Cabal*, 2 Swan, 550; *Burnley v. Rice*, 21 Tex. 171. If the party knows of the time of the trial, and has, or believes he has, a sufficient excuse for his absence, and he is represented by counsel, who permits the trial to proceed without objection, or who moves for a continuance on account of the absence of his client, and that the continuance is refused, no relief can be had in equity, for, in the one case, the going to trial is a result of the mistake or bad judgment of his attorney (*Smith v. Lowry*, 1 Johns. Ch. 320), and, in the other, the question of the propriety of proceeding to trial under the circumstances having been submitted to the trial court, its decision cannot be reviewed in equity: *Cammann v. Traphagan*, 1 N. J. Eq. 28.

Negligence or Mismanagement at the Trial.—If the judgment against which relief is sought might have been prevented by the exercise of proper diligence at the trial, equity will not interfere, as where the complainant himself did not attend the trial, and therefore failed to testify to facts within his knowledge, or to make proper suggestions respecting the cross-examination of the witnesses of his adversary: *Ames v. Snider*, 55 Ill. 498; or in some other respect did not make proper preparations for the trial: *McCollum v. Prewitt*, 37 Ala. 573; or, being sued as a garnishee, permitted judgment to be entered against himself through his neglect in not answering interrogatories: *Warren v. Copp*, 48 La. Ann. 810; or failed to remember a fact which would have constituted a complete defense to the action: *Bailey v.*

Anderson, 6 Humph. 149; or did not exercise diligence in producing vouchers showing credits in his favor: Webster v. Hardisty, 28 Md. 592; or did not apply for leave to examine the books of his adversary where he knew that such examination was necessary: Hines v. Beers, 76 Ga. 9; or wholly failed, under the advice of his counsel, to offer evidence of material facts: Fentress v. Robins, N. C. Term Rep. 177; 7 Am. Dec. 704; or permitted important evidence to be received without objection: Galena etc. Ry. Co. v. Ennor, 163 Ill. 55.

Generally, when a party is present at the trial, or is represented by counsel, he must there pursue all the remedies necessary to insure him a full and complete hearing on the merits, and, if he finds himself embarrassed by the absence of witnesses, or by any other cause through which he fears he cannot safely proceed to trial, he should seek relief in the trial court by suggesting a continuance, or by resorting to any other remedy there available, and, failing to do so, he cannot obtain relief in equity. Hence, relief will not be granted because of his inability at the time of the trial to procure an exemplified copy of a record, or the failure of the principal witness to recollect facts within his knowledge, such failure arising from serious pain and the use of opiates to alleviate it. "Accidents of this kind occasionally occur in the course of trial; but the plain remedy for such an embarrassment is an application to the court to postpone the trial or continue the case, as the circumstances may require. Applications of the kind, if well founded, are seldom or never refused; but if a party elect to proceed and take his chances of success, he cannot, if the verdict and judgment are against him, go into equity and claim to have the judgment enjoined": *Crim v. Handley*, 94 U. S. 659. If for any cause a party cannot safely enter upon the trial, he should seek a continuance, and if such cause is not known to him until the trial is in progress, then application should promptly be made to the trial court for time in which to supply the defect or to otherwise relieve the party from a contingency which has arisen and which he could not reasonably be expected to anticipate. Whether a continuance or other relief will be granted is a question for the decision of the trial court, and any errors which it may make must be corrected by motion for a new trial or by an appeal, and whether these remedies are resorted to or not, cannot furnish a sufficient foundation for an injunction against the judgment: *Ratliff v. Stretch*, 130 Ind. 282; *Canada v. Barksdale*, 84 Va. 742. "In England and in most, if not all, of the American states, either through statute or through judicial action, courts of law have acquired, and constantly exercise, full power to grant new trials, whenever, from the wrongful acts or omissions of the successful party, or from accident or the mistake of the other party, or from error or misconduct of the judge or the jury, there has been a failure of justice. In other words, the powers of courts of law to set aside verdicts or judgments, are so ample as to meet all the requirements of equity and justice, and the special equitable jurisdiction with respect to this matter has become obsolete in the very large majority of the states, if not in all of them": *Pomeroy's Equity Jurisprudence*, sec. 1365.

Negligence in Prosecuting Appeals.—After a judgment is entered, if the judgment debtor has a remedy by appeal to correct any errors therein, and thereby to deprive it of the power to do him injustice, he must

pursue that remedy, and his negligence in pursuing it must deprive courts of equity of the power to grant him aid, whether he altogether failed to appear because he had not examined the judgment, and did not know that it was for an improper sum: *Anderson v. Oldham*, 82 Tex. 228; or, undertaking to appeal, he or his counsel is guilty of error or negligence whereby the record is not perfected in due time, or is for some reason not adequate to fully present his cause on its merits: *Augusta etc. Assn. v. McAndrew*, 63 Ga. 490; *Palmer v. Gardiner*, 77 Ill. 143; *Ruppertsberger v. Clark*, 53 Md. 402; *Miller v. Bernecker*, 46 Mo. 194; *Galbraith v. Barnard*, 21 Or. 67.

Negligence of Attorneys and Other Agents.—A complainant seeking relief from a judgment is chargeable with the negligence of his attorneys and other agents. This rule is a harsh one, because there seem to be no exceptions to it, though the agent chosen was apparently proper and skillful, and the principal himself did everything which he might reasonably be expected to do in the management of his cause to insure its full presentation upon its merits. Relief in equity cannot be had because of any act or neglect of the complainant's attorney in the management of the original cause, not involving actual fraud. The character of the act or neglect is not material. It may consist of entire inattention to the business intrusted to him, of his failure to appear or to plead at the trial, of his misinforming his client with respect to the time of the trial or to the advisability of his being present thereat, or to his procuring witnesses or other evidence, or of an error of judgment with respect to the pleadings, the evidence, or any other matter involved in the management of the cause. In all these cases no relief can be obtained in equity: *Borland v. Thornton*, 12 Cal. 440; *Odell v. Mundy*, 59 Ga. 641; *Sasser v. Olliff*, 91 Ga. 84; *Schricker v. Field*, 9 Iowa, 366; *Darling v. Baltimore*, 51 Md. 1; *Chester v. Apperson*, 4 Heisk. 639; *Wallace v. Richmond*, 26 Gratt. 67; *Ayres v. Morehead*, 77 Va. 576; *Hiles v. Mosher*, 44 Wis. 601; *Barhorst v. Armstrong*, 42 Fed. Rep. 2; *Bateman v. Willoe*, 1 Schoales & L. 201.

The same rule applies when the agent is a public officer charged with the performance of an official duty, which he neglects, as where he is a city attorney, and fails to ascertain the existence of a cause of action in favor of the city: *Darling v. Baltimore*, 51 Md. 1; or is a county clerk, and does not disclose the service of process upon him against the county, and in consequence of which a judgment is entered against it by default: *Knox Co. v. Harshman*, 133 U. S. 153.

If a litigant authorizes another to employ an attorney for him, or to conduct other measures for the proposed defense of the action, and another attorney is not employed, or the other measures essential to the defense are not taken, no relief can be had, in the absence of actual fraud: *Neville v. Pope*, 95 N. C. 346; *Sullivan v. Shell*, 36 S. C. 578; 31 Am. St. Rep. 894.

Each member of a partnership is an agent therefor, and, if a judgment is entered against it which he might have prevented by the exercise of due diligence, all the members of the firm must suffer therefrom: *Walker v. Kretslager*, 48 Ill. 502.

The negligence of an attorney or other agent may be so gross that the principal can sustain an action at law against him therefor, but this right of action may be without substantial value, owing to the in-

solvency of the agent. This inadequacy of the legal remedy does not, however, result in any variation of the rule of equity that the neglect of an agent is chargeable to his principal, and he cannot obtain relief from a judgment at law resulting from such neglect, or which might have been prevented by the exercise of proper care on the part of his attorney or other agent: *Kern v. Strausberger*, 71 Ill. 413; *Rogers v. Parker*, 1 Hughes, 148.

It has sometimes been insisted that an exception to the general rule, that a party cannot obtain relief from a judgment by resort to equity when he has been guilty of negligence on his part, arises when he has in his possession a receipt or release clearly showing that the judgment against him was inequitable. This exception is founded upon the assumption that the evidence in his possession is of a "permanent and unerring nature to the points before in issue," and there are several decisions which seem to sustain this exception: *Winthrop v. Lane*, 3 Desaus. Eq. 324; *Countess of Gainsborough v. Gifford*, 2 P. Wms. 424. It has also been held that where the defendant, in his answer to a bill in equity to enjoin the collection of a judgment, admitted the equity of the bill, or, in other words, did not deny that the judgment obtained against him was unconscionable, relief would be granted, although the complainant had been guilty of negligence in the prosecution of his defense in the original action: *Vanlew v. Bohannon*, 4 Rand. 537. This decision, as well as the decisions permitting the granting of relief against a judgment to a party who was able to produce a receipt for the debt or a release of the cause of action, do not seem to be maintainable upon principle. Of course, the production of the receipt or release makes the equity of the complainant less disputable, and perhaps shows that there ought to be some exception to the general rule, that a party will not be relieved from a judgment which, by the exercise of diligence he might have prevented. The true rule upon the subject, we think, is that the loss of a receipt or other paper and its subsequent recovery may entitle a party to relief, when aided by other circumstances to some extent at least excusing his failure to present it at the trial: *Gold v. Bailey*, 44 Ill. 491; 92 Am. Dec. 190; *Wilday v. McConnell*, 63 Ill. 278. Such was the very remarkable case of *Ahl v. Ahl*, 71 Md. 555. Before the case came on for trial, counsel were shown an acknowledgment in writing purporting to be made in 1877, and which, if then made, was inconsistent with the existence and loss of an agreement upon which their client relied. Notwithstanding his protestations, one of the counsel withdrew from the case, and the other refused to defend upon the theory of the existence and loss of the paper, and merely interposed a technical defense without success. The client afterward succeeded in finding the lost paper, and in showing that the acknowledgment which induced his counsel to abandon his defense had been made in 1876, instead of 1877, and that the figures "1876" therein had been altered to "1877" with such neatness and care that such alteration did not attract the attention of an ordinary observer.

Equitable Defenses.—There are defenses which may be interposed to an action at law which the defendant therein may, if he chooses, reserve for the action of some other tribunal. Thus, if a party sued at law has a defense of an equitable character of which a court of law may take cognizance, he need not, in general, present his equit-

able defenses, but may allow judgment by default to be taken against him, and may afterward assert his equitable defenses for the purpose of obtaining relief against the judgment: *Morrison v. Hart*, 2 Bibb, 4; 4 Am. Dec. 663; *Hempstead v. Watkins*, 6 Ark. 317; 42 Am. Dec. 696; *Fannin v. Thomasson*, 45 Ga. 533; *Clay v. Fry*, 3 Bibb. 248; 6 Am. Dec. 654. A recovery in an action in ejectment, in which nothing but the legal title is in issue, is no bar to any proceedings in chancery, founded upon the equitable title: *Allen v. Stephanus*, 18 Tex. 658; *Brown v. Wyncoop*, 2 Blackf. 230.

Want of Diligence Brought About by Adverse Party.—The rule that a party cannot in equity obtain relief from a judgment where he has been guilty of want of diligence is subject to the further exception that such want of diligence may be excused when it is the result of the act or fraud of his adversary, or of the latter's attorneys or other authorized agents. If, during the progress of the cause, the parties thereto compromise their differences, one paying to the other the amount agreed upon, neither can reasonably expect that the other will, notwithstanding such settlement and payment, proceed with the cause; and his so proceeding to the entry of a judgment is an actual fraud, against which relief may be had in equity, though the judgment might have been prevented by filing a supplemental plea or otherwise calling the attention of the court to the fact that the cause had been settled between the parties: *Gates v. Steele*, 58 Conn. 316; 18 Am. St. Rep. 268; *Greenwaldt v. May*, 127 Ind. 511; 22 Am. St. Rep. 660. So, though there has been no actual settlement of the controversy, one of the parties litigant may fail to present his claim or defense because of his reliance upon some agreement or understanding between himself and his adversary, which, if observed, would have rendered such presentation unnecessary; and it may be said generally that whenever a litigant or his attorney, by his act or agreement, causes his adversary to relax the diligence which might otherwise be expected of him such relaxation cannot be urged as a sufficient reason for denying relief from a judgment obtained thereby: *Freeman on Judgments*, sec. 492; *California etc. Co. v. Porter*, 68 Cal. 369; *Chambers v. Robbins*, 28 Conn. 552; *Stone v. Lewman*, 28 Ind. 97; *Johnson v. Unversaw*, 30 Ind. 435; *Nealis v. Dicks*, 72 Ind. 374; *Baker v. Redd*, 44 Iowa, 179; *Broaddus v. Broaddus*, 3 Dana, 536; *Kent v. Ricards*, 2 Md. Ch. 392; *Newman v. Meeks*, *Smedes & M. Ch.* 331; *Keeler v. Elston*, 22 Neb. 310; *Cadwallader v. McClay*, 37 Neb. 359; 40 Am. St. Rep. 496; *Holland v. Trotter*, 22 Gratt. 136; *Dandridge v. Harris*, 1 Wash. (Va.) 326; 1 Am. Dec. 465. There have been many instances, also, in which a defendant has been assured that he need not appear, that the action against him would be dismissed, and that he was made a formal party, and that the judgment against him could not operate to his injury, and he has been thereby caused to relax the diligence which he would otherwise have exercised, and his adversary, taking advantage of this lack of diligence, has caused judgment to be entered against him. In such cases relief has generally been granted: *Norman v. Burns*, 67 Ala. 248; *McLeran v. McNamara*, 55 Cal. 508; *Gates v. Steele*, 58 Conn. 316; 18 Am. St. Rep. 268; *Markham v. Angler*, 57 Ga. 43; *Stone v. Lewman*, 28 Ind. 97; *Johnson v. Unversaw*, 30 Ind. 435; *Broaddus v. Broaddus*, 3 Dana, 536; *Keeler v. Elston*, 22 Neb. 310; *Jarman v. Saunders*, 64 N. C. 367. The principle that taking

judgment in opposition to an agreement or representation of a party or his attorney is such a fraud that the parties will be restored to their former position is applicable whenever the defendant, on account of the agreement, fails to answer, or, after answering, fails to attend the trial: *Pearce v. Olney*, 20 Conn. 544; *Rogers v. Gwinn*, 21 Iowa, 58; *Edmondson v. Moseby*, 4 J. J. Marsh. 497; *Weirich v. De Zoya*, 2 Gilm. 385; *Dobson v. Pearce*, 12 N. Y. 156; 62 Am. Dec. 152; *Dobson v. Pearce*, 1 Abb. Pr. 97; or when the person against whom the recovery has been had was a garnishee, who, being summoned, had answered, showing that he had no funds of the defendant in his hands, and had thereupon been assured that no further proceedings had been taken against him: *Pelham v. Moreland*, 11 Ark. 443. Where A was sued upon a note and mortgage, and the plaintiff, for a valuable consideration, released him from personal liability, but took judgment in violation of his contract, and issued execution thereon, such execution was restrained, on the ground that it "was against conscience for the mortgagee to retain his advantage": *Hibbard v. Eastman*, 47 N. H. 507; 93 Am. Dec. 467. It makes no difference that the agreement is void because made on Sunday, or was oral, when the rules of the court required all stipulations to be in writing. If it can be shown that it was successfully employed to prevent the defendant from making his defense, then the plaintiff will not be allowed to retain the advantage it has secured him: *Blakesley v. Johnson*, 13 Wis. 530. In one case it was held that a judgment would not be relieved on an allegation that it was entered in violation of an agreement between counsel, unless it was further averred that the counsel were authorized to make the agreement, or that it had been subsequently ratified by the parties: *Anderson v. Oldham*, 82 Tex. 228. This decision seems to us unsound in principle. Each of the parties may reasonably believe that the attorney of the other is authorized to represent him in the various stages of the proceedings, and cannot be expected to call for any other evidence of his authority to act than the fact that he has appeared in the action for his client, and if, through misapprehension respecting the apparent authority of an attorney, a judgment should be procured in violation of an agreement made by him, no court of equity ought to hesitate to grant relief therefrom, and to place the party in the same position as he was in at the time of the making of the agreement upon which he relied. There may, indeed, be causes in which the allegations of the complaint are so explicit that the defendant is not justified in relying upon representations made to him in necessary conflict therewith. Thus, where a senior mortgagee was made a party defendant under a complaint alleging that any lien held by him was junior and subordinate to that of the mortgage sued upon, it is said that he had no right, as against this allegation, to rely upon statements made by counsel for the junior mortgagee to the effect that he was made a party only for the purpose of barring his equity of redemption under a judgment for costs held by him and constituting a lien upon the property, and therefore that his failure to plead his senior mortgage was inexcusable neglect, and he cannot be relieved from a judgment entered against him in default of such plea, and the effect of which must be to give precedence to the junior mortgage: *English v. Aldrich*, 132 Ind. 500; 32 Am. St. Rep. 270. It was also held in one case

that a wife had no right to rely upon representations made by her husband pending a suit between them for divorce with respect to the property owned and acquired by them since their marriage, and that she could not avoid a judgment rendered in such suit in accordance with the representations made by her husband respecting the character and amount of their community property, though she was deceived thereby, and by such deceit and her confidence in him was prevented from making the requisite inquiry before the original judgment was entered to ascertain the existence of all the community property in which she was entitled to share. It was said that she was guilty of inexcusable carelessness in relying upon his statements; *Champion v. Wood*, 79 Cal. 17; 12 Am. St. Rep. 126. The case was clearly one in which to punish the carelessness of a wife in believing her husband was to reward his deliberate perfidy, and we think it would have done less discredit to the "conscience of the chancellor" had he placed his decision on some other ground.

OFFICERS.—JUDICIAL AND MINISTERIAL ACTS are discussed and distinguished in the extended note to *Flournoy v. Jeffersonville*, 79 Am. Dec. 472-476.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

ESTATE OF CHAPOTON.

[104 MICHIGAN, 11.]

DESCENT—CHILDREN WHO ARE.—The word “children,” as used in a statute providing that if the intestate shall leave no issue, father, or mother, his or her estate shall descend, subject to the provision therein made for the widow or husband, in equal shares to his or her brothers and sisters, and the “children” of deceased brothers and sisters, by right of representation, does not include the grandchildren of a deceased brother or sister of the intestate.

Griffin & Warner, for the appellant.

J. W. A. S. Cullen and S. T. Miller, for the respondent.

12 HOOKER, J. This record raises the question of the right of grandchildren of a deceased brother to inherit a portion of the estate of the intestate, in a case where brothers and sisters of the intestate survived him. This depends upon the construction of the word “children” in the second subdivision of section 5772 a of 3 Howell’s Statutes, which provides that: “If the intestate shall leave no issue, father, or mother, his or her estate shall descend, subject to the provision herein made for the widow or husband, if a widow or husband survive the deceased, in equal shares to his or her brothers and sisters, and the children of deceased brothers and sisters, by right of representation.”

Howell’s Statutes, section 2, subdivision 1, provides that, in the construction of the statutes, “all words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.”

The commonly accepted definition of the word "child" is, "a son or a daughter; a male or female descendant in the first degree": Webster's Dictionary. "Grandchildren" are rarely called "children," the word "descendants" being ¹³ ordinarily considered more comprehensive than the word "children" or "grandchildren"; and the term "children" cannot be said to have a technical or peculiar meaning in the law, though it has been held to extend to "grandchildren" in some cases. In Bouvier's Law Dictionary, title "Child," it is said: "The term 'children' does not ordinarily and properly speaking, comprehend 'grandchildren,' or issue generally, yet sometimes that meaning is affixed to it in cases of necessity": In re Curry's Estate, 39 Cal. 529; Adams v. Law, 17 How. 417. We shall find this statement of Bouvier confirmed in many cases involving wills, although cases are not rare where the term "children" has been held coextensive with "issue" or "descendants." Such holdings are not put upon the ground that the word "children" has a technical or peculiar meaning in the law, but because such meaning is necessary to give effect to the instrument, or because of an evident intent upon the part of a testator. It is in deference to the rule that the intent is to be sought after and given effect in the construction of wills, which may be done to the extent of holding illegitimate children to be included in the term "children," though the law ordinarily excludes them: See Bouvier's Law Dictionary, tit. "Child," subd. 3; In re Curry's Estate, 39 Cal. 529; 4 Kent's Commentaries, 345. In Reeves v. Brymer, 4 Ves. 698, cited by counsel, the court said that "'children' may mean 'grandchildren' where there can be no other construction, but not otherwise": Pride v. Fooks, 3 De Gex & J. 252.

In this connection, we may profitably consider the statute under discussion. The first subdivision provides that property shall descend to the children of the intestate, and to the issue of any deceased child by right of representation. The same subdivision declares that, if no child of the intestate be living at his death, his estate shall descend to all his other lineal descendants, etc. Here it is noticeable ¹⁴ that the word "child" is unquestionably used in the ordinary sense. The third subdivision provides that if the intestate shall leave no issue, husband, widow, father, mother, brother, sister, nor children of brother or sister, his estate shall descend to his next of kin in equal degree, where they claim through ancestors equally near. This subdivision again uses the word "children" in close proximity to the term "issue," indicating an understanding of the difference in meaning between them. It also contains clear evidence that it was not the inten-

tion to apply the right of representation to cases where property descends to collateral heirs, beyond certain limits. It also discriminates between collateral kindred of the same degree, by favoring those having the nearest ancestor. It is manifest that, in the opinion of the lawmakers, the right of representation must end somewhere. If not, there would be no occasion for providing for a descent to the next of kin in equal degree. We may think that grandnieces and nephews are too near to be excluded; others might think that the right of representation should be much further extended. It was for the legislature to fix the point where it should end, and we see no way of avoiding the conclusion that this was done intelligently. So long as there are lineal descendants, the right of representation is preserved, but, in dealing with collateral relations, it has been as carefully restricted. The courts of Massachusetts have taken this view of the statute of that state, which is similar: *Bigelow v. Morong*, 103 Mass. 287.

We do not feel justified in holding that the word "children," where used in the statutes, has the same meaning as the word "issue" or "descendants," and are constrained to affirm the judgment of the circuit court.

McGrath, C. J., Grant and Montgomery, JJ., concurred.

Long, J., did not sit.

DESCENT—CHILDREN—WHETHER GRANDCHILDREN ENTITLED TO INHERIT AS.—A bequest to children does not include grandchildren, except from necessity, which occurs when the will would remain inoperative unless the sense of the word "children" is extended beyond its natural import: *Estate of Hunt*, 133 Pa. St. 260; 19 Am. St. Rep. 640, and note; *Scott v. Nelson*, 3 Port. 452; 29 Am. Dec. 266, and note; *Mowatt v. Carow*, 7 Paige, 328; 32 Am. Dec. 641, and note. In *Douglass v. James*, 66 Vt. 21, 44 Am. St. Rep. 817, the word "children" in a will was so construed as to let in a grandson of the testator. See further on this subject the cases collected in the note to *In re Ingram*, 12 Am. St. Rep. 97, 104.

ROUSE v. DONOVAN.

[104 MICHIGAN, 234.]

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—A statute authorizing the issue of execution against the individual members of a limited partnership association to the extent of the unpaid portions of their stock subscriptions, after judicial investigation and determination thereof, and after execution against the association has been returned unsatisfied, is not in conflict with constitutional provisions requiring due process of law.

STATUTES—CONSTRUCTION.—The decisions of a court of last resort in one state, sustaining the validity of a statute in its entirety, are entitled to great respect by the courts of another state, when passing upon the validity of an entirely similar statute enacted in the latter state, and are generally held to be controlling when the law has been enacted after such decisions were made.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW means that notice or summons by which a party is tendered his day in court, with the right to frame an issue and be heard before a judgment can be rendered or execution issued which shall take away his liberty or property.

Bowen, Douglas & Whiting, and O. Kirchner, for the relator.

Russel & Campbell, for the respondent.

236 GRANT, J. The relator, a foreign corporation, recovered judgment against the Detroit Cycle Company, a limited partnership association, for seventeen hundred and five dollars and fifty cents and costs, being for goods sold. The cycle company was organized under chapter 79 of Howell's Statutes. Execution was issued, and returned nulla bona. The plaintiff then moved the court for an order directing execution to issue against the individual members of the defendant to the extent of the portions of their subscriptions, respectively, in the capital of the association not paid up. The motion was based upon the files and records of the cause, and upon an affidavit thereunto attached, which set forth the judgment, the organization of the defendant, the issuance of execution and return, and a copy of its articles of association, showing that the association consisted of three members; that the capital stock was ten thousand dollars, subscribed for in equal amounts by each of its members; that one thousand dollars was paid in by each at the time of the organization; and that the balance of the capital, seven thousand dollars, was to be paid from time to time, as needed. The affidavit further alleged that subsequently each member paid in five hundred dollars, and that the balance of the capital had not been paid; that the defendant had mortgaged all its property to one creditor, and that each member had executed a note to the defendant for the balance of his unpaid subscription, and had then turned these notes over

to that creditor, with the agreement that they were not to be paid; that such action was in fraud of other creditors, who were entitled to the amount of the unpaid capital to apply upon their debts. A copy of this motion and of the affidavit, with notice of hearing, was duly served upon the defendant association and each of its members. These members appeared specially at the hearing of the motion, and protested against its consideration ²³⁷ by the court, because section 2366 of Howell's Statutes, which provides for the issuing of an execution against the individual members, is unconstitutional and void, in that it violates section 1 of the fourteenth amendment to the constitution of the United States, and section 32 of article 6 of the constitution of this state, both of which provide that no person shall be deprived of life, liberty, or property without due process of law. The judge sustained this contention and denied the motion. Relator thereupon applied to this court for the writ of mandamus to compel the vacation of this order made by the respondent.

The section upon which the question arises reads as follows: "The members of any such partnership association shall not be liable under any judgment, decree, or order which shall be obtained against such association, or for any debt or engagement of such company, further or otherwise than is hereinafter provided, that is to say: If any execution or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient thereof whereon to levy or enforce such execution or other process, then such execution or other process may be issued against any of the members to the extent of the portions of their subscriptions, respectively, in the capital of the association not then paid up; provided always, that no such execution shall issue against any member except upon an order of court or of a judge of the court in which the action, suit, or other proceeding shall have been brought or instituted; and the said court or judge may compel the production of the books of the association, showing the names of the members thereof, and the amount of capital remaining to be paid upon their respective subscriptions, and from them or other sources of information ascertaining the truth in regard thereto, and may order execution to issue accordingly; and the said association shall be and it is hereby required to keep a subscription list book for that purpose, and the same shall be open to inspection by the creditors and members of the association, at all reasonable times: provided, that nothing herein contained shall be construed to exempt the members of such partnership association

238 from individual liability for all labor performed for the association."

Joint stock companies, similar in character to those authorized by the statute of Michigan, were early organized in most of the states, and were recognized as lawful without legislative enactment. Their existence and methods were early modified and controlled by statute. An act, similar in character, was passed by the legislature of New York in 1849. Pennsylvania, in 1874, enacted the first law in this country for the organization of limited partnership associations. In 1877 the legislature of Michigan passed an act similar in all essentials to that of Pennsylvania. It is almost an exact reprint of it. The Pennsylvania act first required the capital stock to be paid in cash. It was afterward amended so as to permit contributions to be made in real or personal estate. Virginia, New Jersey, and Ohio enacted the same law in 1875, 1880, and 1881, respectively. In Pennsylvania alone does the law appear to have come before the court of last resort for construction. The supreme court of that state in many decisions has sustained its validity in its entirety, and has expressly passed upon the question now before us. Such decisions are entitled to great respect by the courts of sister states, and in most cases are held to be controlling when the law has been enacted after the construction placed upon it by the court of that state. The following are the leading cases in Pennsylvania sustaining the act: *Bement v. Machine Co.*, 12 Phila. 494; *Maloney v. Bruce*, 94 Pa. St. 249; *Lauder v. Tillia*, 117 Pa. St. 304; *Lauder v. Logan*, 123 Pa. St. 34; *Cox v. Watts*, 157 Pa. St. 93. All the decisions of that state were rendered after the passage of the act in Michigan, and therefore it cannot be said that the legislature adopted the construction which that court has given.

The decision in the case now before the court must be 239 reached with the well-recognized principle in view that "the power of declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the conflict. In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act": *Sears v. Cottrell*, 5 Mich. 259, and authorities there cited.

The due process of law required by the constitution means that notice or summons by which a party is tendered his day in court, with the right to frame an issue and be heard before a judgment can be rendered or execution issued which shall take away his liberty or property. This constitutional provision was "intended

only to protect persons from being deprived of their property without their assent unless by due process of law." The same objection was raised to an entry of judgment upon an appeal bond against the sureties without notice to them; but it was held that the bond should "be read in all respects as if the whole of the statute in reference to the appeal, the bond, and mode of entering up judgment upon it were recited at large in the bond": *Chappee v. Thomas*, 5 Mich. 53, 59. So the summary seizure upon a warrant, without a suit, of the property of a defaulting city treasurer and his sureties was held not to have been made without due process of law: *Weimer v. Bunbury*, 30 Mich. 201. This was upon the ground that the warrant was an administrative, and not a judicial, process. An able and instructive discussion by Mr. Justice Cooley on the meaning of due process of law will there be found.

It appears to be conceded that if, under this statute, the members of the association are entitled, as a matter of right, to their day in court in a proceeding where the issue of fact may be framed and determined, the notice given is due process of law. But it is insisted that the statute makes no provision for a trial, and it is left to the ²⁴⁰ court's discretion to give one. This point was expressly decided in *Lauder v. Tillia*, 117 Pa. St. 304, in which execution was issued against the members without notice to them. The court held that, when the property of the association was exhausted, the court should subrogate the creditor to its demands against its members for unpaid subscriptions; that the association was not in position to show cause for its debtors; and that the rule to show cause why execution should not issue should be served upon the members.

That the creditors of such associations are entitled to the unpaid subscriptions is too clear for argument. The proceeding is analogous to that authorized by statute, whereby the judgment creditor may summon his judgment debtor or other persons before the court, after return of an execution nulla bona, to disclose property subject to an execution. The proceeding against the members in the original suit, and in the court in which judgment has already been rendered against them in their collective capacity, is ancillary to that suit and judgment. By their own voluntary act in organizing, they have read the statute into their articles of association, and have solemnly agreed with their creditors that execution may issue against their unpaid subscriptions. The issue to be determined by the court is simple, viz., How much, if any, of their subscription is unpaid? The statute clearly contemplates and provides for an investigation by the court, for

it is authorized to compel the production of the books, and to ascertain the truth from other sources of information. The court has jurisdiction and is clothed with all the machinery necessary to frame the issue and afford a trial with all the incidents of a judicial proceeding. What other course should be pursued? The creditors are certainly not without remedy, for this would result in the accomplishment of a gross fraud. Should they resort to a court of equity? No such course is provided by this statute, and all parties ²⁴¹ would still be in the same court, and before the same judge, and with the same issue. Is there any objection or lack of power in the legislature to authorize the court of law to determine the question? We can see none. We think it the obvious purpose of the statute to avoid an expensive proceeding in chancery, which might necessarily result in the appointment of a receiver. It must be presumed that the legislature understood that it was conferring this power upon a court already equipped with the necessary machinery to bring the parties before it and to adjudicate their rights.

The learned counsel for the respondent cite and appear to rely mainly upon *Parsons v. Russell*, 11 Mich. 113, 83 Am. Dec. 728, and *Risser v. Hoyt*, 53 Mich. 185. It is unnecessary to review these decisions at length. We think the distinction between them and the case at bar is apparent. In *Parsons v. Russell*, 11 Mich. 113, 83 Am. Dec. 728, the boat and vessel law was held unconstitutional and void, because it provided that a vessel could be seized and sold upon the mere assertion of a debt, without any proof to substantiate the claim before a judicial tribunal, and without any judgment or decree allowing the sale. In *Risser v. Hoyt*, 53 Mich. 185, Act No. 193, Laws of 1883, to prevent debtors from giving preference to creditors, etc., was held unconstitutional for many reasons. It was held that the act provided for no judicial proceedings whatever, nor for any adjudication upon the allegations of the petition filed. Three opinions were written, in but one of which was any reference made to the point that the act provided for the taking of property without due process of law.

In the present case, the members of the association, through the suit against it, have had their day in court to test the relator's claim, and judgment has been duly entered. The relator is entitled to a levy upon all the ²⁴² assets of the association and to a sale thereof in satisfaction of its judgment. The subscriptions of the members are a part of such assets, which they are legally and morally bound to contribute. The statute and their own solemn agreement have provided a simple method by which such

assets can be reached. The proceedings taken by the relator were such as are contemplated by the statute, and constitute due process of law.

The writ of mandamus must issue.

The other justices concurred.

ADOPTED STATUTES—CONSTRUCTION OF.—If a statute or controlling word in a statute has received adjudication in the state where the statute originated, and that statute, in substance, or its controlling word, has been adopted in another state, it is presumed that it was adopted with the meaning which had theretofore attached to it in the state of its origin: *State v. Chandler*, 132 Mo. 155; post, p. 483. The rule that when one state adopts the statute of another, it thereby adopts the construction placed on such statute by the highest court of the state from which it is taken has no application when such construction is not placed on the statute until after its adoption: *Myers v. McGavack*, 39 Neb. 843; 42 Am. St. Rep. 627. See, especially, the discussion of this subject contained in *Pratt v. Miller*, 109 Mo. 78; 32 Am. St. Rep. 656, and note.

DUE PROCESS OF LAW—WHAT IS.—"Due process of law" is the right of trial according to the process and proceedings of the common law or law in its regular course of administration through courts of justice: Note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 28.

PELTON v. SCHMIDT.

[104 MICHIGAN, 345.]

WITNESSES—CREDIBILITY.—A party to an action may change his evidence upon a second trial if he has a legitimate opportunity to do so, although the jury may properly consider such change as affecting his credibility.

EVIDENCE—CUSTOM—NEGLIGENCE.—Evidence of a custom on the part of a truckman to pass through a store to get his receipts for goods delivered at the back door of such store is competent to go to the jury to aid in determining whether the truckman, in obtaining his receipts, was a trespasser or a licensee.

NEGLIGENCE—TRAPDOORS—RIGHT TO MAINTAIN.—A person may lawfully keep and use a trapdoor in his store, subject to the duty to properly guard it to avoid injury to those who lawfully come into the store upon business under an express or implied invitation from the owner.

NEGLIGENCE—TRAPDOORS—DUTY AND LIABILITY OF OWNER.—An owner who invites a truckman to enter his store to obtain a receipt for goods delivered is required to give him notice of an open trapdoor on the premises, of which the truckman has no knowledge. The failure of the owner to give such notice renders him liable for injury resulting therefrom.

NEGLIGENCE—CONTRIBUTORY—TRAPDOORS.—A truckman who enters a store, upon invitation of the owner, to obtain receipts for goods delivered is not required to watch for an open trapdoor on the premises, of the existence of which he has no knowledge or notice. His failure to watch for and to see such door is not contributory negligence.

TRIAL — INSTRUCTIONS — COMPROMISE.— An instruction that any proposed compromise of a claim for injury should not be considered as an acknowledgment of any liability on the part of defendant, should be given, especially if there is evidence that he visited plaintiff in regard to a compromise.

H. J. Felker and A. Crane, for the appellants.

McGarry, McKnight & Judkins, for the respondent.

346 HOOKER, J. A statement of the principal facts in this case will be found in the opinion filed upon a former review of the case, reported in *Pelton v. Schmidt*, 97 Mich. 231.

Upon a second trial, the plaintiff testified that he had been in the habit of going through defendant's store from the back door to the desk, or other places in the store, to get his book receipted, after delivery of goods at the rear of the store, where he had been directed to leave them at all times. One or more other truckmen gave similar testimony. His counsel now claim that this evidence brings the case within the rule stated in the former opinion.

347 Upon the first trial, there was no evidence tending to show any express or implied invitation to enter the store from the rear. The plaintiff testified that he had never been in the store from that way before the occasion of his injury, and it appeared from other testimony that it was the intention of the defendants to have the goods inspected and receipted for at the back door, when delivered. Defendants' counsel contend that the plaintiff is concluded by his former testimony, and that he should not be allowed to recover by reason of evidence flatly contradictory of his former testimony. Decisions of this court in cases brought here by writ of error are conclusive upon the parties, so far as the law is concerned, whenever the same state of facts is presented; but upon different facts other principles may apply. If parties change their testimony, the jury may properly consider the fact; but it is not for this court to say that a party must stand or fall by his former testimony, where there is any legitimate opportunity for a change in the testimony. It may, perhaps, be said that there was no such opportunity here, but by ordering a new trial this court relegated the subject to the jury.

The important question is, whether the trial court should have held that the evidence conclusively showed that the plaintiff was a trespasser, or at most a mere licensee. The record shows that the plaintiff was a truckman for a wholesale house in the city, who delivered goods to the defendants at their store for his employer. He was required (presumably by his employer) to obtain defendants' receipts for the goods delivered. He had been

instructed by the defendants not to deliver at the front door, but to go to a back door, which he reached through an alley. He says that it was his custom to go through to the clerk to get receipts, entering at the back door. Other truckmen did the same. This evidence was contradicted, but it was for the jury to pass upon, if it was sufficient to make the ³⁴⁸ defendants liable if found true. It cannot be said that this is a case where the plaintiff visited the store solely for his own accommodation, and crossed, for his own purposes, a portion of the premises kept by the defendants for their sole private use, without encouragement or permission. The evidence tends to show that both understood that he was not to deliver goods at the front door, and that it was a part of his business to get a receipt for the goods. If it be said that he should have had his goods inspected and have received his receipt at the door, it may be answered that the defendants, and not the plaintiff, were interested in the inspection. Doubtless he was satisfied when he obtained the receipt. If, through confidence in the truckmen, or for other reasons, the defendants relaxed their vigilance, and were content to receipt for the goods upon presentation of the book, without inspecting the goods, and without protest allowed the practice to grow up of receipting in the store, knowing that the truckmen entered and retired by the back door, there is some room for an inference of consent. There is no force in the contention that the plaintiff should have gone around by the front door, for the reasons: 1. That defendants do not say that it was expected, but, on the contrary, that it was not expected, for they desired to receipt at the back door; 2. That it would have been a round-about and unnatural way to go, in the absence of instructions to do so, and there is no pretense that such were given. If the defendants permitted this practice to grow up without protest, so that it became the usual course of dealing, the plaintiff was justified in supposing that it was expected that he would enter from the rear door. It was therefore proper to leave the question of invitation to the jury.

The defendants might lawfully keep and use the trapdoor in their store, subject to their duty to properly guard the same to avoid injury to those persons who should lawfully ³⁴⁹ come into that portion of the store where it was located. This was a duty owing to all persons lawfully there under an express or implied invitation from the owners, upon business concerning the defendants, excepting employes about the premises, or persons having notice of the existence of the trap. In *Shearman and Redfield on Negligence* section 719, it is said that "such openings, unless

far removed from those parts of the building which are lawfully used by persons not having actual notice of their existence, should be thoroughly fenced in, so that no one exercising ordinary prudence could fall through them. If it is impracticable to keep up a fence, as it sometimes is, for example, during the hoisting and delivery of goods through a hoistway, the person using it is bound to give actual notice of the danger to every person lawfully approaching the place, or, in default thereof, he is liable for all injuries resulting therefrom."

This language was quoted with approval by Mr. Justice Cahill in the case of *Engel v. Smith*, 82 Mich. 1, 5, 21 Am. St. Rep. 549, where it was held that the opening of a trapdoor in a frequented place imposed the duty of guarding it, not to do which constituted negligence as matter of law. The trapdoor mentioned in that case was in a back room, through which the plaintiff was accustomed to pass to and from his room.

The character of the plaintiff's mission upon the premises does not except him from the rule. He was not an employé of the defendants, working in and about the store, and therefore bound to assume the risks incident to the character of the premises. He went there on business of the defendants and his employer, by direction of the latter. In that respect the case resembles that of *Indermaur v. Dames*, L. R. 1 Com. P. 274, L. R. 2 Com. P. 311, where this subject is discussed: See *Cornman v. Railway Co.*, 4 Hurl. & N. 781; *O'Callaghan v. Bode*, 84 Cal. 489. The jury having found the invitation to enter and cross the ³⁵⁰ premises, it was the duty of the defendants to give plaintiff notice of the trap, if he was not already aware of its existence—a fact that the jury might well have found from the testimony, if they did not. The question was, however, for them, and not for the court, to decide, being disputed.

The further question of contributory negligence is raised, it being contended that such negligence appears from the undisputed facts. These facts are said to be, in substance: 1. That the plaintiff knew of the existence of the trapdoor; 2. That it was a light day, and plainly visible; 3. That he used no care in avoiding it, and did not even look where he was to step.

The first of these propositions is not undisputed, as the plaintiff testified that he did not know of its presence. His testimony probably justifies the statement that he did not look in the direction of the opening that he came suddenly upon as he came around the pile of goods, and it may not have been visible until his foot was upon the edge of the opening in the floor. If so, it was much the same as though he had fallen into a pit immedi-

ately upon opening a door. If he had no reason to expect this hatchway, and did not suspect its existence, as his testimony indicates, the law does not require him to be watching for it. When one comes suddenly upon an unexpected opening in a passageway—one which he has no reason to anticipate, and one which the law makes it the duty of the owner to guard or give notice of—the case is different from one where a person walks directly forward into an opening, which he would have seen for some distance had he been looking before him as he walked, and where ordinary care could not have failed to discover it: *Hutchins v. Priestly* etc. *Sleigh Co.*, 61 Mich. 252; *Tousey v. Roberts*, 114 N. Y. 312; 11 Am. St. Rep. 655; *Engel v. Smith*, 82 Mich. 6; 21 Am. St. Rep. 549. We think, therefore, that the question was one for the jury.

351 But one other question will be noticed. Evidence was introduced by the defendants tending to show a compromise of the claim of the plaintiff, which was disputed by the plaintiff. An interview about the matter was conceded, and the plaintiff said that the defendant Schmidt admitted that they were to blame. In the argument, counsel for the plaintiff claimed that this visit was evidence that the defendants had perpetrated a wrong. Counsel for the defendants asked the court to charge the jury: "That any proposed compromise should not be considered by the jury as an acknowledgment of any liability to the plaintiff on the part of the defendants."

This instruction was not given. The parties disagreed about what occurred at this time, and the question, "What was defendant there for, if not liable?" would naturally occur to the jury. They should have been told that a man may safely offer a compromise, and that it is no evidence of liability. Counsel say that this was "error without injury," because the defendants' negligence was indisputable; but this claim loses sight of the fact that the plaintiff's contributory negligence was involved in the question of liability.

For this reason we feel constrained to reverse the judgment. A new trial will be directed.

The other justices concurred.

WITNESSES—CREDIBILITY.—The testimony of a witness taken at a preliminary examination, and totally at variance with his evidence given at the final trial, is admissible for the purpose of impeaching him, though he denies the correctness of the record of the testimony first taken, states that he never read it, and that, if he had read it, he would not have signed it: *Jackson v. State*, 33 Tex. Cr. Rep. 281; 47 Am. St. Rep. 30, and note. See the extended note

to Allen v. State, 73 Am. Dec. 768, and the notes to Quinn v. New York etc. R. R. Co., 7 Am. St. Rep. 288, and Consolidated Ice Machine Co. v. Kelfer, 23 Am. St. Rep. 695.

EVIDENCE—CUSTOM—NEGLIGENCE.—One charged with negligence will not be allowed to show that the act complained of was customary among those engaged in a similar occupation, or placed in like circumstances, or owing similar duties: *Columbus etc. Iron Co. v. Tucker*, 48 Ohio St. 41; 29 Am. St. Rep. 528.

COMPROMISE—HOW REGARDED IN LAW.—The law favors offers of settlement, and will not permit them afterward to be used to the prejudice of the parties who make them: *Dwight v. Hayes*, 150 Ill. 273; 41 Am. St. Rep. 367, and note.

DAVENPORT v. STONE.

[104 MICHIGAN, 521.

BANKS AND BANKING—REDISCOUNTED PAPER.—If a bank accepts a renewal note with the same indorser, which is rediscounted for the bank under an arrangement with third parties, and the proceeds are received by the bank, such third parties are entitled to protection as bona fide holders of the new note, although the bank has failed to surrender the old note or to enter the new one on its books.

BANKS AND BANKING—AUTHORITY OF CASHIER.—If the directors of a bank intrust its entire management to its cashier, neither the bank nor its receiver can be heard to deny the authority of the cashier to do any acts which it or its directors might lawfully authorize him to do.

BANKS AND BANKING—REDISCOUNT OF PAPER—AUTHORITY OF CASHIER.—If the directors of a bank, with authority to rediscount its notes, intrusts the entire management of the bank business to its cashier, and third parties at his request rediscount a note belonging to the bank, in the due course of business, without notice of want of authority in such cashier, the bank and its directors are bound by his action and are liable on the note.

M. V. Montgomery, for the appellant.

Smith, Lee & Day, for the respondents.

522 GRANT, J. This suit is brought against Stone, as the receiver of the bank, upon the following note:

"\$1,500. Lansing, Mich., Mar. 1, '93.

"Ninety days after date, I promise to pay to the order of Orlando F. Barnes fifteen hundred dollars, at the Central Michigan Savings Bank. Value received. Interest at 8 per cent after maturity.

"JOHN J. BUSH."

"JOHN J. BUSH."

Indorsed on the back: "Orlando F. Barnes," and "Payment guaranteed. Central Mich. Savings Bank, by Nelson Bradley, Cashier."

The plea was the general issue, with notice that, if the cashier undertook to guarantee the payment of the note in the name of the bank, such guaranty was without authority of the bank or of its directors, and was, therefore, unauthorized, illegal, and void. Upon the trial it was admitted by the parties "that for ten years and upwards, last past, the Central Michigan Savings Bank was a banking corporation organized under the laws of this state; that on April 18, 1893, it became insolvent, and closed its doors; that on the eighth day of May, 1893, defendant Stone was appointed to be, and ever since has been, receiver for said bank; that during all said time, up to such insolvency, one Nelson Bradley was its cashier; that in 1890 notes and bills of the bank had been rediscounted through its cashier, Mr. Bradley, amounting to about forty thousand dollars, and this sum was increased so that at the time the note in suit was discounted they amounted to one hundred thousand dollars. The bank had all the time two departments, viz., a savings and a commercial. When plaintiffs commenced rediscounting for the bank, and ever since, its capital stock was sixty-five thousand dollars, and the surplus sixty-eight thousand dollars. The surplus at the time the note in question was rediscounted was one hundred thousand dollars. August 11, 1890, John J. Bush presented his note for fifteen hundred dollars, at ninety days, indorsed by defendant Orlando F. Barnes, to the Central Michigan Savings Bank, for discount. The bank discounted said note, paying the proceeds to Mr. Bush. On November 12, 1890, on maturity of the note above mentioned, Mr. Bush presented to said bank his note, signed by himself and indorsed by defendant Barnes, for ⁵²³ the same amount as the former note, for the purpose of renewing the same for ninety days, paying to said bank the discount on the same. The last-named note was not entered upon the books of the Central Michigan Savings Bank, but Mr. Bradley, the cashier of said bank, indorsed the same as follows: 'Payment guaranteed. Central Mich. Savings Bank, by Nelson Bradley, Cashier,' and sent the same by mail to plaintiffs for rediscount, having previously had an understanding with plaintiffs by which plaintiffs had consented to rediscount some paper for the Central Michigan Savings Bank. Plaintiffs received said note by mail, with other notes, and discounted said notes; drawing its draft upon Detroit, payable to the order of Nelson Bradley, cashier, and mailing the same to the Central Michigan Savings Bank, at Lansing, Michigan. The proceeds of said Bush note, so discounted by plaintiffs, were used to pay the original note discounted by the Central Michigan Savings Bank August 11, 1890, and until said

funds were received by the Central Michigan Savings Bank the said Bush note was carried by it as past due. Plaintiffs acted in entire good faith, supposing that they were rediscounting the paper for the Central Michigan Savings Bank in the ordinary way."

Mr. Bradley, the cashier, testified that for five years prior to the suspension of the bank he was its financial manager, and that the financial management of the bank was practically left to him by the board of directors. He testified that, besides himself, the president and one or two directors knew about the rediscount of paper by the bank, and there were six directors. No resolution was passed authorizing this rediscount. Plaintiffs testified that they were not aware who the officers of the bank were, besides Mr. Bradley, nor what amount of paper had been rediscounted, and that they took this note in the usual course of business.

1. It is claimed that this note was not in fact rediscounted paper. The note was presented to the Central Michigan Savings Bank by Mr. Bush in renewal of his former note. It was indorsed by the same party as the other. Bush paid the discount. It was tendered to and ⁵²⁴accepted by the bank as a renewal of the other note, and in its place. The new note became thereby the property of the bank. It was sent to plaintiffs, as the note of the bank, for rediscount, under a parol understanding that they would rediscount paper for it. The money was forwarded to the bank, and it got the benefit of it. The acceptance of the new note and the discount constituted a new and binding contract between Bush and the bank. The latter could not maintain suit upon the old note, nor transfer it so as to give it any validity in the hands of the transferee. The facts that it was not surrendered—the reason for which is wholly unexplained—and that the new note was not entered upon the books of the bank, do not change the nature of the transaction. To hold that this is not rediscounted paper, and that plaintiffs are not entitled to protection as bona fide holders of such paper, would be a reproach upon our jurisprudence.

2. The directors intrusted the entire management of the bank to the cashier, Mr. Bradley. Therefore, neither the bank nor its receiver can now be heard to deny the authority of the cashier to do any of those acts which it or its directors might lawfully authorize the cashier to do. The rule is stated by Mr. Morse as follows: "If the directors have for many years allowed the cashier to do, without interference, all the business of the bank, they are held thereby to have conferred upon him authority to do anything and everything on the corporate behalf which the charter

or law does not absolutely prohibit and forbid a cashier to do, and so render illegal under all circumstances": 1 Morse on Banks and Banking, sec. 165, par. c.

In such case, the authority of the cashier will be presumed when the paper is in the hands of a bona fide holder for value, without notice of any defect in his authority: 1 Morse on Banks and Banking, sec. 165, par. b; Kimball v. Cleveland, 4 Mich. 606; Smith v. Lawson, 18 W. Va. 212; 41 Am. Rep. 688. In this last case many authorities are cited: Wild v. Bank of Passamaquoddy, 3 Mason, 505; ⁵²⁵ Houghton v. First Nat. Bank, 26 Wis. 663, 670; 7 Am. Rep. 107. And the indorsement by the cashier for the bank, though wrongful, will bind the bank, and estop it to deny his authority: 1 Morse on Banks and Banking, sec. 158, par. d; Bird v. Daggett, 97 Mass. 494; Robb v. Ross County Bank, 41 Barb. 586; Bank of New York v. Muskingum Branch of Bank of Ohio, 29 N. Y. 619; Monument Nat. Bank v. Globe Works, 101 Mass. 57; 3 Am. Rep. 322; Merchants' Bank v. State Bank, 10 Wall. 604, 644.

3. It is claimed that the rediscount of paper is, in effect, a sale of the property of the bank, and that the cashier cannot do this except on extraordinary occasions, and when the requirements are such as do not admit of delay. Two authorities are cited to support this proposition: Western Nat. Bank v. Armstrong, 152 U. S. 346, 351. It is there said: "The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted." One Harper was vice-president and general manager of the Fidelity National Bank, who negotiated a note made by one Gahr for two hundred thousand dollars, and indorsed by Harper. Complainant sought to charge the bank, although the money was used by Harper, and the bank received no benefit from the loan. Neither in fact nor in principle is that case similar to the one now before us.

The other case is Lamb v. Cecil, 25 W. Va. 288, which was again before the court in 28 W. Va. 653. In that case, Cecil was a director of the bank, and had a deposit. The bank became hopelessly insolvent, and, with full knowledge of the condition of the bank, the cashier, acting fraudulently with Cecil, turned over to him some discounted paper in payment of his deposit. Such transfer was held void. Both the cashier and Cecil, a director, occupied positions of trust toward the depositors and stockholders. If that case is construed to hold that a cashier has no presumed authority to turn out the notes ⁵²⁶ and assets of a bank in payment of its debts, it is in direct conflict with the decision of this court in Kimball v. Cleveland, 4 Mich. 606. It is,

however, there said: "I think it is the practice for the cashier of a bank, in pressing emergencies, to rediscount the bills and notes of the bank to raise money to pay depositors and meet other demands of the bank. But this is only done on extraordinary occasions, and when the requirements are such as do not admit of delay. It is customary, wherever it can be done, to consult the directors, and obtain their consent to make such rediscounts. It is a matter which does not come within the ordinary duties of the cashier, and is not one of his inherent powers; but, inasmuch as it is a power which is exercised by him under some circumstances, a transfer of such bills and notes, made by him in the usual course of the business of the bank, to a person who has no reason to doubt the propriety of the transfer, or to question its good faith, will be *prima facie* valid, and vest a good title in the transferee. The validity of the transfer in such case will be sustained upon the ground that the transferee had a right to presume that the cashier had from the board of directors either an express or implied authority to make the transfer, and not because he had, by virtue of his office, inherent power to do so": *Lamb v. Cecil*, 28 W. Va. 659.

The question now under discussion was not involved in either of these cases. The question, however, is reduced to the power of the board of directors; for, as already shown, if the board had the power, and the cashier exercised it, under the above facts, his act binds them. We are not concerned to determine whether such a power is wise or unwise. Much can be said against it. It would, however, be a surprise to the banking interests of the state to find that no such power existed. It has been exercised for many years, and in the course of the business the transferring bank makes itself liable by indorsement. The rediscounting bank must, of course, rely upon the liability of the transferring bank, with whose responsibility it is familiar. ⁵²⁷ The extent of this business will be seen from an examination of the reports of the commissioner of banking, under the heading "Notes and Bills Rediscounted." An examination of the report of 1893 discloses that there were sixty-eight state banks and forty-five national banks in this state carrying rediscounted paper. The amount of such paper, December 19th of that year, was nearly one million one hundred thousand dollars. There must, therefore, have been a consensus of opinion among the attorneys for these banks that such power existed. We need not discuss the subject further. The authorities fully sustain this power: *People's Bank v. National Bank*, 101 U. S. 181; *Bank v. Wheeler*, 21 Ind. 90. See, also, *Bank of New Haven v. Perkins*, 29 N. Y.

554; 86 Am. Dec. 332; Cooper v. Curtis, 30 Me. 490. Plaintiffs rediscounted this paper in the due course of business, and without any notice or reason to believe that the cashier had not full authority.

Judgment affirmed.

The other justices concurred.

BANKS—AUTHORITY OF OFFICER.—The acts of bank officers within the scope of their powers bind the corporation: State v. Commercial Bank, 6 Smedes & M. 218; 45 Am. Dec. 280, and note; Lloyd v. West Branch Bank, 15 Pa. St. 172; 53 Am. Dec. 581, and note. See, also, the extended notes to Corser v. Paul, 77 Am. Dec. 759, and Cochecho Nat. Bank v. Haskell, 12 Am. Rep. 75, 76.

TAYLOR v. DOWNEY.

[104 MICHIGAN, 532.]

INNKEEPERS—LIABILITY FOR THEFT BY CLERK.—If a regular boarder who has lived in a hotel for several months deposits money in the hotel safe, the proprietor, who has used ordinary care and diligence in the selection and employment of his hotel clerk, is not liable for the theft of such money by the latter.

INNKEEPERS—LIABILITY.—Boarding-house keepers are liable as bailees for mutual benefit for the preservation of goods brought upon their premises by boarders. The nature of the liability is not changed by a deposit of money in the boarding-house safe, though the degree of care may be increased over that required when the boarder retains its custody. Still the boarding-house keeper owes the depositor only the duty of ordinary care, and is liable only for gross negligence.

Cahill & Ostrander, for the appellant.

F. S. Porter, and R. A. Montgomery, for the respondent.

532 HOOKER, J. The plaintiff was a regular boarder at the defendant's hotel, where he had lived for some months. Being engaged in building, he drew money from one of the city banks for the purpose of paying his men; and, not wishing to keep it about his person, he requested the defendant's day clerk to put it in the safe, which was kept in the office of the hotel, and to give him a receipt **533** for the amount. The clerk answered, "I will give you a drawer in the safe, that has but one key, and you can keep that." This was accepted, and after the money was expended the plaintiff returned the key. Two or three weeks later, the plaintiff drew two hundred dollars from the bank for a similar purpose, and asked the defendant's clerk if the drawer was vacant. He was told that it was not, but that he could have another

which had but one key. He took the key, and locked the money in the drawer. A week or two later he found that the drawer had been forcibly opened, and the money taken, by another clerk of the defendant, who had charge of the office nights. It was the practice to leave the safe open, defendant keeping a day and a night clerk. Action being brought against the defendant to recover the amount taken, the circuit judge directed a verdict for the defendant, from which the plaintiff has appealed.

The testimony shows that the night clerk was employed by the defendant upon recommendations from other reputable proprietors of hotels. Defendant had seen him once before employing him, on an occasion of his visit to his father, who was at the time a boarder at defendant's hotel.

Counsel for plaintiff admit that the relation between the parties was that of boarding-house keeper and boarder, and that such relation differs from that of innkeeper and guest. They claim that the defendant was a bailee for hire, and therefore liable for loss of property by the bailor through fault of the bailee's servants. It is said that the defendant was in the habit of allowing boarders similar privileges to those enjoyed by transient patrons, but, if this is important, we discover no evidence to that effect. If the defendant was a bailee for hire, he owed the same care and diligence that all mutual benefit bailees are bound to exercise for the preservation of the property, ⁵³⁴ viz., ordinary care, and "for nothing less than ordinary negligence, or the failure to exercise such care and diligence as persons of average prudence bestow upon their own property under like circumstances, is he, while confining himself to the terms of the bailment, legally responsible": Schouler on Bailments, secs. 15, 316; *Millon v. Salisbury*, 13 Johns. 211; *Collins v. Bennett*, 46 N. Y. 490; *Chamberlin v. Cobb*, 32 Iowa, 161; *Story on Bailments*, sec. 398; *Smith v. Read*, 52 How. Prac. 14, 6 Daly, 33; *Lawrence v. Howard*, 1 Utah, 142; *Johnson v. Reynolds*, 3 Kan. 257; *Wiser v. Chesley*, 53 Mo. 547; *Comp. v. Carlisle Deposit Bank*, 94 Pa. St. 409. Such bailee is in no sense an insurer, as an innkeeper is sometimes said to be, of the property of his guest; but he may be held liable for negligence upon his own part, or the negligence of a servant, if such negligence amounts to a want of ordinary care. If a liability is to be based upon negligence, in this case, it must be based upon a want of care in the employment of the night clerk, for it cannot be said that the clerk was negligent. On the contrary, he committed a felony by stealing the property, not only of the plaintiff, but the defendant also. It was done while in charge of the office by virtue

of his employment. It was a complete and deliberate departure from his duty, and an entering upon an enterprise of his own, wholly outside of the scope of his employment. It was an illegal act, willfully done, for which the employer cannot be required to respond: See opinion of Patteson, J., in *Lyons v. Martin*, 8 Ad. & E. 512; *Stevens v. Woodward*, 50 L. J. Com. P. 231; *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168; *Merchants' Nat. Bank v. Guilmartin*, 88 Ga. 797; *Comp v. Carlisle Deposit Bank*, 94 Pa. St. 409; *Haggerty v. Flint etc. R. R. Co.*, 59 Mich. 366; 60 Am. Rep. 301; *Sutherland v. Ingalls*, 63 Mich. 620; 6 Am. St. Rep. 332; *Mechem on Agency*, secs. 740, 741. There is nothing to show that the defendant did not use ordinary care and diligence in the employment of the clerk, and we must, therefore, hold that no recovery can ⁵³⁵ be had upon the ground of negligence. This discussion has been based upon the assumption that the deposit was a bailment for mutual benefit. This was not conceded in the case.

Counsel for the plaintiff argue, further, that the defendant, "made it a part of his business to receive and take charge of the property of his boarders, and is liable for its safekeeping," and that, while "there is no direct compensation for this service, . . . the contract for the safekeeping was accessory to the main contract for board, and the plaintiff is entitled to damages for the breach of it, the same as a traveler upon a railroad train is for the loss of his baggage." We think there is a radical difference, the contract of the railroad company amounting to an undertaking to deliver the baggage as well as the passenger. The cases cited to sustain this point are cases of innkeeper and guest: 1 *Smith's Leading Cases in Equity*, 8th ed., 416; *Needles v. Howard*, 1 E. D. Smith, 54.

There is not a uniformity of decision upon this question of a boarding-house keeper's liability to a boarder. In *Dansey v. Richardson*, 3 El. & B. 144, a divided court affirmed the instruction that a boarding-house keeper did not contract to safely keep baggage of a boarder. This was where a servant carelessly left a hall door open, permitting a thief to enter and steal the baggage, which was in the hall.

In *Holder v. Soulby*, 8 Com. B., N. S., 263, Erle, J., protested against the claim that it was the duty of the keeper of a lodging-house to take care of a lodger's goods, and said that, where the proprietor had done nothing which amounted to a misfeasance, he knew of no authority or principle upon which he could be held responsible for mere absence of care. In a note to that case it is said that, "even in the case of a common inn, the innkeeper

is not liable as such to persons who reside permanently at ⁵³⁶ his house as boarders, nor otherwise than for actual negligence": Citing *Chamberlain v. Masterson*, 26 Ala. 371; *Manning v. Wells*, 9 Humph. 748; 51 Am. Dec. 688.

In *Lawrence v. Howard*, 1 Utah, 142, it was held that requiring lodgers to lock their rooms and deposit the key at the office was ordinary diligence. Indeed, the court went further, and held that only slight care was required, implying that there was no bailment for mutual benefit in that case. The goods were stolen from the room where the proprietor left them after the plaintiff's departure.

The case of *Jeffords v. Crump*, 12 Phila. 500, holds that "an innkeeper is not liable for goods of a boarder, stolen from the inn, unless there be proof of gross negligence"; thus implying, as did *Lawrence v. Howard*, 1 Utah, 142, that it was a case of depositum: See, also, *Neal v. Wilcox*, 4 Jones, 146; 67 Am. Dec. 266.

The case of *Smith v. Read*, 6 Daly, 33, is perhaps, as strong a case in support of the plaintiff's contention as any, and this goes no further than to hold that ordinary care is due: See, also, *Calye's Case*, 8 Coke, 32 a; *Bacon's Abridgment*, "Inns and Innkeepers," C (5); *Vance v. Throckmorton*, 5 Bush, 41; 96 Am. Dec. 327; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 424; *Hancock v. Rand*, 94 N. Y. 1; 46 Am. Rep. 112; *Bishop's Noncontract Law*, sec. 1171; *Johnson v. Reynolds*, 3 Kan. 257; *Car Co. v. Lowe*, 6 L. R. Ann. 801, and note; *Shoecraft v. Bailey*, 25 Iowa, 553.

It is probable that this is the limit of the rule, viz., that boarding-house keepers are liable, as bailees for mutual benefit, for the preservation of goods brought upon the premises by boarders. The nature of the liability is not changed by a deposit in the safe, though the degree of care may be increased over that required where the boarder retains the custody of valuables; but the keeper of the house is still a bailee for mutual benefit, and still owes the duty of ordinary care, which varies in degree as ⁵³⁷ the responsibility is thrown upon him or is assumed by the owner.

In this case, it is contended by counsel for the defendant that this was a mere deposit; that the plaintiff drew his money from the bank where he usually kept it, and, for his own convenience, chose to make the safe his bank, which should not be said to have been contemplated by either party as a part of, or accessory to, their contract for board. It may be that there is room for such a distinction, but it is unnecessary to determine the question.

The most that plaintiff's counsel can claim is, that the defendant was a bailee for hire. If that be conceded, ordinary care was required. There is no proof that it was lacking.

We must, therefore, affirm the judgment of the circuit court.

The other justices concurred.

INNKEEPERS—LIABILITY FOR THEFT BY SERVANT.—Common innkeepers are liable for all losses in their inns happening either by the acts or negligence of themselves or their servants to travelers and guests received by them: *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; 14 Am. Dec. 254. An innkeeper is bound to keep the property of a guest properly pertaining to him in that relation safe from robbers without, as well as thieves within, his house: *Mateer v. Brown*, 1 Cal. 221; 52 Am. Dec. 303, and note.

INNKEEPERS—LIABILITY TO BOARDERS.—An innkeeper is liable for the loss of the goods of a boarder only where he has been guilty of culpable negligence: *Manning v. Wells*, 9 Humph. 746; 51 Am. Dec. 688.

INNKEEPERS—LIABILITY GENERALLY.—An innkeeper is *prima facie* liable for any loss or injury to the goods of a guest not caused by an act of God, the public enemy, or the fault of the guest: *Bowell v. De Wald*, 2 Ind. App. 303; 50 Am. St. Rep. 240, and note.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

STATE *v.* SIBLEY.

[132 MISSOURI, 103.]

WITNESSES—IMPEACHMENT FOR WANT OF CHASTITY.
Evidence of general bad reputation for chastity is admissible to impeach a witness, whether male or female.

G. S. Elliott and W. Hunter, for the appellant.

R. F. Walker, attorney general, M. Jourdan, assistant attorney general, and J. J. Russell, for the state.

¹⁰³ GANTT, J. As stated by my associate, I dissent from so much of the opinion of the court as discredits and overrules *State v. Rider*, 95 Mo. 486, and *State v. Shroyer*, 104 Mo. 441; 24 Am. St. Rep. 344.

I do not consider that *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218, is authority for the distinction made between the impeachment of male and female witnesses. In that case, Sherwood, J., simply said: "Under the rulings in this state, a witness may be impeached, not only by a general reputation as to veracity, but the inquiry may extend to the general moral character or reputation of the witness. . . . And this ruling has been made in cases as to the general reputation of a female witness respecting chastity. Similar rulings have been made in some other states." I am unable to find in this extract any foundation for the distinction now sought to be established between the credibility of the two sexes. The mere assertion that the general character of the female might be shown falls far short of the announcement that a male witness could not be thus attacked. The case of *Commonwealth v. Murphy*, 14 Mass. 387, cited as authority in *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218, drew no such distinction.

As I interpret *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218, this court simply relaxed the old rule confining the impeachment to general bad reputation for truth and veracity by permitting evidence showing the general moral character of the witness to be bad, and, as an example of this, the Massachusetts case, permitting evidence of prostitution of a female witness, was cited: *State v. Egan*, 59 Iowa, 636.

It is important to get at the reason underlying the decision, and the Massachusetts court put it upon the ground of the loss of moral principle. This testimony ¹⁰⁴ is admitted upon the ground that the prostitute, by her life of vice, has so impaired her moral sense that the obligation to speak the truth is no longer binding, or has become more or less lax. If this be true of the female, why not true of her habitual companions; and why, though there be degrees in the vice, may not a man's disregard of the laws of chastity, which compel his association with the prostitute, be shown as tending to prove a disposition to lightly regard the obligations of his oath. The rule only admits the evidence when it has ripened into a general reputation for the vice. For my part, I think it rests upon the same foundation whether the witness be male or female. It was so ruled by a unanimous court, before its separation into divisions, in *State v. Rider*, 95 Mo. 474, and was followed by division two, as then constituted, in *State v. Shroyer*, 104 Mo. 441; 24 Am. St. Rep. 344; and I concurred in the last case, and I see no reason for changing the view I then held.

For these reasons, I most respectfully dissent from the views of Judge Burgess on this point. Brace, C. J., and Barclay and Macfarlane, JJ., concur with me on this proposition.

IN THE CASE of *State v. Sibley*, 131 Mo. 519, it appeared that Sibley appealed to the supreme court from a conviction and sentence to imprisonment for a term of two years for defiling, debauching, and carnally knowing one Lula Hawkins, a female under the age of eighteen years, who was charged to have been confided to his care and protection. She was the daughter of defendant's wife, Roxie, and, at the time of her mother's marriage to the defendant, was about nine years of age. From that time on defendant kept, clothed, and sent her to school until she was thirteen years old, when she refused longer to go to school, but continued for some time thereafter to reside in defendant's family until she was about sixteen years of age, when she went away and thereafter lived elsewhere. There was nothing to show that Lula was confided to the care and protection of defendant, other than what has been stated. It was proved that when she was about thirteen years of age, the defendant had sexual intercourse with her, and that as the result of such illicit intercourse she was delivered of a stillborn child. The defendant was convicted under a statute providing that "If any guardian of any female under the age of eighteen years, or any other person to whose care or protection any such female shall have been confided, shall

defile her, by carnally knowing her, while she remains in his care, custody, or employment, he shall, in cases not otherwise provided for, be punished by imprisonment," etc: Mo. Rev. Stats., sec. 3487. The supreme court sustained the ruling of the lower court, on the ground that the statute applied to the defiling by a stepfather of his stepdaughter, though there was no confiding of her to his care and protection by express agreement.

That part of the opinion of Mr. Justice Burgess from which Mr. Justice Gantt dissented, as shown by the principal case, was as follows: "Witnesses were permitted, over the objection of defendant, to testify that his general character for chastity and virtue was bad. This evidence was, of course, introduced for the purpose of impeaching him as a witness, and not for the purpose of assailing his character as a party defendant, though it is doubtful if its effect was not more disastrous in its application to him in his character as defendant than as witness. No evidence had been offered by him to sustain his character as defendant, and, until that was done, it could not be directly attacked as such by the state. In *State v. Grant*, 79 Mo. 123, 49 Am. Rep. 218, it was held that the rule in this state permitting a witness to be impeached by proof of general reputation for unchastity has been confined to females. The rule thus announced was followed and approved in *State v. Clawson*, 30 Mo. App. 139. So it was held in *State v. Coffey*, 41 Mo. App. 455. The more recent decisions of this court, however (*State v. Rider*, 95 Mo. 486, and *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344), hold that the rule applies alike to both sexes, and that such reputation may be shown to discredit a male as well as a female witness. The writer adheres to the rule first stated, and is of the opinion that such evidence is inadmissible in any case for the purpose of impeaching the character of a male witness, and especially in a case like the one in hand, where the defendant's character for chastity is directly involved. It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman. It is no compliment to a woman to measure her character for truth by the same standard that you do that of man's predicated upon character for chastity. What destroys the standing of one in all walks of life has no effect whatever on the standing for truth of the other." Mr. Justice Sherwood dissented and said: "Although I concur in reversing the judgment herein, I do not think the cause should be remanded, because I do not believe this case falls within the penalties of section 3487 of the Revised Statutes of 1889. My idea is that there must be an actual or affirmative confiding; at any rate, something more than mere intermarriage with the mother of the girl betrayed. If the relations existing between stepfather and stepdaughter are sufficient to sustain this prosecution, then, under the same section, a father would also be subject to the same provisions; but no one would contend that a father is subject to such a prosecution, and this because his daughter has not been confided to his care and protection within the meaning of the statute."

Impeaching Witnesses by Proving Want of Chastity.

General Grounds of Impeachment.—There is much conflict of opinion among text-writers and in judicial decisions as to the mode of examining into the character of a witness sought to be impeached. Many authorities hold that the inquiry must be limited to the character of the witness for truth and veracity. Others assert that the inquiry involves the entire moral character of the witness whose credit is impeached, and his estimation in society, and that the proper question to be propounded to the im-

peaching witness is whether he knows the general moral reputation of the witness sought to be impeached. The weight of authority sustains the latter rule, but no review of these authorities, or discussion of the reasoning upon which they rest is necessary to the elucidation of the subject matter in hand.

The authorities are somewhat in conflict as to whether want of chastity in a witness can be inquired into for the purpose of impeachment, but the great weight of authority sustains the doctrine that evidence of want of chastity is not permissible in any case other than rape or the like, to impeach the credibility of a witness, whether male or female, and regardless of the fact whether such witness is an interested party to the action or simply a witness called ordinarily by one side or the other.

The credit of a witness can only be impeached by proof of his general character for truth and veracity, as held by some courts, or by proof of this and of his general moral character, as held by others, and under neither rule can he be impeached by proof of a particular immoral act, nor by proof of general reputation for a particular immorality, such as unchastity: *Cline v. State*, 51 Ark. 141; *State v. Fourmer*, 68 Vt. 262; *Morse v. Pineo*, 4 Vt. 281; *State v. Smith*, 7 Vt. 141; *Spears v. Forrest*, 15 Vt. 435; *Gilchrist v. McKee*, 4 Watts, 380, 28 Am. Dec. 721; *Bakeman v. Rose*, 14 Wend. 105; *Ketchingham v. State*, 6 Wis. 426; *Jackson v. Lewis*, 13 Johns. 504; *Commonwealth v. Moore*, 3 Pick. 194; *Commonwealth v. Churchill*, 11 Met. 538; 45 Am. Dec. 229; *Bakeman v. Rose*, 18 Wend. 146; *State v. Larkin*, 11 Nev. 314; *State v. Hobgood*, 46 La. Ann. 855; *State v. Eberline*, 47 Kan. 155; *People v. Yslas*, 27 Cal. 631; *People v. Chin Hane*, 108 Cal. 597; *Barkly v. Copeland*, 86 Cal. 483; *Johnson v. State*, 61 Ga. 305.

In impeaching a witness, the proper inquiry is as to the general character of the witness, and this is generally not restricted to truth and veracity, but an inquiry into the character of the witness for chastity is not permissible for the purpose of impeachment. The question must be confined to the general moral character of the witness, and inquiry cannot be made as to specific acts of immorality, nor as to chastity, generally or specifically: *Holland v. Barnes*, 53 Ala. 83; 25 Am. Rep. 595; *Birmingham etc. Ry. Co. v. Hale*, 90 Ala. 8; 24 Am. St. Rep. 748; *Rhea v. State*, 100 Ala. 119; *Spicer v. State*, 105 Ala. 123; *Kilburn v. Mullen*, 22 Iowa, 498; *Dimick v. Downs*, 82 Ill. 570; *Evans v. Smith*, 5 T. B. Mon. 364; 17 Am. Dec. 74. There is great conflict in the decisions in Missouri upon this question, but until the decision in the principal case it was there maintained, that so far as male witnesses were concerned, it was not permissible to impeach them by evidence of general reputation for unchastity: *State v. Clawson*, 30 Mo. App. 139; *State v. Coffey*, 44 Mo. App. 455. The reasons for this rule were thus stated in *State v. Larkin*, 11 Nev. 330: "A witness may be unchaste and yet be truthful. A witness may be chaste and yet be untruthful. The law affords ample remedies for testing the credibility of witnesses, without introducing testimony of specific acts of immorality, and in particular instances allows greater latitude than in others, owing to the special facts and circumstances that surround each individual case. There are, perhaps, exceptional cases where it might be proper to show the utter depravity of the moral

character of a witness, in order to establish the fact that such a witness is not entitled to any credit. But we are not dealing with the exceptions. The general rule as recognized by a majority of the decided cases, is, that evidence of bad character for chastity, where such character is, collaterally, not directly, in issue, is not admissible for the purpose of impeaching the credibility of a witness. As the naked question whether from the witness's reputation for chastity, he was or was not worthy of belief, was inadmissible, it was improper to couple the question with one relating to his reputation for truth, veracity, and morality, as it would call for an expression of opinion as to the effect of chastity, or want of it, upon the credibility of testimony": *Cline v. State*, 51 Ark. 144; citing *Massey v. Farmers' Nat. Bank*, 104 Ill. 334, 335.

Under the rule that no particular act of immorality is sufficient to impeach the credibility of a witness, it has been held in many cases that testimony to show that the witness either was or had been a common prostitute is inadmissible for the purpose of impeaching her credibility; *Jackson v. Lewis*, 13 Johns. 504; *People v. Chin Hane*, 108 Cal. 597; *Morse v. Pineo*, 4 Vt. 281; *State v. Smith*, 7 Vt. 142; *Spears v. Forrest*, 15 Vt. 435; *State v. Fournler*, 68 Vt. 262; *Bakeman v. Rose*, 14 Wend. 105, affirmed, 18 Wend. 146; *Commonwealth v. Churchill*, 11 Met. 538; 45 Am. Dec. 229. In impeaching a witness, the inquiry is not limited to character for truth and veracity, but may extend to general moral character, and although a notorious want of chastity in a female witness will create a general bad character and general bad reputation, still the independent fact that she is a common prostitute, or keeps a house of ill-fame, is not admissible to impeach her credibility; *Birmingham etc. Ry. Co. v. Hale*, 90 Ala. 8; 24 Am. St. Rep. 748; *Rhea v. State*, 100 Ala. 119; *McInerny v. Irvin*, 90 Ala. 275; *State v. Hobgood*, 46 La. Ann. 855. Evidence of special acts of adultery is not admissible for the purpose of impeaching a witness: *Johnson v. State*, 61 Ga. 305. Nor can a witness be impeached by proof of a single act of immorality of any kind: *Long v. Morrison*, 14 Ind. 595; 77 Am. Dec. 72. In a bastardy case evidence that the general character of the complainant for chastity, previous to her connection with the respondent, was bad, and that she had previously had frequent criminal intercourse with other persons, is not admissible for the purpose of impeaching her credit as a witness: *Commonwealth v. Moore*, 3 Pick. 194; *State v. Perkins*, 117 N. C. 698; *State v. Parish*, 83 N. C. 613. Nor can a single act of bastardy at a remote period be shown to impeach a witness: *Weathers v. Barksdale*, 30 Ga. 888.

Some consideration is due to that line of cases which support the doctrine of the principal case, and hold that want of chastity is ground for the impeachment of a witness. These cases are so few in number, however, as to be almost isolated when compared to the number of cases which maintain the contrary rule. In an early case in Massachusetts, it was held that the credibility of a witness may properly be impeached by proving her to be a common prostitute: *Commonwealth v. Murphy*, 14 Mass. 387. The same ruling obtained in *Weathers v. Barksdale*, 30 Ga. 888. *Commonwealth v. Murphy*, 14 Mass. 387, however, was expressly overruled in *Commonwealth v. Churchill*, 11 Met. 538; 45 Am. Dec. 229. It has

also been held that when a female witness has testified to certain indecent conduct toward herself in a matter in which she is not directly interested, evidence relating to her general character for truth, veracity, and chastity is admissible to impeach her: *Indianapolis etc. Ry. Co. v. Anthony*, 43 Ind. 183. On a trial for rape, it has been held that after the defendant's wife has testified as a witness in his behalf, she may, for the purpose of impeaching her credibility and character, be asked whether she had not lived with the defendant as his mistress before her marriage to him: *Exon v. State*, 33 Tex. Cr. Rep. 461.

In Missouri, the rule has long been maintained that inquiries into the character of a female witness for chastity are permissible for the purpose of impeaching and discrediting her testimony: *State v. Shields*, 13 Mo. 236; 53 Am. Dec. 147; *State v. Grant*, 79 Mo. 133; 49 Am. Rep. 218; and in that state the rule has lately been extended to male, as well as female, witnesses: *State v. Rider*, 95 Mo. 486; *State v. Shroyer*, 104 Mo. 441; 24 Am. St. Rep. 344; *State v. Raven*, 115 Mo. 419. It seems probable that the time must soon come when the rule must be abandoned, even in that state, as a whole, in view of the overwhelming array of authority supporting the contrary doctrine.

Prosecution for Rape.—Although a somewhat vexed question, it is generally held that in prosecutions for rape, assault with intent to commit rape, and indecent assault, neither the credibility of the prosecutrix as a witness, nor her chastity can be impeached by evidence of particular acts of unchastity, though they may always be impeached in such cases by general evidence of her reputation for unchastity: *Pleasant v. State*, 15 Ark. 624; *Watry v. Ferber*, 18 Wis. 500; 86 Am. Dec. 789; *Dimick v. Downs*, 82 Ill. 570; *State v. Daniel*, 87 N. O. 507; *State v. Jefferson*, 6 Ired. 305; *McDermott v. State*, 13 Ohio St. 332; 82 Am. Dec. 444; *McCombs v. State*, 8 Ohio St. 643; *Camp v. State*, 3 Ga. 417; *Commonwealth v. Kendall*, 113 Mass. 211; 18 Am. Rep. 469; *State v. Forshner*, 43 N. H. 89; 80 Am. Dec. 132. In such cases the testimony as to the general character of the prosecutrix for chastity must be confined to the time at or before which the offense was committed. Inquiry cannot be made as to knowledge since acquired: *State v. Forshner*, 43 N. H. 89; 80 Am. Dec. 132; *Pratt v. State*, 19 Ohio St. 277. Evidence of previous acts of unchastity with other men is not admissible: *State v. Knapp*, 45 N. H. 148; *McCombs v. State*, 8 Ohio St. 643. In these cases, evidence that the woman is a common prostitute has been held admissible to impeach her credibility as a witness: *Camp v. State*, 3 Ga. 417. In New York, the rule is maintained that the prosecutrix may be shown to be a common prostitute, for the purpose of impeaching her, and for this purpose evidence may also be given of previous connection or acts of lewdness with other men, indicating on her part a want of chastity: *People v. Abbot*, 19 Wend. 192; *Ford v. Jones*, 62 Barb. 484; *Woods v. People*, 55 N. Y. 515; 14 Am. Rep. 309. And the same rule obtains in California: *People v. Benson*, 8 Cal. 221; 65 Am. Dec. 506. The question of the impeachment of the prosecutrix in rape cases by proof of her unchastity and bad character is treated at length in the note to *Smith v. State*, 80 Am. Dec. 363.

STATE v. CHANDLER.

[132 MISSOURI, 155.]

ADULTERY—LASCIVIOUS COHABITATION—WHAT CONSTITUTES.—Under a statute making it a misdemeanor for a “man and woman, one or both of whom are married, and not to each other, to lewdly and lasciviously abide and cohabit with each other,” such persons can only be convicted upon proof that they have lived together in the same habitation in the manner of husband and wife. Evidence of clandestine sexual intercourse is insufficient to sustain a conviction.

STATUTES—CONSTRUCTION—ADOPTION FROM ANOTHER STATE.—If a statute or controlling word therein has received adjudication in the state where the statute originated, and that statute in substance, or its controlling word, has been adopted in another state, it is presumed that it was adopted with the meaning which had theretofore attached to it in the state of its origin.

CONSTITUTIONAL LAW.—A statute authorizing the punishment of misdemeanors by confinement in a workhouse is not for that reason unconstitutional.

CONSTITUTIONAL LAW.—The constitutionality of a statute may be questioned by motion made in the trial court.

CONSTITUTIONAL LAW—JURISDICTION.—If the constitutionality of a statute is questioned by motion in the trial court, and the cause is for that reason transferred to the supreme court, the latter court acquires jurisdiction to hear and determine the whole case upon the merits.

C. T. Noland, for the appellant.

R. F. Walker, attorney general, and F. Smith, for the state.

158 SHERWOOD, J. 1. This cause, appealed to the St. Louis court of appeals, has been transferred to this court, because of a motion made in the lower court, which raises the question of the constitutionality of the law which allows a party to be punished by imprisonment in the workhouse of the city, on conviction of a misdemeanor.

The prosecution, which resulted in a conviction and sentence of defendant to the workhouse, and the payment of a fine of five hundred dollars, was founded upon section 3798 of the Revised Statutes of 1889: “Every person who shall live in a state of open and notorious adultery, and every man and woman, one or both of whom are married, and not to each other, who shall lewdly and lasciviously abide and **159** cohabit with each other, and every person, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor.”

The information in this case in its material portion is as follows: “That Henry W. Chandler, in the city of St. Louis, on the thirteenth day of March, 1895, did then and there, and from that

day continuously until the twenty-third day of March, 1895, unlawfully, lewdly, and lasciviously abide and cohabit with one Kitty Coyle, and the said Henry W. Chandler and the said Kitty Coyle then and there continuously during the aforesaid time did unlawfully, lewdly, and lasciviously abide and cohabit with each other, and then and there have sexual intercourse together, he, the said Henry W. Chandler, being then and there a married man and having a wife living, and she, the said Kitty Coyle, then and there being a married woman and having a husband living, and they, the said Henry W. Chandler and Kitty Coyle, not being then and there married to each other, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state."

The testimony discloses in substance this state of facts: Defendant was married and lived with his wife and children at Thirty-first and Olive streets, in St. Louis. "Kitty Coyle," whose name appears conjoined with that of defendant in the information, lived with her husband, James F. Coyle, at his residence, 4213 Washington avenue, in the same city. Coyle and his wife had been married since April 3, 1873. The various parties mentioned had, it seems, been acquainted for some ten years.

Owing to certain sounds or whistles heard by Coyle ¹⁶⁰ when he was at home at night on the 10th or 11th of March, 1895, and to the catching sight of defendant immediately thereafter in front of his house, Coyle's suspicions were aroused, and, as business called him away to Denver on the 12th of March, he employed, before leaving, detectives to watch his residence, and defendant, during his absence. The evening after his departure, namely, March 13, 1895, a detective, who had hidden himself in Coyle's cellar where he could have a view of the front door, saw defendant, after nightfall, approach Coyle's house and enter without being admitted by another. During each succeeding night, from the 13th until the 23d of March, 1895, defendant was seen at different hours after night, from 7:30 to 11:30 o'clock, to enter Coyle's residence by unlocking the front door and depart therefrom at from 5 to 5:35 o'clock each morning. During this period, Mrs. Kitty Coyle and two servant girls were the only regular inmates of the Coyle residence. Upon Coyle's return to the city on the night of the 23d of March, 1895, instead of at once hastening home, he took into his counsel one Ford Smith, who it appears was his legal adviser, and in company with him and four others, two of whom were detectives (who had kept watch over the defendant and Mrs. Coyle's maneuvers during the husband's absence), he repaired to his home. Two of the party remained

on the sidewalk in front of the house, to keep a lookout, while two went in through the front door and the other two entered at the rear of the building. Proceeding stealthily to the bedchamber of Mrs. Coyle, they entered and found defendant in bed with her, each being arrayed in their nightgowns.

The section of the statute already quoted, embraces five offenses: 1. Living in a state of open and notorious adultery by two persons of opposite sexes, ¹⁶¹ one or both of whom are married, but not to each other; 2. A man and woman, one or both of whom are married, but not to each other, who lewdly and lasciviously abide and cohabit with each other; 3. Every person, married or unmarried, guilty of open, gross lewdness; or 4. Lascivious behavior; or 5. Of any open, notorious act of public indecency, grossly scandalous.

The offense here charged evidently falls within the second of those subdivisions, and the question arises whether the evidence sustains the charge. It is not believed that it does. There is nothing to show that defendant or his paramour lived together as husband and wife. Webster says "cohabit" means "to dwell or live together as husband and wife": Webster's International Dictionary. Bouvier defines the term: "To live together in the same house claiming to be married; to live together in the same house."

In an early case in Massachusetts, probably the earliest one of the sort occurring in this country, a prosecution was had under the statute of 1784, which provided "that any man and woman, either or both of them being then married, shall lewdly and lasciviously associate and cohabit together, they shall be punished by," etc. Whereupon the court remarked: "By cohabiting must be understood a dwelling or living together, not a transient and single unlawful interview. The design of the statute, in this particular provision, was to prevent evil and indecent examples, tending to corrupt the public morals": *Commonwealth v. Calef*, 10 Mass. *153.

It will be presumed that our legislators were not unfamiliar with the meaning attached to the word in question by earlier adjudications on that word. And when a statute or controlling word in a statute has ¹⁶² received adjudication in the state where the statute originated, and that statute in substance, or its controlling word, has been adopted in another state, it will be presumed that it was adopted with the meaning which had therefore attached to it in the state of its origin.

Virginia has a statute very much resembling that of Massachusetts previously quoted, which provides: "If any persons, not

married to each other, lewdly and lasciviously associate and cohabit together," etc. And in construing this statute Fauntleroy, J., observes: "The terms, 'not married to each other' and 'lewdly and lasciviously associate and cohabit together,' clearly explain the meaning of the statute as intended to apply to cases where a man and a woman, 'not married to each other,' live together as man and wife live together, without the sanction of the nuptial tie. There must be 'cohabitation,' and there must be lewd and lascivious cohabitation. There must be a living together. . . . Obviously, the legal sense of the term in the statute is to live together in the same house, as married persons live together, or in the manner of husband and wife. . . . The conjunction 'and,' in the phrase of the section, is essentially and indispensably copulative; there must be both—lewd and lascivious intercourse, and a living together of the parties as husband and wife live together—to constitute the offense of lewd and lascivious association and cohabitation": *Jones v. Commonwealth*, 80 Va. 20.

Touching this topic, Agnew, C. J., remarks: "Loose notions seem to prevail as to what cohabitation is. It is not a sojourn, nor a habit of visiting, nor even a remaining with for time. None of these fall within the true idea of cohabitation. . . . The legal idea of cohabitation is that which carries with it a natural belief that it results from marriage only. To cohabit ¹⁶³ is to live or dwell together; to have the same habitation": *Yardley's Estate*, 75 Pa. St. 207.

In Florida, under a statute substantially identical with that of Virginia, a similar ruling has been made to that already quoted, to wit, that the evidence must show "a dwelling or living together by the parties as if the conjugal relation existed": *Luster v. State*, 23 Fla. 339.

In Mississippi, the statute read: "If any man and woman shall unlawfully cohabit, whether in adultery or fornication, they shall be fined," etc. And upon this statute, a ruling like the ones previously mentioned was made: *Carotti v. State*, 42 Miss. 334; 97 Am. Dec. 465.

This case was approvingly followed by that of *Kinard v. State*, 57 Miss. 132, where, in commenting on that case, it is said: "The decision is, that no continuance of illicit intercourse makes out the crime, so long as it is secret or attempted to be made so, but that, whenever secrecy is abandoned and the concubinage is open, the offense is complete. In the interests of morality, it is perhaps to be regretted that a more rigorous doctrine cannot be deduced from our present statute and the decisions upon similar statutes elsewhere."

Acting upon this hint, the legislature of Mississippi in 1880 added to the statute these words: "And it shall not be necessary to constitute the offense that the parties shall dwell together publicly as husband and wife, but it may be proved by circumstances which show habitual sexual intercourse": *Granberry v. State*, 61 Miss. 440—thus sanctioning by legislative enactment a prior judicial construction: See, also, *Bishop on Statutory Crimes*, 2d ed., sec. 712; *Bishop on Marriage and Divorce*, sec. 777; *Sullivan v. State*, 32 Ark. 187; *State v. Marvin*, 12 Iowa, 499; *Richardson v. State*, 37 Tex. 346; *State v. Sekrit*, 130 Mo. 401.

¹⁶⁴ In the present instance, there is an entire absence of any evidence tending to show "cohabitation" between the parties implicated, in the sense and meaning of the word as declared by the standards of our language and as settled by frequent adjudications.

It is not the object of the statute to establish a censorship over the morals of the people, nor to forbid the violation of the seventh commandment. Its prohibitions do not extend to stolen waters nor to bread eaten in secret. Its evident object was not to forbid and punish furtive illicit interviews between the sexes, however frequent and habitual their occurrence; but only to make such acts punishable as it plainly designates; acts which necessarily tend, by their openness and notoriety, or by their publicity, to debase and lower the standard of public morals. Here the interviews between the guilty parties were entirely clandestine; even the servants of the household where the liaison had its headquarters were not aware of the occurrences which form the basis of the present prosecution. In such circumstances, to hold that defendant and his paramour did "abide and cohabit with each other" would be to pervert the plain words of the statute, and to convict without evidence.

2. It has been ruled by this court that a statute was constitutional which authorized the punishment of misdemeanors by confinement in the workhouse. Therefore, the lower court was right in holding as it did with regard to the validity of the statute. It was competent, however, to raise the point of the constitutionality of the statute by motion in the lower court: *Bennett v. Missouri Pac. R. R. Co.*, 105 Mo. 642.

3. But notwithstanding the point was correctly ruled by the lower court, relative to the constitutionality of the statute in regard to sentencing defendant to the workhouse, still he had the right to raise the question, and this question being raised would give this ¹⁶⁵ court jurisdiction to hear and determine the whole case upon the merits.

Inasmuch, for reasons heretofore given, the state has no standing in this court, on the merits of the cause, as there is a failure of proof, the judgment should be reversed and defendant discharged. It is so ordered.

All concur.

ADULTERY—WHAT CONSTITUTES THE CRIME.—"Living together," as used in articles 333-337 of the Texas Penal Code, defining adultery, means that the parties must reside together, that is, dwell and abide together in the same habitation as a common or joint residing place: *Bird v. State*, 27 Tex. App. 635; 11 Am. St. Rep. 214, and note; and the testimony must satisfy the jury beyond a reasonable doubt that the intercourse was habitual—that is, frequent—and that occasional acts will not be sufficient: *State v. Carroll*, 30 S. C. 85; 14 Am. St. Rep. 883, and note.

STATUTES—ADOPTION FROM ANOTHER STATE—CONSTRUCTION.—This subject is discussed in the case of *Rouse v. Donovan*, 104 Mich. 234; ante, p. 457, and note.

DIGGS v. KURTZ.

[132 MISSOURI, 250.]

BOUNDARIES—EVIDENCE OF STATUTE OF FRAUDS.—If the true boundaries of lots about to be sold by an executor are unknown, and he causes boundaries to be laid off and marked by visible monuments on the face of the ground, and then sells the lots to parties who purchase with notice of, and in view of, the boundaries so marked, the purchasers establish such boundaries between themselves by agreement, regardless of the true boundaries, and parol evidence is admissible to prove the boundaries as thus fixed at the time of the purchase.

BOUNDARIES—STATUTE OF FRAUDS—EVIDENCE.—A parol agreement establishing a boundary line between contiguous proprietors, where the parties have paid money, taken possession, and made improvements on the faith of such agreement, although it may change the line called for in their title deeds, is not obnoxious to the statute of frauds, nor to the rule forbidding the introduction of parol evidence to contradict a written instrument, but is binding upon the parties, and may be given in evidence under the general issue.

BOUNDARIES.—PAROL EVIDENCE IS ADMISSIBLE to show the boundaries by which a lot was purchased, when the deed does not in any way give a specific description thereof.

N. T. Gentry, for the appellant.

C. B. Sebastian, for the respondent.

253 **BRACE, P. J.** This is an action in ejectment for a strip of ground ten feet wide and one hundred and forty-two and one-half feet long, which plaintiff claims to be a part of lot 312 in the town of Columbia, Missouri. Kurtz is the real de-

fendant, the other defendant being his tenant. Defendants deny that the strip is a part of lot 312, and claim that it is a part of 311. The sole contention is as to the boundary line between lots 311 and 312.

The common source of title to them and lot 310 was Col. F. T. Russell, who died in 1891. His executors, F. L. and W. T. Russell, in October, 1892, made a public sale of these lots, which consisted of a block of ground surrounded by streets and alleys, with an outside fence but no division fence, stake, or mark to indicate the dividing line between the three lots. It was all in one inclosure with a dwelling-house near the center. Before making the sale, the executors ascertained by measurement the boundary lines of the three lots and drove stakes with flags on them, showing all the corners of lots 310, 311, and 312. The sale took place on the lots. Plaintiff and defendant Kurtz were present, standing on each lot as it was sold.

²⁵⁴ The auctioneer made the sale, commencing with 312, stating, "How much am I offered for this lot, commencing at this stake with a red flag on it, and running to this one, across to this one, and then across to this one, and back to the beginning," pointing out the four stakes on the four corners of the lot to be sold. This lot was purchased by plaintiff. The auctioneer and parties, including appellant, then stepped across onto lot 311, and it was sold the same way, but before making the sale, the auctioneer called attention to the fact that the house was on 311, and it was more valuable on that account. This lot and lot 310 were purchased by defendant Kurtz. After the sale, Mr. Gentry, appellant's attorney, drew up the deeds to these lots, describing the one purchased by appellant "as lot number 312 in the old corporate town of Columbia." No reference is made to the town plat or the flags or stakes.

Shortly after this, plaintiff and defendant Kurtz went over to the lot to see about building a partition fence. Whilst over there, they both agreed that they had bought up to the line of the stakes, and that line should be the dividing line between their lots. Failing to agree as to the kind of fence they should build, the respondent Kurtz built a fence of his own on his lot within about a foot of the line of the stakes and flags, took possession of the property and built a coalhouse and outhouse upon the strip of ground now in controversy.

Plaintiff had an ex parte survey made, which placed the boundary line of lot 312 about ten feet east of that line, and brought this suit for the strip. The case was tried by the court

without a jury. Judgment for defendant, and the plaintiff appeals.

The judgment for the defendant is so obviously for the right party that we deem it unnecessary to ²⁵⁵ answer at length and in detail the points urged against it. They will be all sufficiently passed upon in the few general observations following.

It appears from the evidence that at the time of the sale and the execution of the deeds to the purchasers in pursuance thereof, all parties, the executors, the auctioneer, and the purchasers were ignorant of the location of the true line dividing and bounding these lots. To relieve this situation, the executors caused the boundaries of these lots to be laid off and marked by visible monuments, on the face of the ground, so that each purchaser might know exactly the boundaries of the lot he might purchase. With these monuments in view and by the boundaries marked by them, the executor sold, and the plaintiff and defendant purchased, their respective lots, thus establishing by agreement in the most formal manner, as between them, the boundary line between lots 311 and 312 on the line claimed by the defendant, regardless of where the original or true line between those lots might have been located.

That a parol agreement establishing a boundary line between contiguous proprietors, where the parties have paid money, taken possession, and made improvements on the faith of such agreement, although such agreement changes the line called for in their title deeds, is not obnoxious to the statute of frauds, nor to the rule forbidding the introduction of parol evidence to contradict a written instrument, but is binding upon the parties, and may be given in evidence under the general issue, is well settled in this state: *Jacobs v. Moseley*, 91 Mo. 457, and cases cited; *Evans v. Kunze*, 128 Mo. 670, and cases cited.

In the decision of this case, however, it is not necessary to invoke the doctrine announced in these cases to its fullest extent. For the deed here did not undertake to give a specific description of the boundaries ²⁵⁶ of lot 312 either in terms or by reference, and evidence of the agreement did not vary or contradict the deed, but simply identified the lot by showing the boundaries by which it was purchased and conveyed. For such a purpose parol evidence is always admissible: *Skinker v. Haagsma*, 99 Mo. 208. There is no merit in this appeal.

The judgment of the circuit court is affirmed.

All concur.

IN THE CASE of *Ward v. Ihler*, 132 Mo. 375, the supreme court decided that if a boundary line between adjoining owners is in dispute, and the parties agree upon what is the correct line, and take possession and occupy in accordance with such agreement for the time requisite to bar an entry, title is thereby conferred, regardless of where the true line is, and such agreement is not within the statute of frauds, but if the agreed line is projected beyond the point of actual occupancy, the agreement as to such projection is within the statute of frauds, and the true line between such owners so far as the projected line is involved, must be determined by the government corners and field notes.

BOUNDARIES—PAROL AGREEMENTS AS TO—ACQUIESCENCE.—Where parties, by mutual agreement, fix boundary lines and thereafter acquiesce in the lines so agreed upon, they must be considered the true boundary lines between them, even though the period of acquiescence falls short of the time fixed by statute for gaining title by adverse possession: *Notes to Johnson v. Archibald*, 22 Am. St. Rep. 35; *Terry v. Chandler*, 69 Am. Dec. 711, and *Smith v. Dudley*, 13 Am. Dec. 224.

BOUNDARIES BY PAROL AGREEMENT—STATUTE OF FRAUDS.—An oral agreement between adjoining owners, establishing a boundary line between their lands, is not prohibited by the statute of frauds nor within the meaning of statutes regulating the manner of conveying real estate: *Lecompte v. Toudouze*, 82 Tex. 208; 27 Am. St. Rep. 870, and note.

STATE v. MURPHY.

[132 MISSOURI, 382.]

HABEAS CORPUS—JURISDICTION.—Under the Missouri statute the St. Louis court of criminal correction has no jurisdiction, provided either of the judges of the criminal court are in the city, to entertain an application to release on habeas corpus a person held in custody on a charge of murder.

PROHIBITION—USURPATION OF JURISDICTION.—A writ of prohibition is the proper remedy to prevent a usurpation of jurisdiction by a court in entertaining an application for the release, on habeas corpus, of a person charged with crime.

382 **GANTT, P. J.** This is an original proceeding commenced in this court by the attorney general to obtain a final judgment prohibiting the defendant, the judge of the St. Louis court of criminal correction, from further taking cognizance or asserting jurisdiction of an application made to said court by Judge John G. Wear for a writ of habeas corpus to release Charles Wear, who was in the custody of Lawrence Harrigan, chief of police of the city of St. Louis, and by him held 383 for T. A. Tickell, the sheriff of New Madrid county, who held and had the legal custody of said Charles Wear by virtue of an alias capias of commitment issued by the clerk of the circuit court of Butler county, Missouri, upon an indictment duly pre-

ferred in said Butler county against said Charles Wear for murder in said county.

The petition avers that said petition for habeas corpus, so instituted by said John G. Wear on behalf of said Charles Wear, was filed before the defendant as judge of the St. Louis court of criminal correction, and was directed against J. R. Speed and one Hotfelder, the turnkeys at the holdover or jail of the Four Courts building in said city of St. Louis. It is further averred that at the time said application and proceeding for habeas corpus were commenced before said defendant, and the jurisdiction to hear and determine the same assumed by him, the judges of the criminal court of the city of St. Louis, the Hon. Thomas B. Harvey and the Hon. Henry L. Edmunds, were both present in said city, and their respective courts were in session, during the pendency of said proceeding before defendant, and that in issuing said writ of habeas corpus and assuming jurisdiction to hear and determine the same, while the said judges of the criminal court of the city of St. Louis were present in said city, the defendant was exceeding his jurisdiction as judge of the said court of criminal correction.

A preliminary rule upon Judge Murphy was granted, returnable January 7, 1896, at which time he appeared and filed a demurrer to the petition and a motion for judgment upon the pleadings.

Owing to the enforced absence of one of the judges of this division and the refusal of another to sit on account of relation to one of the parties, the matter has been unavoidably delayed until this time.

384 Whether the defendant was exceeding his jurisdiction when he issued the writ, or continued to do so after he was notified that Charles Wear was held in custody by the sheriff of New Madrid county by virtue of a regular commitment issued upon an indictment for murder duly preferred against said Wear in Butler county, Missouri, must be determined by the laws creating the St. Louis court of criminal correction in connection with the statute governing habeas corpus in this state.

The St. Louis court of criminal correction is of statutory origin. While for some purposes it is denominated a court of record, it is not one proceeding according to the course of the common law. The powers of the judge of said court are defined in the seventh section of the act creating the court: 2 Rev. Stats. 1889, p. 2153. Among others it is provided "he shall have power to issue writs of habeas corpus, and determine the same."

By section 5412 of the Revised Statutes of 1889, it is specifically provided that "the several provisions contained in this chapter [chapter 78] shall be construed to apply, so far as may be applicable, and except where otherwise provided, to every writ of habeas corpus authorized to be issued by any statute of this state." By section 5414, chapter 78, of the Revised Statutes of 1889 it is further provided: "When a person applies for the benefit of this chapter, who is held in custody on a charge of crime or misdemeanor, his application, in the first instance, shall be to the judge of the circuit court for the county in which the applicant is held in custody, if, at the time of the application, such judge be in the county, except that in the city of St. Louis the application, in the first instance, shall be made to the judge of the criminal court for said city, if he [the judge], at the time of the application, shall be in said ³⁸⁵ city." And notice shall be given to the circuit or prosecuting attorney.

That this general chapter applies as well to the practice in habeas corpus in the court of criminal correction as in all other courts having jurisdiction in such cases cannot be doubted. It is not only in *pari materia*, but it is made applicable by its own terms. Little room is left for controversy. The demurrer admits the allegations of the petition, and from those averments it appears to us that Charles Wear was, and is, in custody on a charge of murder, and has applied for a writ of habeas corpus. By the plain letter of the statute, as he was detained in the city of St. Louis, he was required to apply in the first instance to one of the two judges provided by law for the criminal court of St. Louis, if either of them was in the city; and this again the demurrer admits, and yet he applied to the defendant, who was not a judge of either of said courts. Notwithstanding the legislature conferred jurisdiction on defendant to issue writs of habeas corpus, that privilege was to be exercised in conformity to the law governing all the courts of the state.

It was pointed out by this court in *State v. Field*, 112 Mo. 554, that when this section first became law in May, 1855, there were several courts of record in St. Louis other than the criminal and circuit courts, to wit, the court of common pleas, the land court, the law commissioner's court, and, when it was amended in 1879, the court of criminal correction. It was entirely competent for the legislature to regulate the issuing and hearing of this great writ of right so as to prevent unseemly conflicts in jurisdiction and to avoid a miscarriage of justice.

The position of defendant, that he had the right to proceed and determine the application for habeas corpus, ³⁸⁶ unless the

applicant disclosed that he was held in custody under a criminal charge, cannot be maintained. The moment he was apprised that the prisoner was held in custody under an indictment for murder, and that either of the judges of the criminal court was in the city, it was his duty to decline all further cognizance of the case, for it then became apparent that the application should have been first made to one of the judges of the criminal court, and from that time defendant was exceeding his jurisdiction. This statute deprives no one deprived of his liberty of an appeal to the courts, but it wisely regulates the hearing of these applications in the city of St. Louis so that those charged with grave offenses shall only be discharged or bailed by the courts, in the first instance, which have jurisdiction in felonies, and it is only when there are no such judges present in the city that applications may be made and heard before the inferior tribunals.

Prohibition is the proper remedy for such an usurpation of jurisdiction as is charged in the petition of the attorney general and admitted by the demurrer.

The demurrer is overruled and final judgment of prohibition awarded as prayed and for costs.

Burgess, J., concurs.

Sherwood, J., being related to Judge Wear, declines to sit.

A WRIT OF PROHIBITION is a writ directed to the judge and parties to the suit in an inferior court commanding them to cease from the prosecution thereof upon suggestion that either the cause originally or some collateral matter arising therein does not belong to that jurisdiction: *Bullard v. Thorpe*, 66 Vt. 599; 44 Am. St. Rep. 867, and note. See, also, the extended note to *State v. Commissioners of Roads*, 12 Am. Dec. 604-609.

ROGERS & BALDWIN HARDWARE COMPANY v. CLEVELAND BUILDING COMPANY.

[182 MISSOURI, 442.]

MECHANICS' LIENS—CONFLICT OF JURISDICTION.—The appointment of a receiver by a federal court for property already charged with a mechanic's lien under a judgment rendered in a state court, does not withdraw the property from the jurisdiction of the state court, nor prevent a valid sale thereof under special execution issued by the state court.

JUDICIAL SALES—SETTING ASIDE—INADEQUACY OF PRICE.—While inadequacy of price alone does not justify the setting aside of a judicial sale, yet when such inadequacy is very great, slight circumstances tending to show that interested parties were misled, or by accident or mistake prevented from attending the sale, or preventing it, it may be set aside.

Massey & Tatlow, for the appellants.

Beardsley, Gregory & Flannelly, and White & McCammon, for the respondents.

⁴⁴⁶ BURGESS, J. This case was transferred to the court in bank, after an opinion reversing the judgment had been rendered: 32 S. W. Rep. 1. We adopt the statement of facts therein made, as well, also, as the first paragraph of the opinion of our learned brother, Barclay, J. They are as follows:

"The questions to be determined on this appeal arose upon a motion in the circuit court to set aside a ⁴⁴⁷ sheriff's sale, which motion the court sustained. The plaintiffs appealed, after having taken proper steps to give the trial court opportunity to review its ruling, and saving the evidence and all exceptions, in the usual way. The original cause in which the motion appears is entitled: 'W. C. Rogers and A. A. Baldwin, composing the firm of Rogers and Baldwin Hardware Co., plaintiffs, v. The Cleveland Building Co., A. B. Crawford, John D. Porter, Seth Tuttle, Marion Davis, W. H. Keyser, owners, and Jarvis-Conklin Mortgage Trust Co., mortgagees, and Samuel M. Jarvis, trustee, W. W. Baldwin, mortgagee, B. U. Massey, trustee, defendants.' Stated first in the shortest form, the case is this:

"Plaintiffs obtained a judgment against the owners of the Baldwin theater or opera house property for a small amount, and a lien against the property under the mechanic's lien law. A special execution issued on that judgment, and the property was sold by the sheriff. Mr. McAfee became the purchaser, as trustee, on behalf of plaintiffs and other holders of liens against the building for work and materials furnished toward its construction. Before the sale, but after the judgment of lien, Judge Philips, at chambers, as judge of the United States circuit court for the western district of Missouri, appointed a receiver of the theater property, in the suit of Lubbock et al., plaintiffs, v. Marion Davis, Ellen Davis, and A. B. Crawford, defendants, to foreclose a mortgage upon the same property. The order of appointment was of wide reach, and is said to be a barrier to the execution of the mechanics' lien judgment, pending the receivership. The plaintiffs in this case are not named as parties to the proceeding in the federal court. After the sale under the execution on the mechanic's lien judgment, the Jarvis-Conklin Mortgage Trust Company and Samuel M. Jarvis filed ⁴⁴⁸ in the state court the motion which is the basis of this appeal. The principal grounds of the motion are that the sale was an interference with the receivership of the property estab-

lished by the federal court, and was hence void. There are other reasons assigned in the motion, which will be mentioned further on.

"Passing now to some of the necessary particulars of the case, it will be convenient to keep the following dates in view: September 9, 1881, date of mortgage sought to be foreclosed in the Lubbock case in the federal court; December 5, 1891, beginning of plaintiffs' lien account; March 5, 1892, close of lien account; May 1, 1892, notice of lien; May 31, 1892, lien filed in circuit clerk's office; August 17, 1891, plaintiffs' mechanic's lien suit begun September 20, 1892, judgment in mechanic's lien suit for thirty-seven dollars and thirty-six cents, and of lien; March 13, 1893, transcript of the judgment filed in circuit clerk's office; March 16, 1894, petition for receiver in federal court; March 17, 1894, receiver appointed by Judge Philips; March 19, 1894, receiver took possession of the property; October, 1894, special execution issued from circuit court on mechanic's lien judgment, returnable to January term, 1895; November 23, 1894, sale on special execution, property bought by Mr. McAfee; December 15, 1894, sheriff's deed recorded; January 14, 1895, motion filed to set aside sale; January 23, 1895, motion sustained; sale set aside.

440 "Although the mortgage first above mentioned ostensibly antedates the opening of the lien account, it seems that the bonds (for forty-nine thousand dollars), secured by it were placed later. When that mortgage was recorded does not appear. The investigation of the facts in regard to that instrument was cut short at the hearing by an admission by one of the attorneys for the motion, who conceded that the 'lien part' of the judgment (under which the sale took place) was a prior lien.

"The proceeding to enforce plaintiffs' mechanic's lien was begun before a local justice of the peace, after the filing of the lien in the circuit clerk's office, according to law: Rev. Stats. 1889, sec. 6161. The defendants in that original cause were the parties named as such at the outset of this opinion. The moving parties in the present motion are the trust company and the trustee, Mr. Jarvis, both defendants in that case. Five of the defendants were personally served; the others (including the trust company and Mr. Jarvis) were ultimately brought in by posting advertisements, as prescribed in such cases: Rev. Stats. 1889, sec. 6163.

"The justice's judgment refers to the mortgage or deed of trust in which Mr. Jarvis was trustee for the Jarvis-Conklin

Mortgage Trust Company, and finds plaintiffs' demand (for the amount of judgment rendered against the owners) to be paramount to the mortgage, and adjudges that it is a lien on the property described, including the estate and interest of these defendants. A transcript of that judgment was duly filed in the circuit clerk's office, and the execution sale now in question took place upon process issued from the circuit court upon that judgment. No appeal from the latter was ever taken, and the judgment became final in due time.

450 "The order made by Judge Phillips in the foreclosure suit is quite long, and need not be fully recited now. Its substance is, that upon a hearing before the judge at chambers, Mr. Jewell was appointed receiver for the United States circuit court for the western district of Missouri, and directed to take immediate possession of the property (which was described), and to 'carry on the business connected with said opera house,' . . . and 'carry out contracts already made by the respondent A. B. Crawford in connection with said opera house business and the procurement of amusement enterprises therefor, to make new contracts in that respect,' etc. The usual directions in regard to funds and accounts were included. The receiver was authorized, among other things, to pay 'any sums necessary for the payment of taxes, or which from time to time may be required to save from sale or sacrifice the said real property.' The order further declared 'that the respondent A. B. Crawford, his agents, employés, and all other persons, whether claiming through or under him, or otherwise, are hereby enjoined and restrained from attaching, seizing, levying upon, or otherwise taking or interfering with any of the property above described, or with the said receiver in his possession, control, and management of the said property.'

"Other facts will be stated in the course of the opinion, in connection with some subordinate points on which they bear.

"1. The chief issue concerns the relation of the original lien case to the receivership in the federal court. It will be seen that, by the terms of the order appointing the receiver, 'all persons,' whether claiming through the defendant Crawford, 'or otherwise,' were enjoined from 'attaching, seizing, levying upon, or otherwise taking or interfering with any of the property,' 451 etc. This language might reach the proceedings under the lien execution in the state court, against this property. But if the property, at the time that order was made, had been already subjected to the judicial control of the state courts, which had not yet concluded their action upon the property, then the fed-

eral order might be disregarded by 'all persons' (not parties to the foreclosure suit, at least) who were entitled to demand the exercise of the state court's jurisdiction upon said property.

"The question is, whether or not the mechanic's lien proceedings subjected the theater property to the judicial power of the state courts until that jurisdiction was exhausted, so that no other court might meanwhile remove the property from the control necessary to make the use of that jurisdiction effective. The comity which should govern the actions of courts of concurrent jurisdiction in such circumstances has passed into a rule of law, now generally recognized in the United States, and which has been thus stated by the highest federal tribunal: 'When the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction': *Heidritter v. Elizabeth Oilcloth Co.* (1884), 112 U. S. 305.

"The proper application of this rule to the facts in judgment depends somewhat on the nature of the mechanic's lien suit. Such suits in this state are regulated by positive law, which clearly indicates their nature. An action to enforce such a lien deals with certain described property, against which the lien is claimed, and, upon establishment of the claim, judgment goes first against the principal debtor on the ⁴⁵² account. The amount ascertained to be due is then adjudged a lien on the specific property, and a special execution thereafter issues, directing a sale of the identical property to satisfy the demand. Whether such an action (so far as it concerns the realty) should be regarded as in rem, or be placed in the class which some jurists have described as 'quasi in rem,' we do not stop to inquire. The true inquiry is, whether the action deals with the property it seeks to affect in such a specific and definite manner as necessarily to withdraw the property from the exclusive control of other courts while the action is pending. We think it does, and that such is the plain effect of the Missouri statutes governing that action: Rev. Stats. 1889, secs. 6159-6167, 6705-6729.

"The jurisdiction of the state courts (having attached to the property a long time before the suit in the federal court began) was not exhausted by the rendition of the judgment of lien. The ultimate process (in this instance, of special execution) needed to make the judgment fruitful is, under our law, an essential part of the means provided for the exercise of power

comprehended in the term 'jurisdiction.' A grant of power is considered to include the use of all incidental powers necessary to make the principal grant effective: Broom's Legal Maxims, 8th Am. ed., *479, *486; *State v. Ryno* (1887), 49 N. J. L. 603. In a leading federal case, it was said that 'proceeds subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred': *Riggs v. Johnson Co.* (1897), 6 Wall. 187.

"The subject of the mechanic's lien suit (namely, the opera house property) was thus plainly within the ⁴⁵³ control of the state courts, and neither the appointment of the receiver nor the order then made withdrew the property from that control. The establishment of the receivership did not transfer the title to the property, nor did it divest liens already fixed upon it. To hold that such was the effect of a proceeding to which the lien claimants were not parties would be to deprive them of their rights in the property, without a hearing, which we certainly decline to do. As the learned federal judge had no authority or jurisdiction to take the property out of the judicial control of the state courts in the manner attempted in said order, it follows (if his order is to be construed as having that effect) that it is void and of no force, as to the rights of the lien claimants in process of assertion in the state court.

"In *Gates v. Bucki* (1893), 12 U. S. App. 69, 4 Co. Ct. App. 116, 53 Fed. Rep. 961, the federal court of appeals of this circuit, by Judge Shiras, declared that 'this property, being thus in the custody of the state court in proceedings intended to affect the title and control the disposition of the same, the property was for the time being withdrawn from the jurisdiction of the federal court, and, when the foreclosure suit was filed in that court, it could not and did not bind or reach the property, because the same was not then within the plane of federal jurisdiction.'

"The above ruling was made in a case wherein the jurisdiction of the federal court was challenged by appropriate moves in that court. But if the principle announced in it is sound, as we believe it to be, it is not essential for the lien claimants to go into the federal court to secure recognition of that principle. It is one of those rules of 'general jurisprudence' binding alike on federal and state tribunals. It follows that the ruling of the trial court on the motion to set aside ⁴⁵⁴ the sale, in so far as it is referable to the pendency of the receivership proceedings, was erroneous."

2. The next question is as to the correctness of the ruling of the court in setting aside the sheriff's sale. That the court had control of its own process, and the power to set aside the sale, if there was gross inadequacy of price, and the interest of the movers was injuriously affected by the sale, if they were by mistake or misapprehension prevented from attending it or preventing it, we think is well-settled law. It is equally well settled that inadequacy of price alone will not justify the setting aside of a judicial sale, and the court so declared; but when the inadequacy of price is very great, as in the case at bar, slight circumstances tending to show that interested parties, such as mortgagees, were misled, or by accident or mistake prevented from attending the sale, or preventing it, will justify its being set aside. While the court declared as a matter of law "that inadequacy of consideration, however gross, is not sufficient ground of itself to set aside the sale," it did set it aside, and it may reasonably be inferred therefrom that in its opinion there were other facts in evidence which justified it in so doing.

The execution under which the sale was made was a transcript execution issued by the clerk of the circuit court of Greene county on the transcript of a judgment rendered before a justice of the peace of said county, enforcing a mechanic's lien against the property in question in favor of Rogers and Baldwin Hardware Company v. The Cleveland Building Company, A. B. Crawford, J. D. Porter, Seth Tuttle, Marion Davis, and W. H. Keyser, owners. The Jarvis Mortgage Trust Company, mortgagees, Samuel M. Jarvis, trustee, W. W. Baldwin, mortgagee, B. U. Massey, trustee, were also made parties to that suit, but no judgment was ⁴⁵⁵ rendered against them. The execution could not be found, but must be presumed to have been in accordance with the judgment.

The judgment, after describing the tract of land by metes and bounds, proceeds as follows, "together with the four-story brick building known and designated as the Baldwin Opera House, situated thereon, and that said land and building be charged with the payment of said debt." In the notice of sale by the sheriff, no mention was made of the opera house, other than as the "buildings and improvements" on the land, although the property was generally known as the "Opera House" block. The sheriff testified that at the time of the sale he did not know that he was selling the opera house property.

The property had been previously advertised for sale by the sheriff under nine executions issued on transcripts of mechanics' lien judgments in favor of different parties, amounting in the

aggregate to about five thousand dollars. The judgment creditors in those cases, as well as in this, were represented by Capt. McAfee as their attorney, the purchaser of the property at the sale in question. Those judgments were all compromised or paid off by T. J. Flannelly, who represented the Jarvis-Conklin Trust Company.

J. T. White, one of the attorneys for said company, testified that about the time the judgments were paid, Flannelly asked Capt. McAfee if he would n't assign those which he had paid off to him, or to his clients, and Capt. McAfee said he could n't, for the reason that he had other suits pending, but that if he would pay off the claims he had pending, that "I will sell them to you, but it would n't be fair to assign to you all those I have in judgment and leave out those that are still pending." Witness further stated that ⁴⁵⁶ his recollection was, that Mr. Flannelly asked the captain if that was all the judgments that he had, and he answered that it was. This conversation, or the chief part of it, Capt. McAfee testified did not occur. White also stated that Mr. McCammon and himself were the attorneys for the mortgage trust company in Springfield and represented it in all the litigation about this property, and the sheriff did not notify them that he had any execution in this matter at all; and that it was his custom to do so in such cases; that the service was had by publication, and the judgment obtained without their knowledge.

The property was worth from forty thousand to fifty thousand dollars, and was sold by the sheriff for two hundred and fifty dollars. The purchaser represented a number of lien claimants whose demands, not then in judgment, amounted to about eleven thousand dollars, and, by an arrangement between himself and them, they were to share the property in proportion to the amount of their respective claims.

While the notice of sale was a technical compliance with the law, it should have given a more particular description of the property, and, in failing to do so, was to some extent misleading. So much so, in fact, that the sheriff did not know what property he was selling.

Herman, in his work on Executions, page 415, in speaking of sheriff's sales for inadequate price, says: "A sale of twelve thousand dollars' worth of property for four hundred dollars is strong ground for relief, especially where the advertisement contains an imperfect description of the property. The fact that the advertisement was so framed as to mislead, so that no one, not acquainted with the premises, could have conjectured from

the advertisement what the property was that was intended to be sold, in connection with the fact that there were no bidders at the sale but the purchaser, and the property was sold at a very inadequate ⁴⁵⁷ price, makes a sale constructively fraudulent against a defendant and others having liens on the property, and constitutes a ground for equitable relief, although the advertisement may have been a technical compliance with the statute, so as to vest a valid title in the purchaser": *Hodgson v. Farrell*, 15 N. J. Eq. 88.

The imperfect description of the property in the notice of sale should be taken into consideration in connection with other facts in evidence in passing upon the validity of the sale. The weight of the evidence clearly showed that Flannelly as the agent and attorney of the mortgage company was misled by the supposed statement of Capt. McAfee with respect to the payment by that company of all lien judgments which he represented against the property, for it is fair to presume that he would not have paid all others, and left remaining unpaid the judgment under which the property was sold, amounting to so small a sum as thirty-seven dollars and sixty cents. His object seems to have been to pay all liens then in judgment, and it is unaccountable why he did not pay that, unless he was misled by what he understood the statements of Capt. McAfee to be with respect thereto. We do not undertake to say that Capt. McAfee was guilty of any intentional wrongdoing, fraud, or unfairness in buying the property, and only speak of matters connected with the sale from a legal standpoint. These facts, taken in connection with the evidence of White that the custom of the sheriff was to notify him with respect to intended sales of this property, and his failure to do so on this occasion, the inadequate price that the property sold for, fully justified the court in setting the sale aside: *Seaman v. Riggins*, 2 N. J. Eq. 214; 34 Am. Dec. 200. The purchaser was attorney for plaintiff and was not an innocent purchaser: *Harness v. Cravens*, 126 Mo. 233.

⁴⁵⁸ Moreover, the sheriff, in selling the property, was the agent of both plaintiff and defendant, owing a like duty to each, and bound to protect the interest of all parties concerned. It was his duty to see that the property was not sacrificed, and to that end could have returned the execution "no sale for want of bidders": *Conway v. Nolte*, 11 Mo. 74; *Shaw v. Potter*, 50 Mo. 281; *Holdsworth v. Shannon*, 113 Mo. 508; 35 Am. St. Rep. 719; *Cole County v. Madden*, 91 Mo. 585; *State v. Moore*, 72 Mo. 285. His failure to do so can only be accounted for on the grounds of his want of knowledge of the property that he was

selling and of its value. His course cannot be justified or excused on the ground that the owner of the fee in the property is not here complaining; the mortgagee is. That, however, does not legalize the sale, which in its result is the transfer of defendant's property to the purchaser, for about one-eighteenth of its value—a merely nominal sum.

All the plaintiff company is entitled to is its debts, and that end is not defeated by opening a bid, but will certainly be attained if that be done. The plaintiff suffers no loss if the sale be set aside, while the mortgage company loses a large amount of money. The object of the sale is not to transfer the property of the execution debtor to the execution creditor, "but to pay the debt; he cannot, therefore, be injured by any proceeding which has that for its object, and does not cause any unnecessary delays or expense": *Littell v. Zuntz*, 2 Ala. 256; 36 Am. Dec. 415. Justice can be but subserved by a resale of the property, for it cannot result in any injury to the purchaser, the purchase money being refunded.

The sale, if invalid as against the movers, could not in any way be legalized by reason of any private arrangement between the purchaser and his clients as to how the property was to be shared by him with them, to which the company was not a party. The judgment ⁴⁵⁹ is affirmed.

Brace, C. J., Sherwood, Macfarlane, and Robinson, JJ., concur.

Gantt, J., concurs in second and last paragraphs, but expresses no opinion as to the first.

Barclay, J., dissents from last, but concurs in first, paragraph.

MR. JUSTICE BARCLAY dissented from that part of the opinion setting aside the execution sale, and said: "All things considered, it seems to me that the order setting aside the sale, without any sort of terms imposed on the moving parties, should not be affirmed, but that the cause should be remanded, to the end that the motion may be reheard on its merits on the circuit, and such conclusion be then reached as the facts disclosed may appear to warrant, in view of the ruling of the supreme court, that the federal receivership is of itself no impediment to the sale." The learned justice gave the following as reasons for such dissenting opinion: "Here the parties moving to set aside the sale are not the primary debtors. They are persons claiming rights in the property under a mortgage, and they profess to have been surprised at the sale, and to have been willing to pay the claim without a sale. These facts are emphasized in the learned opinion of the court in bank.

"It appears that the moving defendants concede that the plaintiffs' mechanics' lien judgment 'is a prior lien' (to use the language of their

admission in the record), and that the lien judgment has become final as to all concerned. The gravamen of defendants' complaint now is, that they were misled by Mr. McAfee when they were trying to pay off all claims reduced to judgments.

"Should any court, on such a showing, set aside an execution sale, in the exercise of discretion, without putting some sort of terms upon the parties moving for such relief? Ought not the latter, in such circumstances, to be required to do that equity which their admissions concede? Ought they not to pay, tender, or, at least, secure, the plaintiff's judgment which the moving parties have no ground to contest (and do not contest), before an order of resale is made?

"The trial judge merely set aside the sale, without more. Even the costs of the first sale were not required to be paid by the moving parties. Plaintiffs are thus put to the hazard of paying costs of the resale, and of the possibility of losing their present full security for payment. At all events, plaintiffs must lose considerable time now in obtaining payment of their demand, though the latter is practically disputed.

"It seems to me that a court, proceeding to deal with the situation described by this record, should at least require security for plaintiffs' judgment before setting aside the former sale in the circumstances here shown, especially where the chief ground of the objection to the former sale is, that these parties were trying beforehand to pay the plaintiffs' demand.

"But no terms were imposed of any sort, for the manifest reason that the learned trial judge thought the sale should be vacated as an interference with the federal receivership. Had he reached, or considered, the general equities of the motion, he would, no doubt, have fully recognized the soundness of these suggestions as to the propriety of imposing reasonable terms on the moving defendants as a condition to setting aside the sale. The imposition of fair terms in such circumstances is approved as well by precedents as by the obvious demands of justice: *Sawin v. Bank*, 2 R. I. 382; *Winterson v. Hitchings*, 34 N. Y. Supp. 183; 13 Misc. Rep. 201."

RECEIVERS—JURISDICTION OF OTHER COURTS OVER.—No court can interfere with the custody of property held by another court through its receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court granting the receiver, and is not open to revision by it if the court had jurisdiction of the subject matter and the parties: *Gay v. Brierfield Coal etc. Co.* 94 Ala. 303; 33 Am. St. Rep. 122, and note with the cases discussing the conflict of jurisdiction between state and federal courts. Receivers appointed by the United States courts are subject to suit in any court having jurisdiction of the subject matter without asking leave of the court which appointed them: *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753, and note.

JUDICIAL SALES—SETTING ASIDE FOR INADEQUACY OF PRICE.—Inadequacy of price, however gross, does not invalidate a judicial sale made at the time and place prescribed by law, upon due notice and without proof of any fraud or unfairness or means used to prevent competition: *Brittin v. Handy*, 20 Ark. 381; 73 Am. Dec. 497. Where property fraudulently conveyed is sold under execution against the grantor for a grossly inadequate consideration, by reason of irregularities in the proceedings, the fraudulent grantee can, by a

proper procedure, have the sale set aside: *Miller v. Koertge*, 70 Tex. 162; 8 Am. St. Rep. 587, and note. See, also, the notes to *Weaver v. Nugent*, 13 Am. St. Rep. 800.

MIDLAND NATIONAL BANK v. MISSOURI PACIFIC RAILWAY COMPANY.

[182 MISSOURI, 492.]

CARRIERS—BILLS OF LADING—LIABILITY FOR MISDELIVERY.—A common carrier who issues an original bill of lading calling for delivery to the shipper or his order, and who, in good faith delivers the consignment to the shipper upon his surrender of a duplicate bill of lading, is not thereby relieved from obligation to deliver the consignment to the indorsee for value of the original bill of lading, in the absence of any restriction or limitation or the negotiable character of such bill.

CARRIERS—BILLS OF LADING.—NO CUSTOM PRACTICED AND MAINTAINED by a carrier can prevail against the express language of his contract of affreightment, to affect the rights of the holder by indorsement thereof, or in anywise limit the liability of the carrier thereon, unless such custom has been exercised, and the indorsee has purchased or received the contract with knowledge of that fact.

CARRIERS — BILLS OF LADING—CUSTOM—MISDELIVERY.—The failure of a consignee to observe a custom, requiring him to take possession of a consignment of goods within a certain time after its arrival at its destination does not justify or excuse the misdelivery of the goods by the carrier, nor relieve against the express language of the bill of lading to deliver only to the shipper's order.

BILLS OF LADING—COLLATERAL SECURITY.—The surrender of bills of lading, held as security, is a good consideration for the substitution, as security of new bills of lading antedating the loan. The holder is still a holder for value as against the carrier.

CARRIERS—BILLS OF LADING—DELIVERY.—The direction in a bill of lading to notify the shipper of the arrival of goods at their destination, can in no way change, modify, or qualify the duty of the carrier to deliver the goods to the shipper's order as provided by the bill of lading.

E. Robinson, for the appellant.

Lathrop, Morrow, Fox & Moore, for the respondent.

495 ROBINSON, J. This is an action by the Midland National Bank of Kansas City, as pledgee of twenty bills of lading issued by the Missouri Pacific Railway Company, against said railway company, for failure to **496** deliver to it the twenty carloads of grain covered by the bills of lading.

The petition contains forty counts, every consecutive odd and even count thereof being based upon the same bill of lading, and all substantially the same, with the exception of the description as to the particular character of grain in each car, its value, and the car number containing same.

The case was tried by a jury, and, after the testimony was all in, the court directed the jury to return a verdict for plaintiff, for which alleged error on the part of the trial court this appeal is chiefly prosecuted.

The following are the substantial averments of plaintiff's petition: "That during the months of September and October, 1891, defendant received the cars of grain at Paola, Kansas, consigned to the order of the shipper at Kansas City, Missouri, and the issuance by defendant of shipper's order bills of lading, covering each car separately; that the various cars of grain, by the terms of these bills of lading, were to be delivered to the order of the Courier Commission Company, at Kansas City, Missouri; that the commission company negotiated a loan of plaintiff, and pledged the twenty original shipper's order bills of lading, duly indorsed, as collateral security for said loan; and that plaintiff presented said bill of lading to defendant, and demanded the grain called for in said bills, which was refused, to plaintiff's damage to the value of the grain," etc.

In each of the even numbered counts of the petition plaintiff set out, in addition to the above facts, the existence of a general custom in Kansas City, in all cases when grain is shipped to that city on bills of lading similar to those herein mentioned, where delivery is to be made to shipper's order, for the railway companies, on the delivery of such grain, to take ⁴⁰⁷ up such bills of lading, and that such custom was at all times known to defendant; and that during all said time a general custom had obtained in Kansas City of loaning money upon the security of grain in the hands of the railroad companies on bills of lading similar to these sued on here, when grain is to be delivered to shipper's order, and of receiving such bills of lading as evidence of the ownership of said grain, which custom was known to defendant; and that, in accordance with, and relying upon, such custom, the plaintiff made the loan to the Courier Commission Company, and that, by reason of the custom, defendant became obligated to deliver said grain to plaintiff on the production and offer to surrender the original bills of lading so issued by it, and is now estopped from refusing so to deliver said grain, etc.

In our view of the law governing such instruments and the rights of indorsers thereunder, the matter of custom so set up in the plaintiff's petition, as well as the countervailing custom pleaded by defendant in its answer, will count for but little in the determination of the real issues involved; and in eliminating them now, as factors not to be considered, many minor questions raised by defendant, as to alleged error of the trial court

in admitting and excluding testimony offered on those questions, are made of no consequence, as its admission or exclusion could affect only nonessential issues raised by the pleadings.

Defendant, in its answer, admitted the execution and delivery of the bills of lading sued on to the Courier Commission Company, and that the commission company, by indorsement in writing, had transferred same to plaintiff before the institution of this suit, and that plaintiff was now the holder and in possession of same, and had made demand upon it for the grain called for in the bills of lading in suit, ⁴⁰⁸ and that it refused to deliver same to plaintiff, but denied that plaintiff had purchased and paid for same, as alleged in its petition.

And, further answering, alleged that, when the grain mentioned in the bills of lading sued on was delivered to it for shipment, it issued bills of lading in sets, that is, three bills of lading for each car, and that, soon after the issuance of the bills, it in good faith delivered the grain covered by said bills of lading to the owner thereof, the Courier Commission Company, on the surrender to it of one set of said bills of lading by the Courier Commission Company; that, subsequent to the delivery of said grain by it to the commission company, the plaintiff obtained possession of the bills of lading sued on, and that, at the time it got possession of same, it knew, or by the exercise of ordinary care, caution, and prudence, could have ascertained, that the grain called for in said bills of lading had been delivered by defendant to the commission company, and that said bills were no longer valid; that at the time when said bills of lading were received by plaintiff, there was, and for a long time prior thereto had been, prevailing in Kansas City, among all the railroad companies which were then in the habit of shipping grain into Kansas City, and particularly with the defendant, a custom whereby the owner of grain so shipped to said city was required to receive and take possession of the same within six days after its arrival in said city, and that said plaintiff, when it received said bills of lading, was aware of such custom, and must have known, if it had exercised reasonable care and diligence, that said grain had, long prior to that time, been delivered to the owner thereof; further, that upon the grain being delivered to the commission company by defendant, said company shipped same to other points, and received from defendants and other railroad companies ⁴⁹⁹ in Kansas City bills of lading therefor, and that afterward the commission company attached said bills of lading to drafts, and delivered the same to plaintiff, who caused said grain to be sold, and received the proceeds thereof.

Plaintiff then filed its reply, alleging the existence in Kansas City of a general custom that shipments of grain and other property consigned to and arriving in Kansas City, billed to the order of the shipper, were deliverable only upon the production, surrender, and cancellation of the original shipper's order bills of lading; and that if any delivery of the grain in controversy was made by the defendant to the Courier Commission Company, it was made without the production, surrender, and cancellation of the original shipper's order bill of lading, in violation of said custom, upon which plaintiff relies; and that defendant, by reason of the premises, was estopped from claiming or showing a delivery without the production and surrender of the original shipper's order bill of lading—coupled with a general denial of new matter set up in the answer, etc.

The question as to the good faith of the defendant in the matter of the delivery of the grain in controversy to the Courier Commission Company, or that, by the exercise of ordinary care and prudence on part of plaintiff, it might have been able to have ascertained the fact regarding the delivery of the grain by defendant to the Courier Commission Company, is in no wise controlling, and cannot be used to defeat plaintiff's right of action as holder for value. The rights of the parties to this litigation must be determined by the contract of affreightment issued by the defendant company to the Courier Commission Company, unless the plaintiff, or some holder of the bills before it, has done something, with the knowledge of plaintiff, whereby ⁵⁰⁰ defendant was discharged from its obligation; and no custom practiced and maintained by the defendant and other railway companies at Kansas City can prevail, against the express language of their contract of affreightment, to affect the rights of the holder by indorsement thereof, or in anywise limit the liability of the defendant thereon, unless such custom had been exercised, and plaintiff had purchased or received the bills with the knowledge of that fact.

The fact that a rule was in force among the railroads at Kansas City at the time of this transaction, and, further, that from its general enforcement and practice, a custom had thereby been established, that was known to plaintiff, to the effect that grain and produce shipped to Kansas City were to be received by the consignee within six days from the date of its arrival on the tracks there, would not excuse or justify the misdelivery of the goods by defendant, or relieve against the express language of the contract of affreightment to deliver to the "shipper's order." If the plaintiff did nothing to mislead defendant, it had the right

to rely upon the fact that it held the bills of lading, and that, according to the ordinary course of business, the grain could not be obtained except upon their production. The custom pleaded by defendant could do nothing more than impose upon the consignee or the holder of the bills by indorsement the expense of paying for the storage of the grain after the sixth day of the arrival of same at Kansas City, and could in no sense be said to operate, influence, or control the question of the delivery and disposition of the grain to other than the rightful owner, except for storage purposes. In other words, the question of where defendant might store the grain, and what burdens he might impose on it, after the sixth day of its arrival, and nonacceptance by the owner, according to a prevailing ⁵⁰¹ custom at Kansas City, in no way affects or controls the question as to who is entitled to the grain, or the question as to whom defendant had contracted to deliver the grain under the bills of lading issued by it.

Nor can the fact that the defendant in good faith delivered the grain covered by the bills of lading in suit to the commission company, knowing that they were the original shippers and consignees named in the bills of lading, as they had oftentimes done before, on surrender of the duplicate bills of lading merely, avail defendant anything in this action, if the bank, the holder by indorsement and assignment of the original bills of lading, were ignorant of the fact. If the defendant, trusting to the former fair dealing and integrity of the commission company, saw fit to deliver to it, or to rebill the cars of grain to other points for the commission company, and issue other bills of lading for same, without requiring the production of the original bills of lading issued at Paola, Kansas, and now held by plaintiff, it took the risk of the truthfulness of the Courier Commission Company's statements as to who was the owner of the grain, and cannot now avoid it, and lay his burden upon the shoulder of the bank, unless it can further show that the bank did something to deceive it, and led it into the error it committed in thus delivering the grain to the Courier Commission Company.

By the admissions of the defendant in its pleading, supplemented by the positive proof of its witnesses, the plaintiff was the holder for value, by written indorsement thereon and the delivery thereof, of the bills of lading sued on; and if so, own testimony, fixes its liability, and it was the duty of then the admission by pleading, supplemented by defendant's the court to give legal effect to such facts by instruction, and

the jury were only left to ascertain the amount of the liability,⁵⁰² as was done in this case. If plaintiff is the holder by indorsement of the bills of lading, then it owned the grain covered by them, and defendant cannot excuse itself by saying that plaintiff did not present its bills in a reasonable time, and that, by reason of that fact, it turned over the grain to the consignee on the simple surrender of its duplicate bills, or rebilled same to other points, without the production, surrender, or cancellation of the original "shipper's order bills of lading."

Defendant next contends that the notes held by the bank show upon their face that the money represented by them had been advanced by the bank to the Courier Commission Company long prior to the time when the bills, or a part of them, at least, were or could have been received by the bank, and that, as a consequence, the money could not have been advanced on the faith of the bills of lading in suit, as alleged in plaintiff's petition; which, in a limited sense, is true, but not in the sense that it was taken as collateral security for an antecedent pre-existing indebtedness.

The testimony of the officers of the bank, as well as Mr. Courier, of the Courier Commission Company, called in behalf of the defendant, was that these bills of lading were delivered as security, under an agreement between the bank and the commission company that advancements would be made by the bank, from time to time, to the commission company, as its necessities would require; or that they were given in exchange for like collateral that had been previously deposited with the bank for money advanced.

The fact that there was a change in the collateral, some of the bills of lading being withdrawn, and part of those in suit being put in their place, will not alter plaintiff's relation to them, or his rights of action thereon as against defendant. The surrender of a former⁵⁰³ set of bills of lading was a consideration for the pledge of those in suit, so taken in exchange therefor, and the plaintiff continues to be a bona fide holder for value of the substituted bills, although antedating the loan secured.

The rule is stated thus in Colebrooke on Collateral Security, section 15: "The exchange or substitution of other securities for those originally delivered as collateral has no effect upon the rights of the pledgee, as founded upon the original contract. The surrender of the securities originally deposited is a valuable consideration for the giving of the new securities, and the pledgee is as to the latter a holder for value, in the usual course of business. Such exchange and substitution is sometimes of

the utmost benefit to the pledgor, and is supported as against creditors, for the reason that they are not harmed thereby. Even after a pledgor is known to be insolvent, such exchange and substitution of securities is valid, if made bona fide, the pledgee receiving securities of no greater value than those surrendered."

While it is true, as contended by appellant, that, as these bills of lading were issued in the state of Kansas, this cause is not to be determined by the provisions of our statute affecting such instruments, it is not true, as further contended by appellant, that, by the rules of the common law, where bills of lading are presented by the person therein named as the party to whom the goods are to be delivered, the delivery to such person is valid, although the party presenting the bills is the holder of only the duplicate or triplicate set of bills, and the original had been surrendered to a bona fide pledgee or purchaser for value.

Our statute not only provides that bills of lading are made negotiable by written indorsement thereon and delivery thereof, in the same manner as bills of ⁵⁰⁴ exchange and promissory notes, but, to the demands of the business and commercial world, went a step further, and provided "that no prescribed or written condition, clause, or provision inserted in, or attached to, any such bills of lading or contract shall in any way limit the negotiability, or affect any negotiation, thereof, nor in any manner impair the rights and duties of the parties thereto, or persons interested therein; and every such condition, clause, or provision purporting to limit or affect the rights, duties, and liabilities created or declared in the chapter shall be void, and of no force or effect"—thus making it unavailing to the carriers to issue bills of lading with such clauses and conditions as have been incorporated in many heretofore issued, and in the consideration of which courts have announced propositions similar to that announced by appellant; and those rulings and utterances of the court in turn have been taken, in many instances, as the general doctrine governing such instruments, and the rights and duties of the parties thereunder, in cases when the conditions and obligations under the bills of lading have not been restricted or conditional, as in the original case that gave birth to the oft-quoted doctrine.

Numerous cases may be found where the doctrine is announced in a general way that, when goods are shipped under bills of lading drawn in parts, to be delivered to the consignee or his order, or assigns, the carrier is justified in delivering to the consignee on production of part of the bill of lading, although there has been a prior indorsement for value to the holder of

another part, provided the delivery be bona fide, and without notice or knowledge of such prior indorsement; and we have been referred to the case of Glyn Mills etc. Co. v. East & West India Dock Co., L. R. 7 App. Cas. 591, decided by the house of lords, ⁵⁰⁵ wherein all the judges rendered separate opinions, and reviewed quite fully the most prominent adjudications on that subject for the past century, in their court, as well as many of the other English appeal courts, as sustaining defendant's contention.

While Lord Selborne, L. C., in that case says: "It is clear that the shipowner may be discharged by a bona fide delivery, under the terms of his contract with the shipper, to a person who is not the true owner; and I think there is no sufficient reason for refusing him the benefit of that contract, when the part of the bill of lading on which he makes a like bona fide delivery is not indorsed"—it must be borne in mind the nature and condition of the contract he is construing, and the contention of the parties to that litigation.

This was a suit for damages by bankers in London—to whom the shipper had indorsed in blank the bill of lading marked "First" of a set of three bills affirmed by the master, all of the same tenor and date, with this condition inserted therein: "The one of which bills being accomplished, the other to stand void"—against a dock company (to whom the goods had been turned over for storage) for delivering them to the shipper on his presenting the bill marked "Second," not indorsed; the bill marked "First" having before that time been duly indorsed for value to the bank, but not known to the shipowner or the dock company, who held the goods for him. The same learned judge, elsewhere in his opinion, uses this language, that clearly indicates the governing consideration in the mind of the court while using the general language above quoted:

"It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor and ⁵⁰⁶ date, are given as to the same goods, it is provided that the 'one of these bills being accomplished the others are to stand void.' It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment, of which the shipowner has no notice, should prevent a bona fide delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment) from being a discharge to the shipowner."

And again, to show the question prominent before the court in that case, we will quote from the opinion delivered by Earl Cairns at the same time, and in the same court: "Then what has the shipowner to do? The shipowner has to protect himself from that which is liable to cause difficulty or embarrassment to him, and the way in which, as it appears to me, he does protect himself is by stating that although 'the master or purser hath affirmed to three bills of lading,' that is to say, has signed three bills of lading, 'all of the same tenor and date,' yet notwithstanding that fact, 'one of these bills of lading being accomplished the others shall stand void,' which I understand to mean that if upon one of them the shipowner acts in good faith he will have 'accomplished' his contract, will have fulfilled it, and will not be liable or answerable upon any one of the others. If one is produced to him in good faith, he is to act upon that and not to embarrass himself by considering what has become of the other bills of lading. That appears to me to be the plain and natural interpretation of these words, having regard to the purpose for which they are introduced."

Thus it will be seen that, while there are authorities using the exact language as used by defendant in its assertion as to the correct rule governing the duty, ⁵⁰⁷ liability, and responsibility of the carrier to the holders of bills of lading issued by it, there must always be kept in mind the peculiar phraseology of the instrument to be construed.

Much of the conflict of the courts on this subject has been due to an attempt to apply the rule announced in a particular case to the general doctrine governing bills of lading. In the case just referred to, the bills of lading bore this caveat and contract on each of the sets issued: "The one being accomplished, the others to stand void"—thus furnishing an ample beware to the money loaner, and at the same time a full protection by contract to the carrier. Under such circumstances, the carrier, in delivering the goods, on production and surrender of either one of the sets of three bills of lading issued, performed his contract, which was in that particular restriction and limitation on the otherwise negotiable and assignable character of such instrument, which, until prohibited, as in this and many other of the states, by statute, was permissible and lawful. In the present case, no such contract appears in the bill of lading issued by defendant, and no such qualifying words restrict its negotiability.

We think the right of the holder by indorsement for value of an original bill of lading goes much farther, in a contest like

this with the carrier, than was announced by this court in the case of *Skilling v. Bollman*, 73 Mo. 665; 39 Am. Rep. 537; cited and so much relied on by defendant. In that case, the court simply declared that, when triplicate bills of lading had been executed by the carrier to the order of the shipper, of which two were delivered to the shipper, and one of the delivered bills of lading has been indorsed to the plaintiff for value before the shipper sold and delivered the goods covered by it to defendant, the plaintiff should recover against the defendant the value of the goods, his bill ⁵⁰⁸ of lading being prior to defendant's purchase and receipt of the goods from the shipper. That case involved simply the question of priority of rights between two independent purchasers of property, or the purchasers in one case, of the symbol or representative of the property, and the purchase of the property itself.

While that case was properly decided, it does not reach the facts of this case. Then it was a question of the priority of right between two parties in nowise connected with, or responsible for, the issuance of the bill of lading. Here a different principle is involved. The contest is between the defendant company, who issued and gave life to, and set afloat, this bill of lading, and the plaintiff, the holder of it by indorsement for value.

The question as to whether defendant disposed of the grain before plaintiff purchased the bills of lading can effect nothing, except for showing plaintiff's knowledge of the fact, and his bad faith in the purchase thereafter. After plaintiff had dealt with the commission company upon the legal assurance, as declared in the bills of lading now held by it, that the grain was in defendant's possession, to be delivered only on the presentation of the shipper's order bill of lading, and had given credit and advanced money on the strength of the announcement and contract therein made by the defendant, it is inequitable that defendant could be now heard to say: "I have delivered the grain to the consignee," in violation of law and of the customs prevailing in Kansas City regarding the surrender and delivery of such property.

While bills of lading before the adoption of our statute were not negotiable in the full sense as notes and bills of exchange, still, by the words "consignee, or order, or assigns," an authority to dispose of it by ⁵⁰⁹ indorsement was manifest on its face, and a person or company who issues it ought, on all principles of estoppel, to be denied the right to be heard, as against the holder, to say: "True, we made and promised to deliver to the consignee, or his order or assign, but a misdelivery has happened

to us by trusting to the word of the consignee, and we ought not now to suffer."

Applying to this case the familiar principle "that where one of two innocent persons must suffer by the act of a third, he should suffer who, by his conduct, has made it possible that the damage should be sustained," how would it affect the parties to this litigation? Assuming that both are equally innocent, the blame must fall on defendant, because it was its act in failing to comply with its duty that made it possible that plaintiff should have invested its money in bills of lading which defendant now seeks to dishonor.

In issuing these bills of lading, defendant said to the business and commercial world: "We hold twenty cars of grain, delivered to us by the Courier Commission Company, which will be retained by us for the company or its assigns, by indorsement in writing, and none of the grain therein will be delivered to anyone, except on the surrender and cancellation of those bills of lading." And now, after thus announcing to the world these facts by the issuance of its bills of lading, which are symbols of the property in its custody, and the muniments of title thereto in the hands of the holder thereof, can it afterward say to the holder of these symbols, which represent and stand for the property itself: "True, we said that we had the property, and that we would hold it subject to be delivered only to the holder of the instruments issued by us, but we ought not now to be held to that agreement, because we have carelessly, but in good faith, delivered the same to the original shipper"; or, what is the same, at ⁵¹⁰ its request rebilled the grain to another point without this state, not requiring the production, surrender, and cancellation of the original shipper's order bills of lading; or, what is equally untenable as an answer, "because you [the plaintiff], as holder of those bills, did not present them as soon as the grain reached Kansas City."

If, under ordinary circumstances, the failure to present, on the part of the holder, bills of lading, indorsed as in the case of the ones in suit, to the carrier within a reasonable time after the cars containing the property have reached their destination, would have authorized the delivery of the property to the original shipper—which is not true—still, under our statutes, full and ample provision is made to cover just such a condition of things by section 6806 of the Revised Statutes, which provides that "when any goods, merchandise, or other property shall have been received by any railroad, . . . and shall not be received by the owner, consignee, or other authorized person, it shall be

lawful to hold the same by said carrier," etc., or the property may be stored with some responsible person, and be retained until the freight and all just charges be paid.

By reason of the negotiable character of the bill of lading, as well as by the practices and necessities of the commercial world, the assignees of same may oftentimes be said to have a better title, and stand in a better position as to the property named in the bill of lading, than the assignor himself had at the time of the transfer by indorsement. Since the assignor, as holder of the bill of lading, is entitled, on its face, to receive the property named therein on presentation of the bill of lading issued by the carrier, and known by the carrier to authorize the holder thereof by indorsement to receive, on presentation of same, the goods therein ⁵¹¹ named as owner, the assignee may be said to have rights superior and greater than the assignor of the bill. The assignor might, in fact (as defendant claimed the Courier Commission Company had no right to the property named in the bills of lading), have had no right to the property by reason of the property having been reshipped, and new bills of lading issued to it for the same, or on account of equities that might exist between the shipper and carriers to defeat the shipper's right to recover the property.

The Courier Commission Company was in the actual, authorized possession of those bills of lading issued by the defendant, which, in the growth and development of commerce and commercial credit, have come to represent the property itself, so that a transfer of the instrument operates to transfer the property. Being armed with these muniments of title and these symbols of property, which, by written indorsement, are negotiable, the holder of the bill is capable of diverting the property of the owner, and vesting it in the indorsee, although he had previously disposed of it to another, provided the indorsee was ignorant of the equities, in this possessing some of the attributes and qualities of a negotiable bill of exchange.

By these means, the property was put under the power and control of the Courier Commission Company for disposition, without the actual delivery of the property itself to its assignee or vendee, and that, too, after an actual delivery might have been made to it or another, should the carrier deliver same to the purchaser without taking up the muniments of title outstanding in the hands of the shippers. If the defendant permitted the Courier Commission Company to remain in possession of these bills of lading after the grain had been reshipped by it for the Courier Commission Company, thereby holding it out to the

world ⁵¹² as having the right to deal with the property, it will be estopped from denying that title and ownership of property in the hands of an innocent purchaser, pledgee, or mortgagee.

By delivering the grain to the Courier Commission Company, or by rebilling and reshipping it for the company, the defendant became liable to plaintiff, unless it can show some valid excuse. The record shows no laches—no act of omission or commission—of plaintiff which would authorize the misdelivery, or excuse the nondelivery, of it.

The case of *Barber v. Meyerstein*, L. R. 4 Eng. & Ir. App. 337, in commenting on the question of an indorser's laches, says: "This is quite immaterial when a man has got both the right of property and the right of possession, passing by a symbol, the bill of lading, which is at once both the symbol of the property and the evidence of the right of possession. When his title is thus complete, there is no obligation on him to give notice to anyone. There was, therefore, no laches on his part, nor was there any ground of complaint that he failed in ordinary prudence, or that he did not, in law and equity, complete his security."

Plaintiff had the right to rely upon the fact that, as it held the original shipper's bills of lading, and that, in the ordinary course of business, the grain could not be obtained except upon their production and surrender, it would be held for it. If the defendant saw fit to rebill and reship for the Courier Commission Company the grain called for in the bill of lading first issued by it, and sued on in this case, it must now suffer the consequences of its own carelessness.

The direction in the bill of lading to notify the Courier Commission Company at Kansas City in no way can be said to change, modify, or qualify the duty of the railroad company to deliver the grain to shipper's ⁵¹³ order. By the contract of affreightment, the duty of the railroad was threefold: 1. To forward the grain; 2. To notify the Courier Commission Company; and 3. To deliver to shipper's order on arrival of the grain at its destination. If, after notifying the Courier Commission Company, it nor anyone came forward with the bills of lading duly indorsed, as provided by the terms thereof, it was the defendant's plain duty to put the grain in store, as provided by statute, as well as by the like emphatic dictates of necessity and business prudence. The duplicate bills of lading issued in this case, and marked as such, cannot be treated as more than written memoranda, demanded by shipper and given by carrier for prudential purposes, in case of the loss of the original. In view of the present universal use and service of the bill of lading in the business and

commercial world, great hardship and wrong would be perpetrated to hold otherwise.

For the reasons herein given, the judgment of the lower court is sustained.

Brace, C. J., and Macfarlane and Barclay, JJ., concur.

CUSTOM.—ADMISSIBILITY OF, TO VARY the terms of a contract is the subject of the extended note to Willmering v. McGaughey, 6 Am. Rep. 678-682.

CARRIERS—DELIVERY—BILLS OF LADING.—A delivery of goods by a common carrier to the consignee is made at the peril of the carrier, unless, when made, the consignee surrenders the bill of lading either made or indorsed to himself: Union Pac. Ry. Co. v. Johnson, 45 Neb. 57; 50 Am. St. Rep. 540.

A BILL OF LADING is a contract between the shipper and the carrier, and binds the shipper so far as the conditions named therein are reasonable in the eye of the law, because, by receiving the bill of lading, the shipper is presumed to have assented to its terms: Davis v. Central Vermont R. R. Co., 66 Vt. 290; 44 Am. St. Rep. 852, and note.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

SMITH *v.* JONES.

[47 NEBRASKA, 108.]

ATTORNEY AND CLIENT—POWER OF ATTORNEY TO RELEASE DEBTOR.—An attorney at law has no power, under a general employment to collect a debt, to release a debtor without an actual payment of the full amount of the debt in money.

Darnall & Kirkpatrick, for the appellants.

O'Neill & Morgan, for the appellee.

¹⁰⁸ IRVINE, C. This was an action by the appellee against Jones, the sheriff of Custer county, Foster, his deputy, and the Farmers & Merchants' Insurance Company to restrain the defendants from the enforcement of a judgment of a justice of the ¹⁰⁹ peace obtained by the insurance company against Smith. Relief against the judgment was sought on the ground that after the judgment was rendered (quoting the petition), "The Farmers & Merchants' Insurance Company acknowledged the payment of said judgment and receipted for same in the following words and figures, to wit:

"Broken Bow, Sept. 8, 1890.

"Received of Humphrey Smith, two dollars, one-half costs Farmers & Merchants' Insurance Co. *v.* Smith, also application for \$3,000 insurance, in consideration of which we agree to release judgment in this case.

"KIRKPATRICK & HOLCOMB,

"Attorneys for Plaintiff."

The evidence shows that, after the judgment was obtained, an agreement was entered into between Smith and Kirkpatrick & Holcomb, attorneys for the insurance company, whereby the

judgment was to be released on payment by Smith of one-half the costs, estimated at two dollars, and the taking out of new insurance to the amount of three thousand dollars. Smith paid the two dollars, and made application for insurance. The company wrote the policy and sent it to the attorneys, but it was never delivered to Smith, for the reason that he failed to pay the premium thereon. It will be observed that the instrument which plaintiff counts upon as evidence of the satisfaction of the judgment is not, in form, a release of the judgment, but an agreement to release, whether in consideration of the application for insurance or in consideration of the insurance is doubtful from the terms of the instrument. There is a conflict in the evidence as to whether the judgment was to be released on Smith's making application for the insurance, or ¹¹⁰ whether it was to be released only on his payment of the premium; but the evidence in support of the former view is very slight. In any event, the conflict is not material. The attorneys, by the undisputed evidence, had no express authority to release the judgment, except upon the taking out of and paying for the new insurance. They merely had a general employment to collect the debt evidenced by the judgment; and the only subsequent authority obtained was through a letter inclosing the policy, with directions to collect the premium, and sent in response to a submission by the attorneys of a proposition to satisfy the judgment on the actual taking out of new insurance. The ordinary powers of an attorney do not authorize him to execute any discharge of a debtor but upon the actual payment of the full amount of the debt, and that in money only: *Hamrick v. Combs*, 14 Neb. 381; *Stoll v. Sheldon*, 13 Neb. 207. See, also, *State Bank of Nebraska v. Green*, 8 Neb. 297; *Luce v. Foster*, 42 Neb. 818. If the agreement was as Smith claims, it was without authority on the part of the attorneys, and was not ratified by the insurance company. It follows that the judgment of the district court granting an injunction as prayed by the plaintiff was erroneous.

Reversed and dismissed.

ATTORNEY AND CLIENT—POWER OF ATTORNEY TO RELEASE DEBTOR.—An attorney is not authorized to release or discharge his client's claim or money judgment without actual payment in money: See monographic note to *Clark v. Randall*, 76 Am. Dec. 260, on powers of attorneys at law. If he is employed merely to collect a debt, he has no authority to receive part of it in full after it is reduced to judgment: *Watt v. Brookover*, 35 W. Va. 323; 29 Am. St. Rep. 811.

HOME FIRE INSURANCE COMPANY OF OMAHA v.
KENNEDY.

[47 NEBRASKA, 128.]

INSURANCE, FIRE.—A WAIVER OF A FORFEITURE, by a fire insurance company, caused by any act of the company, after a loss, and with full knowledge of all the facts, need not be based upon any new agreement, or an estoppel.

INSURANCE, FIRE—EFFECT OF FAILURE TO DECLARE FORFEITURE—WAIVER OF BREACH OF WARRANTY.—A fire insurance company, after a loss, waives all defenses based upon a breach of warranty, and a resulting forfeiture, if, with a knowledge of the facts amounting to such breach, it fails to declare a forfeiture, but continues to recognize its liability by demanding successive amended proofs of loss, and making repeated peremptory calls for arbitration, under a stipulation which applies only to the measure of damages; and notice, by the company's secretary, in returning the first proof of loss for correction, that the company "neither admits nor denies liability nor waives any of its rights under said policy," does not affect such waiver of defenses.

ARBITRATION, STIPULATION FOR, WHEN REVOCABLE. A stipulation for arbitration, which does not provide for submitting the matters in dispute to a particular person, or to a particular tribunal, but to one or more persons to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject matter of the controversy.

INSURANCE, FIRE—WAIVER OF ARBITRATION.—The denial, by an insurance company, of its liability under a fire policy issued by it, upon the ground of a forfeiture, by reason of a breach of warranty, is a waiver of its right to insist upon arbitration as a means for ascertaining the amount of the plaintiff's damage, although such means are provided for in the policy.

Jacob Fawcett, for the appellant.

I. J. Dunn and Martin Langdon, for the appellee.

130 POST, C. J. This was an action by the defendant in error, Catherine Kennedy, against the plaintiff in error, the Home Fire Insurance Company of Omaha, upon a policy of insurance. The defendant company for answer admitted the insuring of the plaintiff's property, to wit, a two-story frame and brick building, and that said building was destroyed by fire within the period covered by said policy. It, however, alleged that said policy was not in force at the time of the loss, for reasons which will be hereafter noticed. A trial was had in the district court for Douglas county, resulting in a verdict and judgment for the plaintiff below, which has been removed into this court for review by the defendant company.

It is first contended that the risk was increased in violation of the policy: 1. From the fact that the building described therein was, at the time of the loss, used and occupied as a tenement house, whereas it was insured as a private dwelling only

2. By the use and keeping therein of gasoline in excess of the amount permitted by the policy. In support of the first of the alleged violations we are referred to the following questions and answers shown by the application for the policy: "Q. Is the house occupied for private dwelling only? A. Yes. Q. By owner? A. Yes." And also to the following conditions of the policy: "Or if the risk be increased in any manner without consent indorsed hereon, . . . then this policy shall be null and void." It is not claimed that the representations of the insured respecting the occupancy of the premises at the date of the policy were false as to any essential fact. The only evidence ¹⁴⁰ we discover bearing upon that question is the following testimony of the defendant in error, Mrs. Kennedy: "Q. Who was occupying the house at the time the policy was issued, March 30, 1889? A. I could not say whether there was anyone but myself or not. Q. The house was not complete at the time the policy was issued? A. No, sir."

It is, however, contended that the foregoing condition of the policy, in connection with the application, is to be construed as a continuing warranty or affirmative agreement that the validity of the said policy should depend upon the literal fulfillment of the contract by the insured. Applying the rule thus asserted to the facts disclosed by this record, counsel argue that the policy is void and of no effect, for the reason that there were, at the time of the loss, in addition to the family of the insured, consisting of herself and son, three families occupying rooms in said house, although the record is silent respecting the number of such occupants or the character of their tenure. It is deemed unnecessary to review the many authorities cited in support of that contention, since it is, we think, conclusively shown that the defendant company has, by its action subsequent to the loss, waived whatever right it may have had to declare the policy void on account of the facts stated, or by reason of the violation of the condition regarding the keeping of gasoline in the building insured. The company, according to the testimony of its own witnesses, was fully advised of the facts constituting the alleged violation of the contract by the insured, five days ¹⁴¹ after the loss, to wit, on March 16, 1891. Fourteen days later, on March 30th, the plaintiff below served upon the defendant what appears to be formal proof of loss, sworn to before a notary public and attested by two disinterested neighbors, in the presence of a justice of the peace. On the same day, Mr. Barber, secretary of the defendant company, acknowledged the receipt thereof as follows:

“Omaha, Neb., March 30, 1891.

“Mrs. Catherine Kennedy, Holder of Policy No. 30715, Issued by the Home Fire Insurance Company of Omaha, Nebraska.

“Papers purporting to be proofs of an alleged loss under said policy have been received, but same are irregular, defective, and deficient, in that they do not comply with the terms of the said policy, in that it requires that proofs duly executed and sworn to by the assured under the said policy be made and furnished the said company. You have been required, and are hereby required, to render under oath a particular account of said alleged loss, setting forth the date and circumstances of the same, together with title, occupancy, and other insurance, if any, and itemized estimate of the value of the property destroyed, said proofs to be signed and executed in accordance with the terms of said policy. No estimate of the said building insured under the said policy, nor the alleged damage thereto, made by J. P. Gardiner, nor any other person, have been furnished this company by you. The papers purporting to be proofs of loss are not signed and sworn to by you, and are defective and deficient as to every requirement of said policy; the same are herewith returned declined.

¹⁴² “The said company neither admits nor denies liability, nor waives any of its rights under said policy.

“Very truly,

“CHAS. J. BARBER,

“Secretary Home Fire Insurance Company.”

In accordance with the direction contained in the above communication the plaintiff, on April 1st, served upon the company an additional, or, as described by the witnesses, an amended, proof of loss, which was likewise returned, accompanied by the following letter:

Omaha, Neb., April 3, 1891.

“Mrs. Catharine Kennedy, Holder of Policy No. 30715, Issued by the Home Fire Insurance Company of Omaha, Neb.

“Madam: Papers purporting to be proof of your alleged loss and damage under the said policy have been received, but same are defective, deficient, and incomplete, in that they do not fully set forth the occupancy of the said building alleged to have been damaged, nor are they accompanied by an itemized estimate of value of property destroyed, nor are said alleged proofs signed by two disinterested neighbors, nor by nearest magistrate, as required by terms of the said policy. The estimates given in said proofs are in lump, and not itemized, and are not made by com-

petent party. The estimate must be specific and in detail in order to be an itemized estimate. The papers are therefore herewith returned, declined.

Very truly,

"CHAS. J. BARBER,

"Secretary Fire Insurance Company."

And on April 6th the plaintiff prepared and served a third statement of her loss, which, so far as appears, conforms to all the suggestions of the ¹⁴³ defendant company. She was in the meantime notified by the defendant of its election to arbitrate the differences between them, by letter of Mr. Barber, under date of March 31st, in the following language:

"Omaha, March 31, 1891.

"Mrs. Catharine Kennedy, Holder of Policy No. 30715, Issued by the Home Fire Insurance Company of Omaha.

"Madam: Arbitration of the differences that have arisen between you and the said company, as to the actual damages by fire to building insured under the said policy, is hereby demanded. Please name arbitrator and date agreeable to have said arbitration take place. The said company, by calling for arbitration, neither admits nor denies liability, nor waives any of its rights under the said policy.

Very truly,

"CHAS. J. BARBER,

"Secretary Home Fire Insurance Company."

The foregoing was followed by communications bearing date of April 3d, 4th, 8th, and 24th, each, in positive terms, demanding arbitration in accordance with a provision of the policy for the adjustment by that means of controversies relating to the amount of loss or damage by the insured.

In *Hollis v. State Ins. Co.*, 65 Iowa, 454, the rule is thus stated: "Where the insured, at the time of the loss, has forfeited his right to recover on the policy, and the company, knowing the facts, continues to treat the contract as of binding force, thereby inducing the insured to act and incur expense in that belief, the company thereby waives the forfeiture"; and in *Titus v. Glen's Falls Ins. Co.*, 81 N. Y. 410, we observe the following ¹⁴⁴ language: "But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it [the insurer] recognizes the continued validity of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an

estoppel": See, also, Webster v. Phoenix Ins. Co., 36 Wis. 67; 17 Am. Rep. 479; Cannon v. Home Ins. Co., 53 Wis. 585; Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234; Silverberg v. Phoenix Ins. Co., 67 Cal. 36; Marthinson v. North British etc. Ins. Co., 64 Mich. 372; Eddy v. Merchants' etc. Ins. Co., 72 Mich. 651; German Ins. Co. v. Gibson, 53 Ark. 494.

The foregoing, among the many cases in harmony therewith, serve to illustrate the rule applicable to the present controversy. The demand for successive proofs of loss after knowledge of all the facts, upon grounds which are, to say the least, highly technical, thus imposing upon the insured the labor and expense incident to their preparation, and the repeated peremptory calls for arbitration, in accordance with the terms of the policy relating to the measure of damage only, cannot be construed otherwise than as a waiver of the alleged forfeiture. And the rulings complained of, so far as they relate to that branch of the case, if erroneous, are manifestly not prejudicial to the plaintiff in error; nor are we unmindful of the fact that Mr. Barber, on the return of the first proof of loss, disavowed the admission ¹⁴⁵ thereby of any liability on the part of the defendant company or a waiver of any of its rights. But such a disavowal will not vary the legal effect of his actions in behalf of the defendant. In Marthinson v. North British etc. Ins. Co., 64 Mich. 372, a case in point, the managing officer of the company, on returning the proof of loss for correction, used this language: "You will further take notice that, in returning said papers and making the objection thereto, and in all other matters herein, this company waives none of its rights and defenses under their said policy, but expressly reserves each and every one thereof unto itself." In commenting upon the foregoing, the court, by Morse, J., say: "We do not think this general reference to other possible defenses was sufficient. It devolved upon the defendant to specifically state its defenses, or some of them, if it had any other than those going to the defects in the proof of loss. If the company had frankly stated that it refused to pay the alleged loss because of the breaches of warranty and forfeiture by the conditions of the policy, the knowledge of which it then possessed, the assured would have, in all probability, gone no further into cost and trouble to perfect such proofs of loss, as its refusal to pay on other grounds would have rendered it unnecessary. This loose and general reservation of its rights cannot be considered as an adequate notice of the defenses insisted upon at the trial, and it must be held that such defenses were waived by its conduct."

The only remaining question relates to the effect of the provision of the policy for determining, in case of loss, by arbitration of the amount of damage. It has been repeatedly held that a ¹⁴⁶ stipulation for arbitration which does not provide for submitting the matters in dispute to a particular person or to a particular tribunal, but to one or more persons to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject matter of the controversy: *Hostetter v. Pittsburgh*, 107 Pa. St. 419; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562; *Donnell v. Lee*, 58 Mo. App. 288; *Rison v. Moon*, 91 Va. 384; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419; *German-American Ins. Co. v. Etherton*, 25 Neb. 505. The last-mentioned case furnishes an additional reason for the rejection of the defense based upon the refusal of the plaintiff below to arbitrate, viz., that the denial by the defendant company of its liability under the policy is a waiver of whatever right it may have had to insist upon the means therein provided for ascertaining the amount of the plaintiff's damage.

The judgment of the district court is right and must be affirmed.

INSURANCE, FIRE—FORFEITURE—WAIVER.—If an insurance company, after knowledge of a breach of condition in its policy, enters into negotiations or transactions with the insured, which recognize the policy as still in force, and induce the insured to incur trouble or expense, it waives the right to insist upon a forfeiture: *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62, and note; *Murray v. Home Ben. Life Assn.*, 90 Cal. 402; 25 Am. St. Rep. 133, and note. If the insurer occasions or encourages the insured to incur the expense and trouble of making proper proofs of loss, it is estopped from afterward proving a known pre-existing cause of forfeiture: Note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 238. The waiver of a forfeiture precludes a party from afterward insisting upon it as a defense: See monographic note to *Smith v. Mariner*, 68 Am. Dec. 85, on relief in equity against forfeitures: *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158; 39 Am. St. Rep. 637.

INSURANCE, FIRE—ARBITRATION—WAIVER.—A party may revoke a submission to arbitration at any time before an award is made: *McKenna v. Lyle*, 155 Pa. St. 599; 35 Am. St. Rep. 910, and note; note to *Commercial Union Assur. Co. v. Hocking*, 2 Am. St. Rep. 567. Submissions to arbitration are revocable in their nature, and the parties cannot make that irrevocable which is of its own nature revocable: *People v. Nash*, 111 N. Y. 310; 7 Am. St. Rep. 747. An insurer waives the remedy of arbitration by denying all liability under its policy: Note to *Hennessy v. Niagara Fire Ins. Co.*, 40 Am. St. Rep. 894.

PHENIX IRON WORKS COMPANY v. McEVONY.

[47 NEBRASKA, 228.]

FRAUD—PLEADING.—When it becomes necessary to plead fraud, a general allegation is insufficient. The facts must be specially pleaded.

REPLEVIN—PROOF OF FRAUD THOUGH NOT PLEADED—RESCISSION OF SALE.—Under a petition in replevin, containing a general allegation of ownership, right of possession, and unlawful detention, the plaintiff may prove fraud which induced a previous sale of the property in controversy by the plaintiff to the defendant, and a rescission of the sale because of such fraud, although the fraud is not specially pleaded.

SALES—RIGHT OF RESCISSION, NOT AFFECTED BY PLEDGE OR MORTGAGE.—One who takes a pledge or mortgage of personal property as security for a pre-existing debt is not a bona fide purchaser, so as to be protected from the rescission of a contract whereby such property was previously sold to the pledgor or mortgagor.

SALES—RESCISSION—RETURN OF PURCHASE MONEY.—It is not essential to the rescission of a contract of sale procured by fraud that the seller should return, or offer to return, what he has received thereunder, if the party guilty of fraud has rendered a return unjust to the seller. Hence, if the property has been damaged by the fraudulent vendee, to an amount equal to, or greater than, the purchase money received, no offer to return the money is necessary.

R. R. Dickson, for the appellant.

H. M. Uttley, for the appellee.

228 IRVINE, C. This was an action of replevin by the plaintiff in error against the defendant in error, to recover an engine, boiler, and other machinery. The plaintiff based its claim on former ownership of the property, which had been parted with in pursuance of a contract of sale, which the plaintiff **229** claimed it had been induced to enter into by fraudulent misrepresentations. The defendant, the sheriff of Holt county, denied plaintiff's ownership and right of possession, and also alleged a sale by the plaintiff of the property to one Donald McLean, followed by a pledge of the property to secure a debt of seven hundred dollars to one Mathews. The defendant also justified under a writ of attachment issued at the suit of the State Bank of O'Neill against Donald McLean, and levied upon the property subject to the lien of Mathews. The case was tried to the court, and there was a finding and judgment for the defendant.

A question which must be disposed of in limine is that presented by the argument of the defendant that the judgment was correct, regardless of any assignments of error, for the reason that the petition did not state a cause of action. The peti-

tion was in the ordinary form in replevin cases where a general ownership is claimed, charging merely, in general terms, ownership, a right to the immediate possession of the property described, and the wrongful detention thereof by the defendant. The contention of the defendant is that, inasmuch as the plaintiff based its claim on fraud, this petition was insufficient, because not pleading the facts constituting the fraud. The defendant, we think, mistakes the rule. When it becomes necessary to plead fraud, a general allegation of fraud is insufficient. The facts must be specifically pleaded; but it is not in all cases that it is necessary to plead fraud, although that question may turn out to be in issue. In ejectment, a defendant under a general denial may prove fraud in the procurement of a deed under which plaintiff claims, for the purpose of disproving plaintiff's right of ²³⁰ possession: *Franklin v. Kelley*, 2 Neb. 79; *Staley v. Housel*, 35 Neb. 160. A certain analogy exists between ejectment and replevin under the code. One is an action to recover the possession of land; the other to recover the possession of personal property; and the pleadings in both actions depart somewhat from the general rules of code pleading: See as to replevin, 2 *Kinkead on Code Pleading*, sec. 1079. As said in *School Dist. v. Shoemaker*, 5 Neb. 36, the code takes actions of replevin out of the general rule in regard to pleadings. In *Haggard v. Wallen*, 6 Neb. 271, it was said: "A petition in replevin should state that the plaintiff is the owner of the goods sought to be recovered (or has a special property therein, stating its nature), that he is entitled to the immediate possession of such goods, and that the defendant wrongfully detains the same." Where a special ownership only is claimed, greater particularity in pleading is required: *Curtis v. Cutler*, 7 Neb. 315; *Musser v. King*, 40 Neb. 892; 42 *Am. St. Rep.* 700; *Randall v. Persons*, 42 Neb. 607; *Sharp v. Johnson*, 44 Neb. 165; *Camp v. Pollock*, 45 Neb. 771. But from the time of the early cases cited it has always been considered that a general allegation of ownership, right of possession, and unlawful detention is sufficient, however the plaintiff may deraign his title on the trial; and the reports are full of cases where such petitions have been treated as sufficient, although the proof of the case involved an issue of fraud. That the general rule as to pleading fraud has no application to actions of replevin under the code was held in *Sopris v. Truax*, 1 *Colo.* 89. In *Tootle v. First Nat. Bank of Chadron*, 34 Neb. 863, the petition, after the general allegations, pleaded the fraud specially. In discussing this, the court ²³¹ said that had the pleader stopped at the general allegations, "it is conceded

that the petition would have been sufficient." This was reaffirmed on rehearing: *Tootle v. First Nat. Bank*, 42 Neb. 237. The objection so raised by the defendant could hardly in any event go to the general sufficiency of the petition, but would rather go to the admissibility of evidence of fraud thereunder; but, however raised, we hold the objection not well taken.

The defendant also contends that the petition in error contains no sufficient assignments to reach the other questions argued. This may be true in a general way, but there is an assignment that the finding was not sustained by sufficient evidence. This we may consider. Most of the facts in the case were settled by a stipulation thereof embodied in the bill of exceptions. From this it appears, among other things, that on September 18, 1890, the plaintiff sold and delivered to Donald McLean the property in controversy, seven hundred dollars to be paid during the erection of the machinery, at O'Neill, and the remainder sixty days after erection, the total price being two thousand eight hundred and eighty-eight dollars. McLean was the president of the Pacific Short Line Railroad, and represented that he desired to purchase the property for said railroad, for the purpose of heating and lighting a roundhouse at O'Neill; that he had authority to purchase such property and bind the railroad for the payment; that the railroad was solvent, and on a prosperous and solid financial basis. Relying on these representations, the plaintiff sold the property. In fact, McLean had no authority to purchase for the railroad. He was not acting for the railroad, but for himself. The property was not desired for heating and lighting the roundhouse, but for carrying ²³² on an electric system owned by McLean for lighting the city of O'Neill, and the railroad was insolvent. The plaintiff had no knowledge of the falsity of the representations until shortly before this action was instituted, and after all intervening rights, if any, accrued. The plaintiff put in the machinery according to its contract. About January 1, 1891, the plaintiff received the payment of seven hundred dollars from McLean, McLean borrowing the money from the State Bank of O'Neill, the plaintiff knowing that fact, but not knowing that the loan was a personal one of McLean's, and the payment not that of the railroad. McLean then entered into possession of the property with the consent of the plaintiff. In December, 1890, McLean made to Mathews his note for two thousand dollars. This note was purchased by the bank, which, on December 22, 1891, commenced a suit against McLean thereon, and caused the property in controversy to be attached. It was further stipulated that, at the time of bringing the action,

the property had been damaged while in the possession of McLean to the amount of nine hundred dollars. In addition to the foregoing facts, it appears from parol testimony, and in part by the stipulation, that after the bank had lent McLean the seven hundred dollars to make the first payment on the machinery, one of its officers insisted upon security therefor, and some kind of a writing, not disclosed by the evidence, was prepared, whereby the property was pledged to Mathews, the president of the bank, to secure the loan; and there was also some kind of a constructive delivery of the property by McLean to Mathews. There is much controversy in the briefs as to this transaction; but we do not deem its precise nature material, because the same result must be ²³³ reached even though there was a complete pledge or mortgage. There is no room for doubt that under these facts a case of fraud was established which would have entitled the plaintiff to recover the property from McLean. McLean procured it on the representation that he was acting on behalf of a solvent corporation, purchasing the property for a particular purpose, whereas he was purchasing for himself for another purpose. The corporation was not bound, and was insolvent, even if it had been bound. It may be added, also, that there is sufficient to show McLean's insolvency. It has been several times held, directly or by plain inference, that one who takes personal property as security for a pre-existing debt is not a bona fide purchaser, so as to be protected from the rescission of a contract whereby such property was sold to the pledgor or mortgagor: *Symns v. Benner*, 31 Neb. 593; *Tootle v. First Nat. Bank of Chadron*, 34 Neb. 863; 42 Neb. 237; *Work v. Jacobs*, 35 Neb. 772. The case of *Tootle v. First Nat. Bank of Chadron*, 34 Neb. 863, 42 Neb. 237, is directly in point. The bank, when it lent the money, did not take the property as security. It was only after the loan had been perfected that it sought security. The interval of time was only a day, but that makes no difference. The bank did not part with the money on the faith of this property as security, and the pledge, mortgage, or whatever it was, to Mathews was one to secure a pre-existing debt. The plaintiff has made no offer to return the seven hundred dollars received by it; but it is stipulated that the property was damaged to the amount of nine hundred dollars while in McLean's possession. A question is thus presented as to whether, under the circumstances, it was necessary to offer to return the money. We think not. The rule that one, in ²³⁴ order to rescind a contract procured by fraud, must return, or offer to return, what he has received thereunder, is not one of universal ap-

plication. In *First Nat. Bank v. Yocum*, 11 Neb. 328, the rule was stated that in such case a party seeking to rescind must put the subject matter of the contract as near in statu quo as may be under the circumstances; or upon the trial must give a reason why the same could not be reasonably done. It is well established that no offer to return is necessary when the party guilty of fraud has rendered a return impossible; and it would seem to be equally true when the party guilty of fraud has rendered a return unjust to the other party. In *Symns v. Benner*, 31 Neb. 593, one hundred dollars had been paid on the purchase money; but goods to the value of forty-seven dollars had been sold. It was held that an offer to repay fifty-three dollars after the value of the sold goods had been ascertained was sufficient; and in *Tootle v. First Nat. Bank of Chadron*, 34 Neb. 863, 42 Neb. 237, the same doctrine was reaffirmed. If, then, McLean had sold a portion of this machinery to the value of nine hundred dollars, the remainder might be replevied without offering to return the seven hundred dollars received. We can see no difference in principle between the sale of a portion of the property and its deterioration in value by damage or use while in the vendee's possession. Under our view of the law, as above stated, the evidence did not sustain the finding of the court.

Reversed and remanded.

FRAUD—PLEADING—EVIDENCE — REPLEVIN.—The general rule is, that fraud is not available as a cause of action, or as a defense, unless it is specially pleaded: *De Votie v. McGerr*, 15 Colo. 467; 22 Am. St. Rep. 426; and the facts clearly stated: *Nichols v. Stevens*, 123 Mo. 96; 45 Am. St. Rep. 514. A general allegation of fraud is insufficient. The facts constituting it must be specifically averred: *Clough v. Holden*, 115 Mo. 336; 37 Am. St. Rep. 393; *Albertoli v. Branhams*, 80 Cal. 631; 13 Am. St. Rep. 200; note to *Andrews v. King County*, 22 Am. St. Rep. 142. In an action to recover possession of personal property, where the plaintiff alleges that he is the owner and entitled to the immediate possession thereof, and that it is unjustly detained by defendant, evidence is admissible to show that the property was obtained from the plaintiff by false and fraudulent representations, and that defendant is not a purchaser thereof for value and in good faith: *Benesch v. Waggenr*, 12 Colo. 534; 13 Am. St. Rep. 254, and note.

SALES—RESCISSION FOR FRAUD—REPLEVIN.—A vendor rescinding a sale for fraud must, as a general rule, restore the consideration if it has been paid: *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700, and note; note to *Gibson v. Western etc. R. R. Co.*, 44 Am. St. Rep. 596; and before a seller can maintain replevin for goods which he was induced to sell, through fraud, he must ordinarily restore the purchase price, if he has received it: Note to *Benesch v. Waggenr*, 13 Am. St. Rep. 257.

BROWN v. WESTERFIELD.

[47 NEBRASKA, 39.]

DEEDS.—THE TERM “EXECUTION,” in conveyancing, denotes the final consummation of a contract of sale, and includes only those acts which are necessary to the full completion of an instrument. These are the signature of the disposing party, the affixing of his seal, where that is required by law, to give character to the instrument, and its delivery to the grantee.

DEEDS—SEAL.—Under the laws of Nebraska, the seal of the grantor in a deed is unnecessary.

DEEDS, THOUGH UNACKNOWLEDGED, PASS TITLE, WHEN.—As an acknowledgment, under the laws of Nebraska, is no part of a deed conveying land other than the grantor's homestead, an unacknowledged deed to real estate, otherwise perfect, passes the title.

DEEDS—EVIDENCE OF TITLE—LOSS OR DESTRUCTION. A deed, being merely evidence of the grantee's title, its loss or destruction, after delivery, does not divest the title of the grantee.

DEEDS.—THE DELIVERY of a deed is indispensable to its validity.

DEEDS—DELIVERY—PLEADING.—An averment, in a petition to quiet title, that the grantor “made and executed” a deed, includes not only his signature, but all other acts essential to the completion of the muniment of title, such as the delivery of the instrument to the grantee.

DEEDS—DELIVERY AND INTENT—HOW DETERMINED. The delivery of a written instrument is largely a question of intent, to be determined by the facts and circumstances of each particular case. No particular act or form of words is necessary to constitute such a delivery; but anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.

DEEDS—DELIVERY, WHAT CONSTITUTES.—It is not essential to the validity of a deed that it should be delivered to the grantee personally. If the grantor, without reserving any control over the instrument, delivers it to a third person, unconditionally, for the use of the grantee, and with the intent that it shall take effect immediately, such delivery is sufficient, and title to the property passes to the grantee.

DEEDS—DELIVERY, WHEN SUFFICIENT—ILLUSTRATION.—If a mother signs and acknowledges a deed before a justice of the peace, conveying to her minor daughter certain real estate, and delivers the deed to the justice, for the use and benefit of the grantee, without reserving any control over it, with the intention and understanding that he is to keep it until the mother's death, when he is to file it for record, and the grantor subsequently tells her daughter that the property belongs to the latter, and that it has been fixed so that she will have a home, the delivery is complete, and the deed passes title at the date of such delivery, though it is afterward lost or destroyed.

Roscoe Pound, Pound & Burr, and Burr & Burr, for the appellants.

B. F. Johnson and T. F. Barnes, for the appellees.

⁴⁰¹ NORVAL, J. This was a suit by Ruthie Brown against Sam Westerfield and Ida Westerfield, his wife, and Louis and Jimmie Brown, to quiet the title in plaintiff to the south half of lot C, a subdivision of lots 4, 5, and 6, in block 28, of Kinney's O street addition to the city of Lincoln. The petition alleges that plaintiff is the only living child of Hannah and James Brown; that on the twentieth day of June, 1883, the said Hannah Brown, now deceased, being the owner in fee simple of the real estate, above described, together with her husband ⁴⁰² said James Brown, made and executed a warranty deed to the plaintiff of said property, reserving a life estate therein to said James Brown; that said deed has become lost or stolen—plaintiff is unable to state which—but is informed that the same was placed in the hands of Sam Westerfield, one of the defendants; that though demand for the same has been made upon him, he has refused to comply therewith, and disclaims all knowledge of the deed; and that the defendants, Sam Westerfield, Jimmie and Louis Brown are not the issue of the said James and Hannah Brown, but are children of said Hannah Brown by a former husband. James Brown, plaintiff's father, was, subsequent to the institution of the suit, joined as party plaintiff, and no service of summons having been had upon Louis and Jimmie Brown, the action was dismissed as to them. Sam Westerfield answered, admitting that plaintiff is the child and one of the heirs at law of said Hannah Brown, and denying all other averments of the petition. By way of cross-petition, Westerfield sets up that Hannah Brown and her husband, James Brown, executed and delivered a mortgage upon said lot C to one Mary Jane Carman to secure the payment of twenty-seven dollars and interest; that the defendant is the owner of said mortgage, and that the debt for which the same was given to secure has not been paid, nor any part thereof. The answer prays for the dismissal of plaintiff's suit, and for foreclosure of said mortgage. Upon the hearing, a decree was entered quieting the title to the premises in controversy in Ruthie Brown, subject to the life interest therein of her father, and foreclosing said mortgage. From the decree quieting the title the Westerfields appeal.

⁴⁰³ The appellants contend, in argument, that the petition is defective and fails to state a cause of action, in that it contains no specific allegation that the deed in question was ever delivered. The delivery of a deed is indispensable to its validity. While it is true there is no direct averment in the pleading that the deed had been delivered, yet this is not fatal. It is averred that the grantors "made and executed a warranty deed to the

plaintiff" to the property. "Execute" is defined by Webster thus: "To complete, as a legal instrument; to perform what is required to give validity to, as by signing, and perhaps sealing and delivering; as, to execute a deed, lease, mortgage, will," etc; and the same authority gives the following as one of the definitions of the word "execution": "The act of signing, sealing, and delivering a legal instrument, or giving it the forms required to render it valid; as the execution of a deed." In 1 Warvelle on Vendors, page 482, it is said: "The term 'execution' primarily means the accomplishment of a thing—the completion of an act or instrument; and in this sense it is used in conveyancing to denote the final consummation of a contract of sale. The term properly includes only those acts which are necessary to the full completion of an instrument, which are the signature of the disposing party, the affixing of his seal to give character to the instrument, and its delivery to the grantee." In this state, the seal of the grantor is unnecessary, and an acknowledgment is no part of the deed conveying land other than the grantor's homestead, but an unacknowledged deed to such real estate, otherwise perfect, as between the parties, passes the title. The averment in the petition that the grantors "made and executed" ⁴⁰⁴ the deed, under the definitions already given, includes the delivery of the instrument as a conveyance of the property.

The uncontradicted testimony shows that James and Hannah Brown signed and acknowledged a deed of conveyance to their daughter, Ruthie Brown, one of the plaintiffs herein, for the premises in controversy, reserving a life estate therein to James Brown, one of the grantors. It was never actually delivered to the grantee in person, nor was it ever placed upon record. The instrument is not now to be found. A deed is merely the evidence of the grantee's title. The loss or destruction of the deed did not divest plaintiffs of their title, if they ever acquired one. And whether the title ever passed from Mrs. Brown, the owner of the fee to this property, depends upon whether the facts disclosed by this record amount, in law, to a delivery of the deed in question. It appears from the evidence adduced that Hannah Brown, being the owner of the property in dispute and another tract of the same size adjoining it on the north, on the twentieth day of June, 1883, caused two deeds to be prepared by J. H. Brown, a justice of the peace of the city of Lincoln, one covering the north portion to Sam Westerfield, one of the defendants, and the other covering the south tract to Ruthie Brown, subject to a life interest in her father, James Brown. These deeds, properly witnessed, were signed and acknowledged by both Hannah

and James Brown before said justice of the peace. The magistrate is the only person who testified as to what transpired at the time, and the disposition made of the deeds. He states, in substance, that he had acted as Mrs. Brown's legal adviser, having at various ⁴⁰⁵ times transacted considerable business for her; that on the date already mentioned, at her request, he went to see her, when she informed him it was her desire that the property be divided between her two children, Ruthie and Sam, the former being then some nine or ten years old, reserving a life interest in her husband in the home property; that her two sons, Jimmie and Louis, had abandoned her, and it was her wish to make a division of the property then for fear they would come in for a share at her death. In pursuance of this request, the two deeds were prepared by the witness, and then signed and acknowledged. The magistrate was requested to keep them and place them upon record after her death. He carried them for two or three days thereafter, when he went to Mrs. Brown's place of abode, put them in a tin box in which she kept her tax receipts and other papers, and at the time the witness, at Mrs. Brown's request, promised to see to the recording of the deed in question upon her death; that four or five times thereafter, the last one being about a week or ten days before Mrs. Brown died, she talked the matter over, expressing herself satisfied with the disposition she had made of the property; that immediately after the death of Mrs. Brown, the justice, with James Brown, looked for the deed, and then discovered that it was gone. Sam Westerfield testified that he had never seen the deed, but had heard it spoken of by several; and that the deed to himself he had recorded August 28, 1883, prior to his mother's death. Ruthie Brown testified that about a week before her mother died, the latter told her, as she had frequently stated before, that the place was Ruthie's, and that it had been fixed so that she would ⁴⁰⁰ have a home; that about two weeks before the trial witness asked Sam Westerfield about the deed, and he replied that he had it, or knew where it was. This conversation Westerfield denies having ever occurred.

The matter of contest is, whether there was in law a delivery of the deed, for a delivery is indispensable to its binding effect. But, as was said by Chief Justice Lake in *Brittain v. Work*, 13 Neb. 347: "No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient." Delivery of a written instrument like a deed is largely a question of intent, to

be determined by the facts and circumstances of the case. In the case at bar, it depends on whether the intention of the grantor at the time was that the deed should operate as a muniment of title to take effect presently. In other words, did Mrs. Brown part with control over the instrument and place the title in her daughter? If such was the purpose, the delivery was complete, and the title to the property passed: 1 Devlin on Deeds, secs. 260-262; Warren v. Swett, 31 N. H. 332; Jordan v. Davis, 108 Ill. 336; Burkholder v. Casad, 47 Ind. 418; Masterson v. Cheek, 23 Ill. 73. From an examination of the evidence we are satisfied that it establishes a delivery of the deed. It was placed in the hands of the magistrate who took the acknowledgment to hold for the grantee. This was sufficient to carry the title to the land: Byington v. Moore, 62 Iowa, 470; Hinson v. Bailey, 73 Iowa, 544; 5 Am. St. Rep. 700; Black v. Hoyt, 33 Ohio St. 203; Mitchell v. Ryan, 3 Ohio St. 377; Albright v. Albright, 70 Wis. 528; Ball v. Foreman, 37 Ohio St. 132.

⁴⁰⁷ In the case last cited, the grantor delivered the deed to a third party with the understanding that he should retain the custody of the same until the grantor's death, when he was to deliver to the grantee. It was held to be the grantee's deed in praesenti, and that the subsequent destruction of the instrument by the grantor did not have the effect to divest the title of the grantee. Cassody, J., in delivering the opinion of the court in that case, cites numerous authorities which sustain the proposition enunciated in the case. In Hinson v. Bailey, 73 Iowa, 544, 5 Am. St. Rep. 700, Eva Hinson went to a justice of the peace and signed and acknowledged a deed before him conveying certain lands to her children. She left the deed in the possession of the magistrate, with directions to retain it until her death, and then have it recorded. The justice told her that she could have the deed whenever she desired it, but she replied: "I don't want it. You must keep it until I die." It was held to be a good delivery, and that the deed took effect immediately upon the delivery to the justice: See, also, Wittenbrock v. Cass, 110 al. 1; Bury v. Young, 98 Cal. 446; 35 Am. St. Rep. 186. It is true in the case before us that, after the delivery of the deed to Justice Brown, he took it to the grantor and put it in a box where she kept her papers; but it was not with the intention of surrendering the deed, nor did that fact have the effect to divest the title of the grantee. Having once passed, it could not be divested in that way: Bunz v. Cornelius, 19 Neb. 107; Connell v. Galligher, 39 Neb. 793.

It is argued by appellants that the conveyance was intended to operate in the nature of a testamentary disposition of the property, not to take ⁴⁰⁸ effect until the death of Mrs. Brown, and authorities are cited in the brief to the effect that such a deed is invalid. The facts do not warrant such conclusion. The intention clearly was, that the deed should take effect at once. The recording alone was to be deferred until Mrs. Brown's death. This is not a case where a grantor has placed a deed in a depository to be delivered to the grantee upon the death of the grantor, reserving the right to recall the deed at any time. The authorities cited by counsel for appellants are, therefore, not applicable here. We are constrained to hold that the trial court was, under the circumstances, justified in finding a sufficient delivery of the deed.

The decree is affirmed.

What is a Delivery of a Deed.*

The delivery of a deed, in the law of conveyancing, is a transfer of it from the grantor to the grantee, or to some third person for the grantee's use, in such a manner as to deprive the grantor of the right to recall it at his option, and with the intent to convey title; but to determine what constitutes such a transfer is sometimes a matter of extreme difficulty. The frequency with which the question has been brought before the courts is evidence of this. The delivery of a deed is, of course, essential to the transfer of the title: *Younge v. Guilbeau*, 3 Wall. 636; *Parmelee v. Simpson*, 5 Wall. 81; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326, and note; *Oliver v. Oliver*, 149 Ill. 542; *Price v. Hudson*, 125 Ill. 284; *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Bullitt v. Taylor*, 34 Miss. 708; 69 Am. Dec. 412; *Rittmaster v. Brisbane*, 19 Col. 371; note to *Gant v. Hunsucker*, 55 Am. Dec. 412, and cases there collected; *Samson v. Thornton*, 3 Met. 275; 37 Am. Dec. 135; *Van Amringe v. Morton*, 4 Whart. 382; 34 Am. Dec. 517; *Hughes v. Easten*, 4 J. J. Marsh. 572; 20 Am. Dec. 230; *Herbert v. Herbert*, Breese, 354; 12 Am. Dec. 192; *Paddock v. Potter*, 67 Vt. 360; *Scott v. Scott*, 95 Mo. 300; *Hall v. Hall*, 107 Mo. 101; *Pennington v. Pennington*, 75 Mich. 600; *Schwab v. Rigby*, 38 Minn. 395; *Durauid's Appeal*, 116 Pa. St. 93; *Moody v. Dryden*, 72 Iowa, 461; *Cooper v. Jackson*, 4 Wis. 537; *Maddox v. Gray*, 75 Ga. 452; *Colyer v. Hyden*, 94 Ky. 180; *Hall v. Barnett*, 71 Miss. 37; *Nay v. Mognrain*, 24 Kan. 75; *Hulick v. Scovill*, 4 Gilm. 159; *Bryan v. Wash*, 2 Gilm. 557; *Provart v. Harris*, 150 Ill. 40; *Turner v. Carpenter*, 83 Mo. 333.

Leaving a deed signed and attested on a table, without delivery to any person, and in the absence of the donee, is not sufficient evidence of delivery: *Hughes v. Easten*, 4 J. J. Marsh. 572; 20 Am. Dec. 230. But where a deed of marriage settlement was duly executed by the

*REFERENCE TO MONOGRAPHIC NOTES.

Delivery of deeds: 16 Am. Dec. 39-45; 40 Am. Rep. 217, 218; 53 Am. Rep. 289-296.

Deeds to take effect after death of grantor: 63 Am. Dec. 243-246.

Conveyance to take effect after grantor's death; 49 Am. St. Rep. 219-222.

parties, and laid on the table, and the wife, as cestui que trust, took it up and kept it in her possession until her death, it was held, under the circumstances, to be a good and valid delivery of the deed; *Jaques v. Methodist Episcopal Church*, 17 Johns. 549; 8 Am. Dec. 447. Delivery of a deed is as essential to the passing of the title as is the signing or acknowledgment of it. It is the final act, without which all other formalities are ineffectual: *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131. Delivery, or that which is legally its equivalent, is as essential to the validity of a deed as is the signature of the grantor: *Colee v. Colee*, 122 Ind. 109; 17 Am. St. Rep. 345; and delivery includes, not only an act by which the grantor parts with the possession of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee: *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131. If there is no delivery, the deed is inoperative: *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237; *Gore v. Dickinson*, 98 Ala. 363; 39 Am. St. Rep. 67; because the delivery of a deed is the final act of its execution: *Newlin v. Osborne*, 4 Jones, 157; 67 Am. Dec. 269. The finding that a deed was executed includes, as a necessary and essential incident, the delivery of the instrument: *Colee v. Colee*, 122 Ind. 109; 17 Am. St. Rep. 345; *Pool v. Davis*, 135 Ind. 323. A deed not delivered and accepted, though recorded, passes no estate: *Herbert v. Herbert*, Breese, 354; 12 Am. Dec. 192; and recording a void deed gives it no validity: *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237. Until a deed is delivered to the grantee to become presently operative, the grantor has a right to rescind or to recall it: *Pennington v. Pennington*, 75 Mich. 600; and so long as the delivery of a deed remains incomplete, a grantor can change his intention relating thereto, and destroy the deed if he so desires: *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337. A deed takes effect only from the time of delivery, not from its date: *County of Calhoun v. American Emigrant Co.*, 93 U. S. 124; *McDowell v. Chambers*, 1 Strob. Eq. 347; 47 Am. Dec. 539; *Floyd v. Ricks*, 14 Ark. 286; 58 Am. Dec. 374; *Bryan v. Wash*, 2 Gilm. 557; except where it is declared by statute to be efficient and operative from its date, as in Maryland: *Betts v. Union Bank*, 1 Har. & G. 175; 18 Am. Dec. 283. The effect of executing a deed to land is equivalent to livery of seisin, and transfers the legal estate and possession to the grantee. If the grantor continues to reside thereon, it must, therefore, be under the grantee: *Reading v. Weston*, 7 Conn. 143; 18 Am. Dec. 89. The delivery of a deed authorizing the exercise of dominion and control over property is equivalent to a delivery of the property itself: *Gilmore v. Whitesides*, Dud. Eq. 14; 31 Am. Dec. 563. There can be no partial delivery and acceptance of a deed, for the purpose of conveying title to the grantee, and yet so as not to give effect to its conditions, recitals, and limitations: *Warren v. Jacksonville*, 15 Ill. 236; 58 Am. Dec. 610.

Delivery, Generally—By Whom and to Whom.—A deed delivered without the consent of the grantor is of no effect: *Felix v. Patrick*, 145 U. S. 317, 329. If a husband and wife, being in possession of a homestead, the title to which is in the wife, join in a deed of gift, but with the intention of not delivering it until after the death of both, and the wife, during the life of her husband, delivers such deed without his knowledge and consent, it does not affect the husband's rights in the homestead: *Meeks v. Stillwell* (Ohio), May 26, 1896. But in

Texas it is held that the delivery of a deed properly executed by a husband and wife, and acknowledged by them in accordance with the statute, will, if such delivery is made by the husband, pass the wife's title, although the delivery is made in violation of the wife's instructions, if the grantee has no notice of such instructions, but that it would be otherwise if the grantee has notice that such a delivery would be unauthorized: *Edwards v. Dismukes*, 53 Tex. 605. An unauthorized delivery of a deed is a void act, and the deed will pass no title: *Burnap v. Sharpsteen*, 149 Ill. 225. A deed delivered by an agent should be pleaded as the deed of the principal; not that it was delivered as the deed of the agent: *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82. A stranger, without authority, by an instrument under seal, cannot complete and deliver an incomplete deed in the absence of the party who executed it: *Ingram v. Little*, 14 Ga. 173; 58 Am. Dec. 549. An unauthorized delivery of a deed may, however, be ratified by the grantor: *Van Amringe v. Morton*, 4 Whart. 382; 34 Am. Dec. 517. A personal delivery of a deed is unnecessary; it may be made by another by the grantor's appointment or authority precedent, or by his subsequent assent or agreement: *Duncan v. Hodges*, 4 McCord, 239; 17 Am. Dec. 734.

An actual, manual delivery to the grantee in person is not necessary: *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82; *Cooper v. Jackson*, 4 Wis. 537; *Shirley v. Ayres*, 14 Ohio, 307; 45 Am. Dec. 546; *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Issitt v. Dewey*, 47 Neb. 196. It may even be made to a stranger for the grantee's use: *Cooper v. Jackson*, 4 Wis. 537; *Chess v. Chess*, 1 Pen. & W. 32; 21 Am. Dec. 350; *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82, and other cases cited *infra*, where this matter is discussed. The question of delivery is one of intention, and the delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed; and he does some act putting it beyond his power to revoke: *Martin v. Flaherty*, 13 Mont. 96; 40 Am. St. Rep. 415; *Compton v. White*, 86 Mich. 33; *Fisher v. Hall*, 41 N. Y. 416, 423; *Davis v. Garrett*, 91 Tenn. 147; *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445; *McDonald v. Minnick*, 147 Ill. 651; *Wilson v. Wilson*, 158 Ill. 567; 49 Am. St. Rep. 176; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Ruckman v. Ruckman*, 32 N. J. Eq. 259. Although there may not have been any manual delivery of a deed, or anything said, in terms, about its delivery, yet the fact of delivery may be found from the acts of the parties preceding, attending, and subsequent to the signing, sealing, and acknowledgment of the instrument: *Dukes v. Spangler*, 35 Ohio St. 119. If the grantor in a deed intends, when executing it, to be understood as delivering it, that is sufficient. The intention of the party is the controlling element: *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445. If nothing further is expected to be done by the beneficiary in a declaration of trust, or the grantee in a deed, to complete the transaction as a whole, a formal sealing and delivery, without an actual delivery to the other party, or to a third person for his use, is sufficient to make the declaration or deed operative immediately, unless something else exists or is done to qualify the delivery: *Linton v. Brown*, 20 Fed. Rep. 455. The delivery of a deed of gift is sufficient, if, after being prepared by

the express direction of the grantor, it is read over to him by the notary, is signed and acknowledged by him, and is, by his order, and in his presence, given to the husband of one of the grantees, and the grantor thereafter indicates no wish to retract the deed: *Hamilton v. Armstrong*, 120 Mo. 597.

Even a manual delivery of a deed is ineffective without an intention to deliver the instrument, as the very essence of the delivery of a deed is the intention of the parties: *Ashford v. Prewitt*, 102 Ala. 264; 48 Am. St. Rep. 37. The mere placing of a deed in the hands of one of the grantees does not necessarily constitute a delivery. There must be an intention on the part of the grantor that the deed shall pass the title at the time, and that he shall lose control of it: *Wilson v. Wilson*, 158 Ill. 567; 49 Am. St. Rep. 176. Thus, if a party, under a contract for the exchange of lands, makes a manual delivery of his deed with the understanding that he is to receive in exchange a warranty deed, and, immediately upon discovering that he has not received such a deed, demands the return of the deed made by him, there is, within the meaning of the law, no delivery of the deed: *McDonald v. Minnick*, 147 Ill. 651. So, if the circumstances of a manual delivery of a deed are such as to indicate a conditional, rather than an absolute, delivery, no title passes until the condition is fulfilled; and the character of the delivery must be determined by the acts or words of the parties, or by both: *Chick v. Sisson*, 95 Mich. 412.

A delivery may be made to another than the grantee upon sufficient authority from the latter: *Fisher v. Hall*, 41 N. Y. 416, 423; *Chess v. Chess*, 1 Pen. & W., 32; 21 Am. Dec. 350. It may be delivered to the attorney or agent of the grantee: *Rosseau v. Bleau*, 131 N. Y. 177; 27 Am. St. Rep. 578; *Ashford v. Prewitt*, 102 Ala. 264; 48 Am. St. Rep. 37; *Blanchard v. Blackstone*, 102 Mass. 343. The delivery of a conveyance to an attorney, with instructions to him to deliver it to the grantee, has the effect, when such delivery is made, to divest the title of the grantor, and vest it in the grantee by relation as of the date of the delivery to the attorney: *Rosseau v. Bleau*, 131 N. Y. 177; 27 Am. St. Rep. 578. A deed delivered to the husband of the grantee, with an intention on the part of the grantor that title should pass, divests the grantor of the title and vests it in the grantee, although the deed was made without the wife's knowledge, and was not delivered to her by her husband, but came into her possession some months afterward: *Parker v. Parker*, 56 Iowa, 111. The delivery of a deed to one of two joint grantees inures to the benefit of both: *Powers v. Minor*, 87 Tex. 83. It is a delivery to both: *Eshleman v. Henrietta Vineyard Co.*, 102 Cal. 199. The wife of the grantor may be the third party to whom the grantor delivers a deed for the grantee: *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326. A deed by a grantor to his grantee after the latter's death, is of no effect as a correction of a former deed, if executed without the consent of the grantee's heirs: *Bartlett v. Brown*, 121 Mo. 353. The delivery of a deed to the real beneficiary of the grant, or the person to whose benefit it will inure, is good, without any delivery to the person named as grantee in the deed: *Holcombe v. Richards*, 38 Minn. 38. Leaving a deed, properly acknowledged, signed, and sealed, in the possession of the officer who takes the acknowledgment without the

grantor's doing or saying anything to qualify the delivery, is sufficient to vest the title in the grantee, although he is not present; and the grantor cannot, by subsequent instructions, limit the effect of such acts to a mere delivery in escrow: *Blight v. Schenck*, 10 Pa. St. 285; 51 Am. Dec. 478.

A deed, though signed on Sunday, is valid if delivered on the following Monday: *Schwab v. Rigby*, 38 Minn. 395. Compare *Phillips v. Phillips*, 83 Mich. 259. The time of delivery, when material, is a question of fact for the jury to determine: *Hall v. Benner*, 1 Pen. & W., 402; 21 Am. Dec. 394.

What Constitutes Delivery.—This subject is discussed at some length in the monographic notes to *Jones v. Jones*, 16 Am. Dec. 39-45, *Byars v. Spencer*, 40 Am. Rep. 217, and *Fain v. Smith*, 58 Am. Rep. 289-296, on delivery of deeds, where the English and earlier American cases are discussed. The simplest mode of delivering a deed is a manual transfer of it by the grantor to the grantee, with the intent of transferring the title to the property and of relinquishing all control over the instrument; but the delivery may be effected without actually passing the writing from the grantor to the grantee, as where, while the instrument is in the presence of both parties, the grantor directs the grantee to take possession of it, with intent to transfer the property, and the latter expresses his willingness so to do. No particular formality is required: *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Jamison v. Craven*, 4 Del. Ch. 311. The question whether a deed has been delivered or not is one of intention; and it may be effected by words without acts, or by acts without words, or by both: *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Provart v. Harris*, 150 Ill. 40; *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Turner v. Carpenter*, 83 Mo. 333; *Burnap v. Sharpsteen*, 149 Ill. 225. "A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both": *Flint v. Phipps*, 16 Or. 437; *Provart v. Harris*, 150 Ill. 40. No particular form of delivery is required. It is enough that by some expression or act, the party executing the instrument puts it into the possession of the other party: *Alsop v. Swathel*, 7 Conn. 500. The delivery may be constructive, as well as actual. Thus, the delivery of a deed to one partner is a delivery to the partnership: *Henry v. Anderson*, 77 Ind. 361. So where a deed has been recorded and the grantee has conveyed land as owner under the deed with the concurrence of the grantor, this amounts to a delivery, though the deed was made without the knowledge of the grantee, and was never actually delivered to him: *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 266.

The rule, however, is that a grantor must part with all dominion and control over his deed, in order that it may be considered as delivered: *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326; *Provart v. Harris*, 150 Ill. 40; *Shults v. Shults*, 159 Ill. 654; 50 Am. St. Rep. 188; *Bovee v. Hinde*, 135 Ill. 137; *Wilson v. Wilson*, 158 Ill. 567; 49 Am. St. Rep. 176; *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131; *Denis v. Velati*, 96 Cal. 223; *Turner v. Carpenter*, 83 Mo. 333; *O'Neal v. Brown*, 67 Ga. 707; and that there is no delivery if the deed is retained by the grantor, and he keeps possession of the property: *Provart v. Harris*, 150 Ill. 40; *McElroy v. Hiner*, 133 Ill. 156; *Cline v. Jones*, 111 Ill. 563;

Byars v. Spencer, 101 Ill. 429; 40 Am. Rep. 212; Hall v. Barnett, 71 Miss. 37; Fain v. Smith, 14 Or. 82; 58 Am. Rep. 281; Anderson v. Anderson, 126 Ind. 62; Schuffert v. Grote, 88 Mich. 650; 26 Am. St. Rep. 316; Lang v. Smith, 37 W. Va. 725; Porter v. Woodhouse, 59 Conn. 568; 21 Am. St. Rep. 131; Chadwick v. Webber, 3 Greenl. 141; 14 Am. Dec. 222; though the deed is recorded: Stevens v. Castel, 63 Mich. 111.

The rule, however, that a grantor must part with all dominion and control over his deed does not mean that he must put it out of his physical power to procure repossession of it: Sneathen v. Sneathen, 104 Mo. 201; 24 Am. St. Rep. 326. If he, by his acts of delivery, loses all control over his deed, the delivery is sufficient: Shults v. Shults, 159 Ill. 654; 50 Am. St. Rep. 188. Thus, papers which are evidence of claims and securities, and deeds transferring the same, are well delivered, if the grantor puts them into the control of the grantee, with the intent that they shall pass to him, and the grantee assents: Thompson v. Easton, 31 Minn. 99. So, if a deed is made in the grantee's presence, and he, instead of taking it, directs the notary public who drew it to send it to the county recorder for record, the delivery is good, as of the day on which the deed was made, although the notary put the deed in his safe, and for some months forgot to send it for record: Adams v. Ryan, 61 Iowa, 733. An instrument is well delivered if, in the presence of all the parties, it is given by the grantors into the hands of the justice who drew it for safekeeping: Orr v. Clark, 62 Vt. 136. So, where an insolvent, in accordance with an oral agreement of marriage, executed and acknowledged a deed to his intended wife, and handed it to her before marriage, and she handed it back to him to have it recorded and to take care of it for her, and he recorded and kept it, the delivery was held to be good: Otis v. Spencer, 102 Ill. 622; 40 Am. Rep. 617. So, where a deed was made to a granddaughter, a minor, who was afterward married, and it was put into her father's hands, to be retained by him until she should arrive at an age of sufficient discretion to take care of the property, it was held that the deed was delivered to the father for the use and benefit of his daughter, and that thereby an estate was created presently in her: Bryan v. Wash, 2 Gilm. 557. Again, if assignors execute and acknowledge a deed of assignment, and the assignee accepts the trust, and directs the assignors to do whatever is necessary to perfect the assignment, this constitutes a delivery of the deed to the assignee, and carries with it the title to the property; and the fact that the deed is not filed for record by the attorney until after the levy of an attachment upon the property, does not give priority to the attachment, as the provision for the recording of the assignment is intended, not for the benefit of existing creditors, but for the protection of subsequent purchasers: American etc. Co. v. Frank, 62 Iowa, 202.

On the other hand, the mere signing and acknowledgment of a deed, although made in pursuance of a prior agreement, do not constitute its delivery: Turner v. Carpenter, 83 Mo. 333. Neither does the act of the grantor in handing his deed, inclosed in an envelope, to the grantee, to be deposited by the latter in his box in a bank for safekeeping, but not for the purpose of passing the title: Bovee v. Hinde, 135 Ill. 137. In the absence of any intention on the part of

the grantor to deliver, and of the grantee to accept, a deed left by the grantor in a place accessible to the grantee does not constitute a delivery: *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337. There is no delivery where the grantee asks to look at the deed, and then makes off with it against the will of the grantor: *Haskell v. Doty*, 78 Cal. 424.

Neither is there any delivery where the facts show a retention of possession: *Fain v. Smith*, 14 Or. 82; 58 Am. Rep. 281; *Schuffert v. Grote*, 88 Mich. 650. Thus, handing a deed to the grantee to be put into a trunk containing the joint papers of the grantor and grantee, they being partners, and the grantor keeping the key, is not a valid delivery: *Chadwick v. Webber*, 3 Greenl. 141; 14 Am. Dec. 222. So, where a father conveys land to his two sons and puts the deed in a box in a room occupied by him with the family of one of his sons, and makes no effort, by word or act, to deliver the deed, though the sons are aware of its existence, and the deed cannot be found after his death, there is no delivery: *Anderson v. Anderson*, 126 Ind. 62. A deed, signed and acknowledged by a father, conveying land to his two minor sons is invalid for want of delivery, where he retains it through his lifetime, and refuses to record it, for the reason that such recording would put the title beyond his power, and declares that he will sell the land for a certain price, if he can get it, and offers it for that price: *Byars v. Spencer*, 101 Ill. 429; 40 Am. Rep. 212. If it is deducible from all the circumstances that the purpose of signing and acknowledging a certain deed, and handing it to the person named therein as grantee, to be placed in the trunk of the grantor, is not to have it take effect immediately, but to have it ready to complete the transaction afterward, there is no delivery where he never completes the transaction, and destroys the deed: *Hall v. Barnett*, 71 Miss. 37.

The authorities clearly establish the general rule that it is an essential characteristic and an indispensable feature of every delivery of a deed, whether absolute or conditional, that there must be a parting with the possession of it, and with all power and control over it, by the grantor for the benefit of the grantee at the time of the delivery: *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131; *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Burnap v. Sharpsteen*, 149 Ill. 225; but the "crucial test" of a delivery, in all cases, is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery, were done: *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; and the delivery of a deed, in all cases, seems to be simply evidence of the intention of the grantor to consummate the conveyance. Some courts have, therefore, held that delivery may be made of an instrument without the maker's parting with the paper, though his retention of it is always a circumstance strongly evidential of a want of final renunciation of control of the instrument: *Hall v. Barnett*, 71 Miss. 37; and, notwithstanding the general rule that a grantor must part with the possession of his deed, or at least with his right to retain possession of it, it has been held, in a number of cases, that there may be delivery of a deed so as to make it effectual in law, without an actual surrender of the instrument. Such a holding would probably be justified when the circumstances, aside from the retention of the deed, do not show that the grantor did not intend it to operate immediately; and where the circumstances do unmis-

takably show that the grantor intended to divest himself of title, and to invest the grantee with it, there certainly seems to be no injustice in holding the delivery of the deed to be complete, as has been done, although the instrument still remains in the hands of the grantor: See discussion of this question in the monographic note to *Jones v. Jones*, 16 Am. Dec. 42, on necessity of delivery of deed: *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 266; *Farrar v. Bridges*, 5 Humph. 441; 42 Am. Dec. 439, and note; *Scrugham v. Wood*, 15 Wend. 545; 30 Am. Dec. 75, and note.

Intention and Acceptance.—The question of delivery is said to be mainly one of intention, and the rule commonly stated is, that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed, and for it to pass the title at the time: *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445; *Wilson v. Wilson*, 158 Ill. 567; 49 Am. St. Rep. 176; *Shults v. Shults*, 159 Ill. 654; 50 Am. St. Rep. 188; *Martin v. Flaherty*, 13 Mont. 96; 40 Am. St. Rep. 415; *Parrott v. Avery*, 159 Mass. 594; 38 Am. St. Rep. 465; *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131; *McDonald v. Minnick*, 147 Ill. 651; *Dikeman v. Arnold*, 71 Mich. 656; *Woolcut v. Lerdell*, 78 Iowa, 668; *Stevens v. Stevens*, 150 Mass. 557; *Conlan v. Grace*, 36 Minn. 276; *Haskell v. Doty*, 78 Cal. 424; *Newell v. Cochran*, 41 Minn. 374; *Nazro v. Ware*, 38 Minn. 443; *Davis v. Garrett*, 91 Tenn. 147; *Cazassa v. Cazassa*, 92 Tenn. 573; 36 Am. St. Rep. 112; *Jordan v. Davis*, 108 Ill. 336; *Hall v. Barnett*, 71 Miss. 37; *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Lancaster v. Blaney*, 140 Ill. 203; *Fisher v. Hall*, 41 N. Y. 416, 423; *Vreeland v. Vreeland*, 48 N. J. Eq. 56; *Meeks v. Stillwell* (Ohio), May 26, 1896; *Burk v. Sproat*, 96 Mich. 404.

Thus, a deed of conveyance, delivered to the person equitably entitled thereto by the holder of the legal title, and retained by the grantee, the deed running to a third person, is not necessarily to be regarded as having taken effect as a conveyance: *Newell v. Cochran*, 41 Minn. 374. Upon the issue whether a deed of land, signed by the grantor, passed into the hands of the grantee so as to convey the title, the grantor may testify that he never parted with the deed with the intent that it should take effect as such: *Stevens v. Stevens*, 150 Mass. 557. It is essential that a deed should be understood by the parties to be completed and ready for delivery, in order to have the mere placing of it in the hands or possession of the grantee or his agent construed into a delivery: *Jordan v. Davis*, 108 Ill. 336. The making of a deed, and the fact that the grantee has, while in possession, made lasting and valuable improvements on the real estate is competent as tending to show the intention of the grantor, that there had been a delivery of the deed in question, and that the title had passed to the grantee: *McFall v. McFall*, 136 Ind. 622; *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326.

But it is essential to the legal operation of a deed that the grantee named therein assents to receive it. In order to constitute a complete delivery, there must, therefore, be an acceptance by the grantee. There can be no complete delivery without such acceptance, for, until the grantee is informed of the execution of the deed, and does some act equivalent to an acceptance of it, it is manifest that he may

refuse to accept it, notwithstanding the fact that, by a fiction of law, the presumption of an actual acceptance had all the while existed for his benefit, as against the grantor, his heirs, devisees, and ordinary creditors. Hence, it must be true that intent and acceptance are both necessary to a complete delivery and consummation of a deed: *Cooper v. Jackson*, 4 Wis. 537; *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82; *Beardsley v. Hilson*, 94 Ga. 50, 53; *Moore v. Flynn*, 135 Ill. 74; *Rittmaster v. Brisbane*, 19 Colo. 371; *Cravens v. Rossiter*, 116 Mo. 338; 38 Am. St. Rep. 606; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Jefferson County etc. Assn. v. Hell*, 81 Ky. 513; *Hibberd v. Smith*, 67 Cal. 547; 56 Am. Rep. 726; *Hall v. Hall*, 107 Mo. 101.

The payment of a debt by the execution and delivery of a deed requires the assent of the grantee, and until such assent is given no title is transferred: *Cravens v. Rossiter*, 116 Mo. 338; 38 Am. St. Rep. 606. A delivery, followed by the grantee's acceptance, will, of course, bind the parties and make the deed effectual, though it has been delivered to a third person for the use and benefit of the grantee: *Price v. Hudson*, 125 Ill. 284; *McElroy*, 133 Ill. 156; *Weber v. Christen*, 121 Ill. 9; 2 Am. St. Rep. 68; *Cravens v. Rossiter*, 116 Mo. 338; 38 Am. St. Rep. 606; *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Lee v. Fletcher*, 46 Minn. 49; *Standiford v. Standiford*, 97 Mo. 231; *Black v. Hoyt*, 33 Ohio St. 203; *Duncan v. Hodges*, 4 McCord, 239; 17 Am. Dec. 734; *Guard v. Bradley*, 7 Ind. 600. The delivery of a deed by the grantor to the officer who takes the acknowledgment, with unqualified instructions to deliver to the grantee whenever he calls for it, followed by an acceptance of the title to the land conveyed, vests title to the land in the grantee, although the grantee permits the officer to retain possession of the deed merely as a matter of convenience: *Black v. Hoyt*, 33 Ohio St. 203. Acceptance need not be made in person. It is sufficient if authorized or approved by the grantee: *Cooper v. Jackson*, 4 Wis. 537. An express acceptance of a mortgage to creditors by the mortgagees, is not required; nor is it necessary that all the mortgagees should accept the mortgage; part may accept though others refuse so to do: *Bundy v. Iron Co.*, 38 Ohio St. 300. If the grantee dissents, the deed is, of course, ineffectual and void; and proof of dissent is admissible: *Treadwell v. Bulkley*, 4 Day, 395; 4 Am. Dec. 225; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Lady Superior v. McNamara*, 3 Barb. Ch. 375; 49 Am. Dec. 184.

The acceptance of an absolute and unconditional deed by a grantee, though delivered to a third person for the former's use and benefit, and without his knowledge, is presumed, from the beneficial character of the transaction, until the grantee renounces it: *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873; *Halluck v. Bush*, 2 Root, 26; 1 Am. Dec. 60, and cases cited in note; *Boody v. Davis*, 20 N. H. 140; 51 Am. Dec. 210; *Blight v. Schenck*, 10 Pa. St. 285; 51 Am. Dec. 478; *Lady Superior v. McNamara*, 3 Barb. Ch. 375; 49 Am. Dec. 184; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Peavy v. Tilton*, 18 N. H. 365; 45 Am. Dec. 365; *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82; *Treadwell v. Bulkley*, 4 Day, 395; 4 Am. Dec. 225; *Hulick v. Scovil*, 9 Ill. 159; *Jones v. Swayze*, 42 N. J. L. 279; *Rittmaster v. Brisbane*, 19 Colo. 371; *Henry v. Anderson*, 77 Ind. 361; *Moore v. Flynn*,

135 Ill. 74; *Guard v. Bradley*, 7 Ind. 600; *Eyrick v. Hetrick*, 13 Pa. St. 488; *Thompson v. Cander*, 60 Ill. 244; *Vreeland v. Vreeland*, 48 N. J. Eq. 56; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Crain v. Wright*, 114 N. Y. 307.

The well-established general rule with regard to all deeds is, that until rejected, if for the benefit of the parties in favor of whom they are executed, they are presumed to be accepted by them. This rule applies to trust deeds, and even to trusts for creditors: *Stone v. King*, 7 R. I. 358; 84 Am. Dec. 557. The law presumes that every estate is beneficial to the party to whom it is conveyed, until he renounces it, and this applies to trustees as well as grantees: *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873; and to voluntary conveyances: *Colee v. Colee*, 122 Ind. 109; 17 Am. St. Rep. 345; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68.

The assent of a grantee to a deed need not be shown, where he is an infant, or otherwise not sui juris, for the law presumes assent on his part to the beneficial conveyance; and knowledge thereof and of its delivery are not essential: *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326; *Colee v. Colee*, 122 Ind. 109; 17 Am. St. Rep. 345; *Standiford v. Standiford*, 97 Mo. 231; *Hall v. Hall*, 107 Mo. 101; *Eyrick v. Hetrick*, 13 Pa. St. 487; *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Ceell v. Beaver*, 28 Iowa, 241; 4 Am. Rep. 174; *Cazassa v. Cazassa*, 92 Tenn. 573; 36 Am. St. Rep. 112; *Bjmerland v. Eley* (Wash.), July 6, 1896.

In *Moore v. Flynn*, 135 Ill. 74, 80, it is held that, in respect to a grantee who is not under legal disability, the rule is, that when such grantee is aware of the conveyance, and does not dissent, and the conveyance is positively beneficial to him, or her, acceptance will be presumed, but that no such presumption will arise so long as the grantee is ignorant of the conveyance. The delivery of a deed to a stranger for the benefit of the grantee is deemed to be a constructive delivery to the latter only when his assent thereto or facts which authorize a presumption of assent are shown: *Hibberd v. Smith*, 67 Cal. 547; 56 Am. Rep. 726. As to persons sui juris, courts will not lightly presume acceptance where the grant imposes some burden or obligation upon the grantee: *Rittmaster v. Brisbane*, 19 Col. 371. The assent of a beneficiary will be presumed only where the provisions of the deed are beneficial to his interest: *Hempstead v. Johnston*, 18 Ark. 123; 65 Am. Dec. 458. The assent of creditors to an assignment, apparently for their benefit, will be presumed; but if the assignment is conditional, that the assignor shall be released, assent will not be presumed: *McCain v. Pickens*, 32 Ark. 399. So, if a deed is made to secure creditors, but not in the manner prescribed by the laws regulating assignments, the assent of the grantee in such deed is not presumed: *Johnson v. Farley*, 45 N. H. 505.

Proof of intent to deliver may be deduced from all the surrounding circumstances: *Hibberd v. Smith*, 67 Cal. 547; 56 Am. Rep. 726; and acceptance may be implied from circumstances: *Bundy v. Iron Co.*, 38 Ohio St. 300. The intention to deliver, on the one hand, and of acceptance on the other, may be shown by direct evidence, or it may be presumed from acts or declarations of the parties, constituting

parts of the *res gestæ*, which manifest the intention or acceptance. In like manner the presumption of a delivery may be rebutted and overcome by proof of a contrary intention, or of acts and declarations from which the contrary presumption arises: *Price v. Hudson*, 125 Ill. 284; *Hall v. Hall*, 107 Mo. 101; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Lady Superior v. McNamara*, 3 Barb. Ch. 373; 49 Am. Dec. 184; *Colee v. Colee*, 122 Ind. 109; 17 Am. St. Rep. 345.

While evidence of assent would show a valid delivery, if the evidence also shows that the grantor's object in making the deed was to place his property beyond the reach of creditors, and that he retained the deed after it was recorded, the deed is ineffective for want of delivery: *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68. The acceptance of a deed by a grantee or trustee is presumed from its delivery, unless he renounces it. This presumption is not rebutted by the fact that he, acting as a notary public, took and certified the deed: *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873. If acceptance is not proved, and the facts do not justify the presumption that the grantee has accepted, the title will not pass: *Moore v. Flynn*, 135 Ill. 74. The court may instruct the jury to find a delivery, if the whole testimony shows a state of facts from which delivery is a positive inference of law; but, if the testimony is conflicting, the question of delivery should be left to the jury, under proper instructions: *Jones v. Swayze*, 42 N. J. L. 279; *Cocks v. Simmons*, 57 Miss. 183; *Crain v. Wright*, 114 N. Y. 307; *Cummings v. Glass*, 162 Pa. St. 241; *Whitman v. Shingleton*, 108 N. C. 193; *Lutes v. Reed*, 138 Pa. St. 191. Intervening claims, however, should be regarded in determining the question of delivery, where delivery is not made at the time the deed is signed. Thus, while a deed signed, sealed, and recorded, but not delivered to the grantee, nor accepted by him until long afterward, may, as between the grantor and grantee, take effect from the date when it was left for record, yet, as against attaching creditors, it takes effect only from the time of delivery to, and acceptance by, the grantee: *Bell v. Farmers' Bank*, 11 Bush, 34; 21 Am. Rep. 205. The sending of a deed to be recorded is not a valid delivery against an intervening attachment, unless the recorder receives it as the agent of the grantee, or unless some other act of acceptance by the grantee is shown: *Derry Bank v. Webster*, 44 N. H. 264. So, as the registry of a deed by the grantor, without the grantee's knowledge or consent, does not, of itself, constitute a delivery, the subsequent ratification and acceptance of the deed by the grantee do not relate back so as to cut out an intervening judgment lien: *Cravens v. Rossiter*, 116 Mo. 338; 38 Am. St. Rep. 606.

Recording of Deed as a Delivery.—The acknowledgment or recording of a deed is not delivery, but only evidence of it; and such evidence is merely presumptive, not conclusive, evidence of delivery. The deed does not transfer title until delivery to the grantee. In other words, delivery of a deed by the grantor, and its acceptance by the grantee, is essential to vest title in the grantee. The placing of a deed on record by the grantor is strong presumptive evidence, but not conclusive proof, of delivery, and this presumption may be rebutted by proof of a contrary intent on the part of the party responsible for such recording: *Chess v. Chess*, 1 Pen. & W. 32; 21 Am. Dec. 350; *Bullitt v. Taylor*, 34 Miss. 708; 60 Am. Dec. 412; *Wellborn*.

v. Weaver, 17 Ga. 267; 63 Am. Dec. 235; **Glaze v. Three Rivers etc. Ins. Co.**, 87 Mich. 349; **Hendricks v. Rasson**, 53 Mich. 575; **Tobin v. Bass**, 85 Mo. 654; 55 Am. Rep. 392; **Deere v. Nelson**, 73 Iowa, 186; **Stevens v. Castel**, 63 Mich. 111; **Metcalf v. Brandon**, 60 Miss. 685; **Walsh v. Vermont etc. Fire Ins. Co.**, 54 Vt. 351; **Union Mut. Ins. Co. v. Campbell**, 95 Ill. 267; 35 Am. Rep. 166; **Burke v. Adams**, 80 Mo. 504; 50 Am. Rep. 510; **Hawkes v. Pike**, 105 Mass. 560; 7 Am. Rep. 554; **Alexander v. Alexander**, 71 Ala. 295; **Hutton v. Smith**, 88 Iowa, 238; **Davis v. Davis**, 92 Iowa, 147; **Barns v. Hatch**, 3 N. H. 304; 14 Am. Dec. 369; **Gilbert v. North American Fire Ins. Co.**, 23 Wend. 43; 35 Am. Dec. 543; **Colee v. Colee**, 122 Ind. 345; 17 Am. St. Rep. 345; **Davis v. Garrett**, 91 Tenn. 147; **Helms v. Austin**, 116 N. C. 751; **Saffold v. Horne**, 72 Miss. 470; **Doorley v. O'Gorman**, 6 App. Div. (N. Y.) 591; **Jourdan v. Patterson**, 102 Mich. 602; **Sullivan v. Eddy**, 154 Ill. 199; **Parrott v. Avery**, 159 Mass. 594; 38 Am. St. Rep. 465; **Barnes v. Barnes**, 161 Mass. 381.

Mere directions, or a desire, to have a deed recorded, on the part of a grantor, do not amount to a delivery: **Stone v. French**, 37 Kan. 145; 1 Am. St. Rep. 237; **Provart v. Harris**, 150 Ill. 40. Evidence tending to show that a deed, though recorded, was not actually delivered is admissible in an action of ejectment for the land described in the deed: **Bush v. Genther**, 174 Pa. St. 154. The delivery of a deed to a recorder for registry is not a delivery to the grantee; and registry of a deed by the grantor, without the grantee's knowledge or consent, does not of itself constitute a delivery: **Cravens v. Rossiter**, 116 Mo. 338; 38 Am. St. Rep. 606. If a father executes and records a deed to his minor son, it is *prima facie* a delivery, although there is no manual delivery and he retains possession of the deed: **Tobin v. Bass**, 85 Mo. 654; 55 Am. Rep. 392. The presumption that a duly recorded deed has been delivered is not rebutted by proof merely that, after it was acknowledged but before it was recorded, it was in the possession of the president of a corporation, which was the grantor: **Estes v. German Nat. Bank**, 62 Ark. 7. A deed not delivered and accepted, though recorded, is invalid and passes no estate: **Herbert v. Herbert**, Breese, 354; 12 Am. Dec. 192. The recording of a deed, although not conclusive as to its delivery, is strong evidence thereof in the hands of an innocent purchaser: **Blight v. Schenck**, 10 Pa. St. 285; 51 Am. Dec. 478. The placing of a deed in the hands of one of the grantees with the understanding that it shall be returned to the grantor, if he should call for it, but, if not, it was to be placed upon record upon his death, does not constitute a delivery: **Wilson v. Wilson**, 158 Ill. 567; 49 Am. St. Rep. 176. If a deed confers substantial rights on the grantee, acceptance on his part will be inferred from very slight circumstances, but such presumptions may be overthrown by direct and negative proof: **Metcalf v. Brandon**, 60 Miss. 685. While a deed, duly recorded, is recognized, in **Laughlin v. Calumet etc. Dock Co.**, 65 Fed. Rep. 441, as *prima facie* evidence of delivery by the grantor to the grantee, it is there held to be conclusive evidence of delivery, in the absence of clear evidence to the contrary, as between them and a purchaser for value, who relies upon the deed, unless he had, or was chargeable with, notice of its nondelivery. The delivery of a deed is not effected by signing, acknowledging, and recording it, without the knowledge

or assent of the grantee, if he is an adult, unless it is shown that the grantor intended thereby to give effect and operation to, and to relinquish all control over, such deed, and that the grantee, on being informed, assented. A deed signed, acknowledged, and placed on record, without any intent to part with the deed or the land (the grantors retaking possession of the deed as soon as recorded, and ever thereafter retaining such possession, and the grantees having no knowledge of the deed at the time, nor any possession or control of the deed at any time) is not delivered, nor is the title of the grantors divested thereby: *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68.

It has been held, however, that the recording of a deed by the grantor, for the supposed benefit of the grantee, and without the latter's direction or knowledge, is not of itself evidence of acceptance, nor does it raise a presumption that it was ever accepted: *Rittmaster v. Brisbane*, 19 Colo. 371; *Jefferson Co. etc. Building Assn. v. Hell*, 81 Ky. 513; *Young v. Guilbeau*, 3 Wall. 636.

And, in some jurisdictions, the recording of a deed, or having it recorded, is regarded as equivalent to a delivery thereof, or as sufficient, if not conclusive, evidence of delivery. At least, if the deed is placed on record with the intent that it shall pass the title to the grantee, it constitutes a good delivery, for this is in harmony with the pervading principle of the law of deeds that delivery is a question of intention: See *Gordon v. Trimmer*, 91 Ga. 472; *Moore v. Giles*, 49 Conn. 570; *Levy v. Cox*, 22 Fla. 546; *Elsberry v. Boykin*, 65 Ala. 336; *Sheffield etc. Coal Co. v. Neill*, 87 Ala. 158; *Swiney v. Swiney*, 14 Lea, 316; *Parrott v. Baker*, 82 Ga. 364; *Lady Superior v. McNamara*, 3 Barb. Ch. 375; 49 Am. Dec. 184; *Compton v. White*, 86 Mich. 33; *Lee v. Fletcher*, 46 Minn. 49.

When the deed is recorded with such intent, especially when it runs from parent to child, actual manual delivery and formal acceptance are not essential to the validity of the conveyance: *Issitt v. Dewey*, 47 Neb. 196; *Palmer v. Palmer*, 62 Iowa, 204. A recorded deed is complete and valid and delivered, although the grantee never had it in his actual possession: *Snider v. Lackenour*, 2 Ired. Eq. 360; 38 Am. Dec. 685; and it is found among the grantor's papers at his death: *Scrugham v. Wood*, 15 Wend. 545; 30 Am. Dec. 75. The delivery of a recorded deed is, of course, sufficient, where the grantee assents: *Boody v. Davis*, 20 N. H. 140; 51 Am. Dec. 210; *Cooper v. Jackson*, 4 Wis. 537. The delivery of a deed to the recorder for the grantee, and as the latter's deed, is a sufficient delivery, where the grantee agreed to accept the deed before its execution: *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637. If by agreement, the grantor delivers a deed for record, his delivery is good, when ratified by the grantee, as, in such a case, the grantor acts as the grantee's agent: *Cooper v. Jackson*, 4 Wis. 537. The acknowledgment of a deed for the purpose of registration is delivery: *Newlin v. Osborne*, 4 Jones, 157; 67 Am. Dec. 269. In the absence of a contrary intention, the delivery of a sheriff's deed for record is a delivery to the grantee: *Lewis v. Watson*, 98 Ala. 479; 39 Am. St. Rep. 82. If a deed is drawn up by the grantee, and sent to the grantor to be executed, with directions to record it, the recording officer, when the deed is delivered to him pursuant to such directions, becomes the

agent of the grantee, and such delivery gives the deed full force: *Prignon v. Daussat*, 4 Wash. 199; 31 Am. St. Rep. 914.

But the recording of a deed cannot cut out intervening rights. Thus, if a son in one state sells land to his father, who lives in another state, and sends a recorded deed to his father by mail, there is no delivery of the deed, in a legal sense, until the deed is received and accepted. Hence, an attachment levied on the land before the receipt of the deed creates a paramount lien: *Deere v. Nelson*, 73 Iowa, 186. So, a deed of gift of real and personal property contained this clause: "This deed will be delivered to a friend for safekeeping, with directions to deliver at such time as I may direct." The directions accompanying it instructed the receiver to deliver it to the county recorder for registration on the grantor's death. The deed was held subordinate to a deed of gift delivered to other grantees, and accompanied by possession, although not recorded until after the former: *Davis v. Cross*, 14 Lea, 637; 52 Am. Rep. 177.

Illustrations of a Sufficient Delivery.—Any acts or words which clearly manifest an intention on the part of the grantor to consummate and complete his deed, and to part absolutely and unconditionally with it, and all control over it, are sufficient to give legal existence to it as a deed, and to constitute a sufficient delivery, where the deed is received by the grantee under circumstances indicating an acceptance of it, or from which an acceptance may be implied: *Rushin v. Shields*, 11 Ga. 636; 56 Am. Dec. 436; *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; *Byington v. Moore*, 62 Iowa, 470; *Lowd v. Brigham*, 154 Mass. 107; *Reorganized Church etc. v. Church of Christ*, 60 Fed. Rep. 937; *Miller v. Meers*, 155 Ill. 284; *Orr v. Clark*, 62 Vt. 136; *Devereux v. McMahon*, 108 N. C. 134; *Myrover v. French*, 73 N. C. 609; *Hubbard v. Cox*, 76 Tex. 239.

The delivery of a deed by one or more of several heirs, to the grantee, intending thereby to convey his or their interest in the land, passes the title and divests them of such interest, notwithstanding a condition imposed by the grantor that, if the other heirs refuse to sign, the deed shall become void: *Stanley v. White*, 160 Ill. 605. The retention of possession by the grantor in a deed providing that he shall receive the rents for life, is not inconsistent with delivery of the deed: *Williams v. Evans*, 154 Ill. 98. If a grantor delivers a duly executed deed to a grantee, with the understanding that it shall take effect upon the payment of certain liens and the execution of a mortgage by the grantee, the deed operates at once and passes title absolutely to the grantee: *Richmond v. Morford*, 4 Wash. 337.

Illustrations of an Insufficient Delivery.—If a grantor does not evince an intention to part presently and unconditionally with his deed, and, of course, to pass title to the land at once according to the terms of the deed, there is no delivery. There is no delivery where it is apparent that the conveyance was not intended to be made as a consummated transaction: *Hicks v. Goode*, 12 Leigh, 479; 37 Am. Dec. 677; *Van Amringe v. Morton*, 4 Whart. 382; 34 Am. Dec. 517; *Tisher v. Beckwith*, 30 Wis. 55; 11 Am. Rep. 546; *Rogers v. Carey*, 47 Mo. 232; 4 Am. Rep. 322; *Bernheim v. Horton*, 103 Ala. 380; *Beardsley v. Hillson*, 94 Ga. 50; *Farmers' etc. Bank v. Haney*, 87 Iowa, 101; *Wellington v. Heermans*, 110 Ill. 564; *Bank of Healdsburg v. Bailhache*, 65

Cal. 327; *Donnel v. Bellas*, 11 Pa. St. 341; *Moody v. Dryden*, 72 Iowa, 461; *Hutton v. Smith*, 88 Iowa, 238; *Woolcut v. Lerdell*, 78 Iowa, 668; *Ireland v. Geraghty*, 15 Fed. Rep. 35; *Cressinger v. Dessenburg*, 42 Mich. 580; *Davis v. Williams*, 57 Miss. 843; *Vaughan v. Godman*, 94 Ind. 191; *Donnelly v. Rafferty*, 172 Pa. St. 587; *Ruckman v. Ruckman*, 33 N. J. Eq. 354; *Paddock v. Potter*, 67 Vt. 360; *Miller v. Lullman*, 81 Mo. 311; *Foley v. McNamara* (Iowa), February 4, 1895.

If a grantor in a deed hands it to the grantee, telling him to "take this deed and put it in our box at the bank," without doing any other act showing an intention to formally deliver the deed, and himself retaining possession of the land granted, this does not constitute a present delivery of the deed to the grantee, but a mere employment of him, as agent of the grantor, to do an act for the grantor whereby the latter could retain the custody of the deed: *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326. Handing a deed to counsel for the grantees does not constitute a delivery: *Donnelly v. Rafferty*, 172 Pa. St. 587. If the grantor, under circumstances showing that he does not intend to execute a deed at the time, reserves the right, after signing it, to examine it on the next day, and it is agreed that, if it is found incorrect, corrections shall be made, and the grantee, while the paper is lying upon a table, takes it up and gives it to his clerk, with instructions to put it in his vault, there is no delivery: *Stokes v. Anderson*, 118 Ind. 533. If a deed on its face is not complete, but requires some further act to execute it, delivery of it to the party to whom it is to be made is not absolute, and it remains in his hands subject to the performance of the act: *Hicks v. Goode*, 12 Leigh, 479; 37 Am. Dec. 677. If a deed has been executed by all but one of several grantors, and left with a notary for the purpose of securing the signature of the remaining grantor, but upon the condition that it is not to be delivered until the consideration agreed upon is ready to be passed, the notary is the agent of the grantors, and is bound to hold the deed for them, even after its completion, until he is directed by them to deliver it to the grantee. The grantee, by procuring the uncompleted deed from the notary and placing it upon record, obtains no rights thereunder: *Healy v. Seward*, 5 Wash. 319. To render a deed effectual, it must be delivered with the knowledge and consent of the grantor, so that if the grantee, by some trick or other means, obtains possession of a deed not intended to be delivered to him, there is no delivery and no title passes: *Allen v. Ayer*, 26 Or. 589; *Golden v. Hardesty* (Iowa), January 30, 1895. The mere execution of an undelivered deed conveys no interest in the premises to a grantee who has no legal right to demand a conveyance; but, if the deed is subsequently delivered, the grantee's title dates from such delivery: *Paddock v. Potter*, 67 Vt. 360. The mere execution of an undelivered deed, unaccompanied by any other acts or circumstances showing an intention to pass the title, will not be construed to be a delivery of the deed, especially where the grantor retains possession of the property: *Wood v. Ingraham*, 3 Strob. Eq. 105; 51 Am. Dec. 671; *Benneson v. Aiken*, 102 Ill. 284; 40 Am. Rep. 592; *Lang v. Smith*, 37 W. Va. 725; *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; *Cazassa v. Cazassa*, 92 Tenn. 573; 36 Am. St. Rep. 112; *Porter v. Woodhouse*, 59 Conn. 568; 21 Am. St. Rep. 131; *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237.

Delivery to Third Person for Use of Grantee.—The unconditional delivery of a deed to a third person for the use and benefit of the grantee is, when accepted by the grantee, as good a delivery as if it had been made directly to him: *Haenni v. Bleisch*, 146 Ill. 262; *Colyer v. Hyden*, 94 Ky. 180; *Trask v. Trask*, 90 Iowa, 318; 48 Am. St. Rep. 448; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326; *Miller v. Meers*, 155 Ill. 284; *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; *Merrills v. Swift*, 18 Conn. 257; 46 Am. Dec. 315; *Peavey v. Tilton*, 18 N. H. 151; 45 Am. Dec. 365; *Jackson v. Rowland*, 6 Wend. 666; 22 Am. Dec. 557; *Chess v. Chess*, 1 Pen. & W. 32; 21 Am. Dec. 350; *Buffum v. Green*, 5 N. H. 71; 20 Am. Dec. 562; *Verplank v. Sterry*, 12 Johns. 536; 7 Am. Dec. 348; *Bryan v. Wash*, 2 Gilm. 557; *Cooper v. Jackson*, 4 Wis. 537; *Marsh v. Austin*, 1 Allen, 235; *Holcombe v. Richards*, 38 Minn. 38; *Winterbottom v. Pattison*, 152 Ill. 334; even in cases where the deed is made without the grantee's knowledge: *Haenni v. Bleisch*, 146 Ill. 262; *Halluck v. Bush*, 2 Root, 26; 1 Am. Dec. 60, and cases cited in note; *Bryan v. Wash*, 2 Gilm. 557; *Lee v. Fletcher*, 46 Minn. 49; *Sheffield etc. Coal Co. v. McNeill*, 87 Ala. 158; note to *Jones v. Jones*, 16 Am. Dec. 39; *Vreeland v. Vreeland*, 48 N. J. Eq. 56.

And this is true, although the deed may not have been delivered to, or accepted by, the grantee until after the death of the grantor: *Colyer v. Hyden*, 94 Ky. 180; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326, and other cases cited below, where the matter is more specifically treated. A deed to a third person may, of course, be made for the use and benefit of infants, as well as adults: *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326. So, the unconditional delivery of a deed to a third person for the use of a lunatic grantee not under guardianship, followed by circumstances indicating acceptance by the grantee, is a valid delivery: *Campbell v. Kuhn*, 45 Mich. 513; 40 Am. Rep. 479. In the absence of anything to show a contrary intention, a voluntary deed by a grantor to his nephews and nieces, handed, upon its execution and acknowledgment, to the former's partner or employé, and placed in a safe by him, no control being exercised by the grantor over it for fifteen years, is a good delivery, especially where the grantor, at the same time, made a life lease of the property, to which the deed was made subject, and which expressly recognized the grantees as owners: *Miller v. Meers*, 155 Ill. 284.

The delivery, however, of a deed to a stranger, to be delivered to the grantee at the direction of the grantor, or with a reservation of a right in him to countermand it, does not pass the title, nor raise a presumption that the delivery is made with that intention. To pass the title, the facts and circumstances attending the transaction must be such as to show that the grantor intended that the deed should be delivered by the custodian to the grantee: *Trask v. Trask*, 90 Iowa, 318; 48 Am. St. Rep. 446; *Shults v. Shults*, 159 Ill. 654; 50 Am. St. Rep. 188; *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592.

The acceptance of a deed, delivered to a stranger for the use and benefit of the grantee, makes it operative from the time of delivery: *White v. Pollock*, 117 Mo. 467; 38 Am. St. Rep. 671; *Lady Superior v. McNamara*, 3 Barb. Ch. 375; 49 Am. Dec. 184; *Peavey v. Tilton*, 18 N.

H. 151; 45 Am. Dec. 365; Bryan v. Wash, 2 Gilm. 557; Thompson v. Candor, 60 Ill. 244; Jones v. Swayze, 42 N. J. L. 279; Vreeland v. Vreeland, 48 N. J. Eq. 56; even though the grantee is ignorant of its existence, for the law will presume, if nothing appears to the contrary, that a man will accept what is for his benefit, as we have elsewhere shown: Vreeland v. Vreeland, 48 N. J. Eq. 56. In Kingsbury v. Burnside, 58 Ill. 310, 11 Am. Rep. 67, the deed was held to be operative only from the time the assent was given.

Rights of creditors, however, must be protected. Hence, if a deed is placed in the hands of a third person to be by him delivered to the grantee, it will not be good against an intervening attachment of the land conveyed: Johnson v. Farley, 45 N. H. 505. So, if a deed is delivered to a third person for the use of the grantee, but without his knowledge or assent, his subsequent assent will not defeat the lien of an intervening judgment against the grantor: Hibberd v. Smith, 67 Cal. 547; 56 Am. Rep. 726. So, if one places on record a deed to a party, who has no knowledge of the existence of the deed, and does not authorize or give his assent to the record, there is no such delivery as will give the grantee precedence of a mortgage executed between such a placing of the deed on record and a formal subsequent delivery. A ratification of a grantor's unauthorized delivery can, as a general rule, it is true, be made by the grantee, but not when the effect is to cut out an intervening mortgage for value: Parmelee v. Simpson, 5 Wall. 81.

Contingency of Death.—This subject is discussed in the monographic notes to Wellborn v. Weaver, 63 Am. Dec. 243-246, on deeds to take effect after death of grantor, and to Wilson v. Carrico, 49 Am. St. Rep. 219-222. If a grantor executes a deed in sufficient form, and deposits it with a third person to be delivered to the grantee upon the grantor's death, it is a good and sufficient delivery, where the grantor parted with all control over the instrument, and reserved no right to recall it or to alter any of its provisions, and the grantee, though he had no knowledge of the conveyance, will upon acceptance, after the grantor's death, succeed to the title, which vests, by relation, as of the time when the deed was left for delivery with such third person: Hoffmire v. Martin, 29 Or. 240; Trask v. Trask, 90 Iowa, 318; 48 Am. St. Rep. 446; Hathaway v. Payne, 34 N. Y. 92; Ball v. Foreman, 37 Ohio St. 132; Cook v. Patrick, 135 Ill. 499; Marsh v. Austin, 1 Allen, 235; Strough v. Wilder, 119 N. Y. 530; Gish v. Brown, 171 Pa. St. 479; Wall v. Wall, 30 Miss. 91; 64 Am. Dec. 147; Hill v. Hill, 119 Ill. 242; Cummings v. Glass, 162 Pa. St. 241; Winterbottom v. Pattison, 152 Ill. 334; Douglas v. West, 140 Ill. 455; Loveland v. Loveland, 136 Ill. 75; Denzler v. Rieckhoff (Iowa), January 26, 1896; Martin v. Flaherty, 13 Mont. 96; 40 Am. St. Rep. 415; Dimmick v. Dimmick, 95 Cal. 323; Bury v. Young, 98 Cal. 446; 35 Am. St. Rep. 186; Stewart v. Stewart, 5 Conn. 317; Woodward v. Camp, 22 Conn. 457; O'Neal v. Brown, 67 Ga. 707; Stinson v. Anderson, 96 Ill. 373; Crabtree v. Crabtree, 159 Ill. 342; Baker v. Baker, 159 Ill. 394; Squires v. Summers, 85 Ind. 252; Owen v. Williams, 114 Ind. 179; Goodpaster v. Leathers, 123 Ind. 121; Estate of Hoffman v. Hoffman, 81 Iowa, 292; Latham v. Udell, 38 Mich. 238; Taft v. Taft, 59 Mich. 185; 60 Am. Rep. 291; Brown v. Stutson, 100 Mich. 574; 43 Am. St. Rep. 462; Standiford v. Standi-

ford, 97 Mo. 231; Williams v. Latham, 113 Mo. 165; Berly v. Taylor, 5 Hill. 577, 586; McCalla v. Bane, 45 Fed. Rep. 828; Wheelright v. Wheelright, 2 Mass. 447; 3 Am. Dec. 66; Belden v. Carter, 4 Day, 66; 4 Am. Dec. 185, and cases cited in the note thereto; Hatch v. Hatch, 9 Mass. 307; 6 Am. Dec. 67; Ruggles v. Lawson, 13 Johns. 285; 7 Am. Dec. 375; note to Jones v. Jones, 16 Am. Dec. 39, 41; Jackson v. Rowland, 6 Wend. 666; 22 Am. Dec. 557; Foster v. Mansfield, 3 Met. 412; 37 Am. Dec. 154; Jaggers v. Estes, 2 Strob. Eq. 343; 49 Am. Dec. 674; Hinson v. Bailey, 73 Iowa, 544; 5 Am. St. Rep. 700; Phillips v. Thomas Lumber Co., 94 Ky. 445; 42 Am. St. Rep. 367. It has been held that the delivery of a deed to a third person, to be delivered to the grantee after the grantor's death, and the delivery thereof by such third person before the grantor's death, in breach of the trust imposed upon him, may be a sufficient delivery to vest title at the death of the grantor: Wallace v. Harris, 32 Mich. 380.

But if the grantor does, either by himself or his agent, retain any control over the deed, or reserves any right to recall it, or to alter any of its provisions, the delivery is not good, and the deed conveys no title: Denis v. Velati, 96 Cal. 223; Stinson v. Anderson, 96 Ill. 373; Cline v. Jones, 111 Ill. 563; Lancaster v. Blaney, 140 Ill. 203; Price v. Hudson, 125 Ill. 284; Hayes v. Boylan, 141 Ill. 400; 33 Am. St. Rep. 326; Reichart v. Wilhelm, 83 Iowa, 510; Colyer v. Hyden, 94 Ky. 180; McGraw v. McGraw, 79 Me. 257; Taft v. Taft, 59 Mich. 185; 60 Am. Rep. 291; Schuffert v. Grote, 88 Mich. 650; 26 Am. St. Rep. 316; Fisher v. Hall, 41 N. Y. 416; Weisinger v. Cock, 67 Miss. 511; 19 Am. St. Rep. 320; Williams v. Schatz, 42 Ohio St. 47; Duraind's Appeal, 116 Pa. St. 93; Peck v. Rees, 7 Utah, 467; McCalla v. Bane, 45 Fed. Rep. 828; Harman v. Harman, 70 Fed. Rep. 894; Jackson v. Dunlap, 1 Johns. Cas. 114; 1 Am. Dec. 100; Wheelright v. Wheelright, 2 Mass. 447; 3 Am. Dec. 66; Baker v. Haskell, 47 N. H. 479; 93 Am. Dec. 455; Prutsman v. Baker, 30 Wis. 644; 11 Am. Rep. 592; Byars v. Spencer, 101 Ill. 429; 40 Am. Rep. 212, and note; Fain v. Smith, 14 Or. 82; 58 Am. Rep. 281, and note; Stone v. French, 37 Kan. 145; 1 Am. St. Rep. 237; Porter v. Woodhouse, 59 Conn. 568; 21 Am. St. Rep. 131; Trask v. Trask, 90 Iowa, 318; 48 Am. St. Rep. 446.

A deed is not delivered, though it is executed in the presence of a witness, if there is no declaration on the part of the grantor that he intends it to take effect at once, and he retains it in his possession during his lifetime, putting it in a chest and bequeathing the chest to the grantee: Parrott v. Avery, 159 Mass. 594; 38 Am. St. Rep. 465. If after executing a deed for the use of a third person, to be delivered upon the grantor's death, the grantor executes a mortgage on the property to another person, this act is equivalent to a withdrawal of the deed, and vitiates the delivery: Stinson v. Anderson, 96 Ill. 373. So, obtaining such a deed after the grantor's death, and having it recorded, where the grantor had its custody and possession until his death, will give no validity to the instrument. There can be no valid delivery after the grantee's death: McElroy v. Hiner, 133 Ill. 156. A deed left by the grantor in a place accessible to the grantee does not constitute a delivery, in the absence of an intention on the part of the grantor to deliver and of the grantee to accept: Tyler v. Hall, 106 Mo. 313; 27 Am. St. Rep. 337; Scott v. Scott, 95 Mo. 300. Com-

pare *Le Saulnier v. Loew*, 53 Wis. 207. Exercising acts of ownership after such deeds are given tends to show that the delivery was not intended to pass title: *Shults v. Shults*, 159 Ill. 654; 50 Am. St. Rep. 188. If a deed of this kind, from father to son, is inclosed in the same envelope as the father's will, but is never discovered or known to the son until after the father's death, the son, in the meantime, leasing and paying rent on the very land described in the deed, there is no delivery: *Miller v. Murfield*, 79 Iowa, 64. So, where the grantor hands his deed in an envelope to the grantee, to be deposited by the latter in his box in a bank for safekeeping, but not for the purpose of passing the title, there is no delivery: *Bovee v. Hinde*, 135 Ill. 137. In such cases, the grantee is merely the agent of the grantor, the act of the grantee being the act of the grantor: *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326. If the maker's intention is to fix a time for the title to vest, and he dies without doing so, there is no delivery: *Davis v. Williams*, 57 Miss. 843. If a person executes a deed and puts it in the hands of a third person, to be delivered to the grantee upon the grantor's death, such third person holds it as agent of the grantor, and as trustee for the grantee, and the grantor may revoke it at any time: *Hale v. Joslin*, 134 Mass. 310; *Ball v. Foreman*, 37 Ohio St. 132, 139; *Wheelright v. Wheelright*, 2 Mass. 447; 3 Am. Dec. 66. Intervening rights will be protected where deeds have been made to take effect upon the grantor's death: *Reichart v. Wilhelm*, 83 Iowa, 510; *Jones v. Loveless*, 99 Ind. 317; *Blair v. St. Louis etc. R. R. Co.*, 24 Fed. Rep. 539; *Rosseau v. Bleau*, 131 N. Y. 177; 27 Am. St. Rep. 578.

A deed for land will not convey the legal title, unless it is delivered by the grantor in his lifetime: *Otto v. Doty*, 61 Iowa, 23 *Hayes v. Boylan*, 141 Ill. 400; 33 Am. St. Rep. 326; *Taft v. Taft*, 59 Mich. 185; 60 Am. Rep. 291; *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326. So long as a deed is within the control, and subject to the dominion and authority of the grantor, there is no delivery, without which there can be no deed. There can be no valid delivery of such a deed after the grantor's death: *Lang v. Smith*, 37 W. Va. 725. Hence, a delivery through the mail by a third person after the death of the grantor is not sufficient: *Otto v. Doty*, 61 Iowa, 23. But a delivery by one cotenant after the death of another, where both have signed, is a good and lawful delivery: *Holt's Appeal*, 98 Pa. St. 257.

But where the grantor has intrusted his deed to another for delivery to the grantee, such delivery may lawfully be made, though the grantor is at that time dead: *White v. Pollock*, 117 Mo. 467; 38 Am. St. Rep. 671; *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326.

The question as to whether a conveyance to take effect after the grantor's death is a deed or a will is the subject of a monographic note to *Wilson v. Carrico*, 49 Am. St. Rep. 219-222. A conveyance not to take effect until the death of the grantor is an attempt to make a testamentary disposition without complying with the statute of wills, and is void: *Wilson v. Wilson*, 158 Ill. 567; 49 Am. St. Rep. 176.

Delivery in Escrow.—It is not our purpose to discuss the conditions upon which a deed is placed in escrow, or to show when such conditions are violated; but simply to state the law as to the first delivery. A written instrument, signed, sealed, and acknowledged by the grant-

or, and by him delivered to a third person, to be by such person delivered to the grantee upon the happening of some future event, is an escrow, which takes effect upon the second delivery: *Harkreader v. Clayton*, 56 Miss. 383; and delivery is as essential to the validity of an escrow as to a deed; the only difference being as to the manner of the delivery: *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235. The manual delivery of a deed will not be regarded as a full and complete delivery if it is mutually understood at the time, between the grantor and the grantee, that such deed is not to become operative until some future event: *Fraser v. Davie*, 11 S. C. 56. There cannot be a delivery of a deed in escrow to the grantee. Such a delivery would make the deed an absolute one to the grantee; or it would be void: *Stevenson v. Crapnell*, 114 Ill. 19; *Braman v. Bingham*, 26 N. Y. 491; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Ordinary of New Jersey v. Thatcher*, 41 N. J. L. 403; 32 Am. Rep. 225; *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330; *Hicks v. Goode*, 12 Leigh, 479; 37 Am. Dec. 677; *Gilbert v. North American Fire Ins. Co.*, 23 Wend. 43; 35 Am. Dec. 543; *Foley v. Cowgill*, 5 Blackf. 18; 32 Am. Dec. 49. It may be valid and operative though the condition is not complied with: *Miller v. Fletcher*, 27 Gratt. 403; 21 Am. Rep. 356. A deed in the hands of a grantee is never treated as an escrow: *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68. A deed may be delivered as an escrow to any person other than the grantee, and does not become a conveyance so long as it remains in that condition, or until the condition is performed upon which it is to take effect: *Gaston v. Portland*, 16 Or. 255. The delivery of a deed to a third person in escrow is sufficient, if the grantor, by his act of delivery, loses all control over the instrument, and by it the grantee is to become possessed of the estate: *Shults v. Shults*, 159 Ill. 654; 50 Am. St. Rep. 188. Upon the happening of the court named, the grantee may compel the delivery of the deed to him: *Brown v. Stutson*, 10 Mich. 574; 43 Am. St. Rep. 462. The question whether a deed is absolute, or is delivered as an escrow, is, generally, a question of fact to be determined by the jury: *White v. Bailey*, 14 Conn. 271; *Clark v. Gifford*, 10 Wend. 310.

A DEED is a writing, signed, sealed, and delivered. The seal has been dispensed with, in a number of states, by statute; and in some it has never been adopted: See monographic note to *Gant v. Hunsucker*, 55 Am. Dec. 412, showing when a deed can be avoided at law for fraud. A deed is valid between the parties without attestation or acknowledgment: *Wood v. Chapin*, 13 N. Y. 509; 67 Am. Dec. 62. The loss or destruction of a deed, after delivery thereof, does not, of itself, necessarily divest the title of the grantee: *Potter v. Adams*, 125 Mo. 118; 46 Am. St. Rep. 478, and note; *Speer v. Speer*, 7 Ind. 178; 63 Am. Dec. 418.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. STATE.

[47 NEBRASKA, 549.]

STATUTES—RETROSPECTIVE OPERATION.—A statute does not operate retroactively from the mere fact that it relates to antecedent events.

STATUTES—RETROACTIVE OPERATION.—A statute giving a city power to require railroad companies to construct and keep in repair "any viaduct or viaducts" includes those in existence, as well as those subsequently constructed.

POLICE POWER.—THE ESSENTIAL QUALITY of the police power, as a governmental agency, is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public.

CONSTITUTIONAL LAW—RESERVED POWERS.—To require persons and corporations to so exercise and enjoy their rights as not unnecessarily to injure others is one of the powers which has been reserved by the people of the state, and which cannot be surrendered; and the principle is especially applicable to existing rights, without regard to the time of their acquirement, or to the source whence they are derived.

POLICE POWER—DEFINITION.—The limit of the exercise of police power has not been defined with precision; but it is determined by "the gradual process of judicial inclusion and exclusion."

POLICE POWER—COURTS.—THE LEGISLATURE cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights, but it must appear to the court, when such regulation is called in question, that there is a clear and real connection between the assumed purpose of the law and its actual provisions.

EVIDENCE—JUDICIAL NOTICE—PLACE OF DANGER.—A grade crossing, on a railroad, is judicially recognized as a place of danger.

CONSTITUTIONAL LAW—HEARING.—"DUE PROCESS OF LAW," like the term "police power of the state," is not susceptible of a precise definition; but the constitutional requirement as to "due process of law" does imply a hearing according to the established practice in courts of common law or equity, and is satisfied, if the citizen, whose property is taken or damaged for public use, is afforded an adequate remedy therefor in a court of competent jurisdiction.

POLICE POWER—HEARING.—PREVIOUS NOTICE, and an opportunity to be heard, by persons affected thereby, is not indispensable to a valid exercise of the police power of the state, although a portion of that power has been delegated to a municipal corporation. It is enough that such persons are enabled, in maintaining their rights, to invoke the equal protection of the law, by any appropriate proceeding.

POLICE POWER—LEGISLATURE—PRIVATE PROPERTY—STATUTES.—The legislature, in the exercise of its police power, does not have absolute power over private property, and cannot, at will, impose upon property burdens so unreasonable as to work a practical confiscation thereof; but courts will not interfere to prevent the enforcement of statutes relative to an exercise of the police power, on account of any mere difference of opinion between them and the law-making branch of the government respecting the wisdom or necessity of particular measures.

POLICE POWER—NATURE OF.—LEGISLATIVE POWER to subserve the general welfare by all needful and proper regulations in the interest of health and safety, is inherent in the sovereignty of the state, and cannot be bartered away by contract or otherwise.

POLICE POWER—DELEGATION OF, TO MUNICIPAL CORPORATIONS.—The police power of the state may be asserted directly by the legislature, or it may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations, or other agencies, provided for its exercise.

POLICE POWER—MUNICIPAL CORPORATIONS—RAILROADS—VIADUCTS.—A charter provision authorizing a city, by ordinance, to require railroad companies to construct and keep in repair viaducts in streets therein, crossed by their tracks, is a valid exercise of the police power of the state over the subject to which it applies, where the sole purpose of the legislation is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible.

MUNICIPAL CORPORATIONS—ORDINANCES—RAILROADS—REPAIR OF VIADUCTS—VIOLATING OBLIGATION OF CONTRACTS.—An ordinance which requires two railroad companies to repair specific portions of a viaduct previously erected by them jointly with the city does not violate prior contract obligations.

MUNICIPAL CORPORATIONS—RAILROADS—VALIDITY OF ORDINANCE AS TO REPAIR OF VIADUCTS.—If a city has power, under its charter, to determine, by ordinance, the proportion of a viaduct, and approaches, to be constructed by two or more railroad companies owning or operating separate lines of track to be crossed thereby, or to determine the cost thereof to be borne by each, an ordinance requiring the companies to repair specific portions of a viaduct, if not within the letter of the city's charter, is clearly within its declared scope and purpose, and is valid.

MUNICIPAL CORPORATIONS—ORDINANCES—REPAIR OF VIADUCT BY RAILROADS—PARTIES.—Under a charter authorizing a city to require, by ordinance, two or more railroad companies, owning or operating separate lines of track, to repair viaducts to be crossed thereby, an ordinance requiring two of such companies to do so is not rendered invalid by the fact that the city does not make other companies, engaged in operating one or more of said tracks as lessees of the owners, parties to the proceedings. They are not necessary parties, because the city may proceed against the owners of the tracks operated by the lessees.

MANDAMUS—RAILROADS—VIADUCTS.—The duty of railroad companies to construct or repair viaducts, which is imposed upon them by a city charter, and ordinance, may be enforced by a writ of mandamus, especially where authority to proceed in that way is expressly conferred by the charter.

C. J. Greene and J. W. Deweese, for the appellant.

W. J. Connell, for the appellee.

555 POST, C. J. This was a proceeding on the relation of the city of Omaha to require the Chicago, Burlington & Quincy Railroad Company, hereafter referred to as the "respondents," to repair the south one-third of the so-called Eleventh street viaduct, in said city. There was a trial upon issues joined in the district court for Douglas county, resulting in a finding and judgment in accordance with the prayer of the relator, and which has, by appropriate proceedings, been removed into this court for review.

It is essential to a perfect understanding of the questions discussed to refer in detail to the legislation of the state and the city so far as it relates to the subject of the controversy, and in so doing ⁵⁵⁶ we will follow the order in which they are presented in the valuable brief submitted in behalf of the respondent.

In the year 1869, the Omaha & Southwestern Railroad Company was organized under the general statutes of this state, and immediately thereafter constructed a line of road from the city of Omaha, in a southwesterly direction, to a point on the Platte river in Sarpy county, and which it continued to operate until the year 1871, when it transferred all of its property and franchises to the Burlington & Missouri River Railroad Company, also a Nebraska corporation, by lease for nine hundred and ninety-nine years. Said road was by the last-named company operated until 1880, in which year it was, together with all the property and franchises of the original corporation, transferred to the respondent company, a corporation of the state of Illinois. Section 83, chapter 25 of the Revised Statutes of 1866, under which the Omaha & Southwestern Company was organized, contained, among other provisions, the following:

"Sec. 83. If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authority owning or having charge thereof and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied."

In the year 1884, application was by the last-named company made to the city for permission to lay its tracks over and across certain streets therein, including Eleventh street; and, in response to that request, an ordinance, No. 729, ⁵⁵⁷ was enacted and approved in the following language:

"Said Omaha & Southwestern Railroad Company shall have the right to construct, maintain, and operate a line of railroad along, upon, through, and across said portion of said streets and alleys as a part of its line; provided, that said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; and provided that nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall

authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company, in any portion of the streets and alleys herein named and enumerated."

Pursuant to said ordinance, the respondent soon thereafter constructed a track from Tenth street across Eleventh street, and thence in a southwesterly direction to the city limits. Long previous to the last-mentioned date, the Union Pacific Railway Company had, with the consent of the city, constructed twenty-one or more tracks across Eleventh street, which have ever since been in continual operation for general traffic and for switching purposes, so that the additional tracks therein of the respondent did not materially increase the inconvenience or danger of the public in the use of said street.

By sections 1, 2, and 4 of an act entitled, "An act to provide for viaducts, bridges, and tunnels, in ⁵⁵⁸ certain cases, in cities of the first class," approved March 4, 1885 (Sess. Laws, 1885, c. 12, p. 109), it was declared:

"Section 1. That the mayor and city council in any city of the first class shall have power, whenever they deem any improvement, herein provided for, necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct or bridge over, or tunnel under, any railroad track or tracks, switch or switches in such cities, when such track or switches cross or occupy any street, alley, or highway thereof, in the manner and to the extent hereinafter provided.

"Sec. 2. Whenever any such viaduct, bridge, or tunnel shall be deemed necessary, as provided in the preceding section, the mayor and city council shall have the power to secure and adopt plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies across whose tracks or switches the work is proposed to be built will assume three-fifths (3-5) of the entire cost thereof, and three-fifths (3-5) of all damages to abutting property on account of construction of said viaduct, bridge, or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth (1-5) of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donation or by execution of good and sufficient bond as will protect said city from the payment of said one-fifth (1-5), then the said mayor and council may proceed to contract with the necessary ⁵⁵⁹ party or parties for the construction of such

viaduct, bridge, or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth (1-5) of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth (1-5) by special tax to property benefited, as provided in the following section, if not otherwise provided for.

"Sec. 4. The city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge, or tunnel as herein provided, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street railway company. And the compensation paid for such use shall be set apart and used toward the maintenance of such viaduct, bridge, or tunnel."

In virtue of the foregoing provisions, the city, the Union Pacific Company, and the respondent, in the year 1886, entered into an agreement in writing, the essential part of which is as follows: "Witnesseth, that the said parties of the second part, in pursuance of the provisions of an act of the legislature of the state of Nebraska, entitled, 'An act to provide for viaducts, bridges, and tunnels in certain cases in cities of the first class,' do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street in said city over the railroad tracks of said parties of the second part, and three-fifths of the damages to abutting ⁵⁶⁰ property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars (\$90,000), the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company and one-fourth thereof to be paid by said Omaha & Southwestern Railroad Company. . . .

"The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and dam-

ages, in the same manner and according to the same division as hereinbefore agreed."

Pursuant to that agreement, the viaduct in question was constructed and dedicated to the use of the public early in the year 1887. In the year last named, a new charter was provided for the city by an act entitled, "An act incorporating metropolitan cities, and defining and prescribing their duties, powers, and government" (Sess. Laws, 1887, c. 10, p. 105), section 48 of which, as amended in 1893, reads as follows:

"Sec. 48. The mayor and council shall have power to require any railway company or companies ⁵⁶¹ owning or operating any railway tracks upon or across any public street or streets of the city to erect, construct, reconstruct, complete, and keep in repair any viaduct or viaducts upon or along such street or streets, and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. . . . When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies, upon being required as herein provided to erect, construct, reconstruct, or repair, any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, reconstruct, or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect, or refuse to perform such duty, and, upon conviction, such company or companies shall be fined one hundred dollars (\$100), and each day any such company or companies shall fail, neglect, or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled, by mandamus or other appropriate proceedings, to erect, construct, reconstruct, or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power, whenever any railroad company or companies shall fail, neglect, or ⁵⁶² refuse to erect, construct, reconstruct, or repair any viaduct or viaducts, after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction, or repair of such viaduct or viaducts by contract, or in such other manner as may be provided by ordinance, and assess the costs of erection, construction, reconstruction, or repair of such viaduct or viaducts against

the property of the railroad company or companies required to erect, construct, reconstruct, or repair the same, and such cost shall be a valid and subsisting lien against such property, and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court": Sess. Laws, 1893, c. 3, sec. 7, p. 70.

In the month of January, 1894, the relator, having determined from the report of the city engineer, the board of public works, and other competent evidence that extensive repairs were required upon said viaduct by reason of structural weakness thereof and other causes, enacted an ordinance approving the plans and specifications therefor previously submitted by the city engineer, sections 2 and 3 of which read as follows:

"Sec. 2. That the Union Pacific Railway Company be, and is hereby, ordered, directed, and required to repair that portion of said Eleventh street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct, and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Burlington & Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is ⁵⁶³ hereby ordered, directed, and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance.

"Sec. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington & Quincy Railroad Company, owning or operating railroad tracks upon and across said Eleventh street under said Eleventh street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs."

Notice of the foregoing order was in due form served upon the respondent as well as upon the Union Pacific Railway Company, and, upon the refusal of the former to comply with the terms of the ordinance, this proceeding was instituted, with the result stated.

The first proposition asserted by the respondent is that section 48, above set out, has a prospective operation only, and does not, in terms or by implication, apply to viaducts in existence at the time it took effect. We are, however, unable to accept counsel's definition of a retrospective law. A statute does not operate retroactively from the mere fact that it relates to antecedent events. A ⁵⁶⁴retrospective law has been defined as one intended to affect transactions which occurred, or rights which accrued, before it became operative as such, and which ascribes to them effects not inherent in their nature in view of the law in force at the time of their occurrence: Bishop on Written Laws, sec. 83; Black on Interpretation of Laws, 247. The language employed in the statute is "any viaduct or viaducts," and must, when read in the light of the authorities cited, be held to include such as were then in existence, as well as those subsequently constructed.

The essential quality of the police power as a governmental agency is, that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. It is one of the powers which has been reserved by the people of the state, and which cannot be surrendered, to require persons and corporations to so exercise and enjoy their rights as not unnecessarily to injure others. That the principle stated is especially applicable to existing rights, without regard to the time of their acquirement or to the source from whence they are derived, appears to us a self-evident proposition not requiring argument, and the subject will not, therefore, be further pursued in this connection.

The next and most important subject of inquiry is presented by respondent's contention that the ordinance under which the city proceeded in ordering the repairs in question contemplates the taking of its property without due process of law, within the meaning of the state and federal constitutions, and also impairs the obligation of the contract under which its track was laid and under which said viaduct was constructed. The difficulty ⁵⁶⁵attending a solution of the questions presented by this assignment is augmented from the fact that courts have not always observed the distinction between the different reserved powers of the state, and have cited indiscriminately cases involving the police power, the taxing power, and the power of eminent domain; nor is the confusion on that account at all strange when we remember that those powers all depend for their vitality upon a common principle, viz., the subordination of private rights to the public welfare—of the individual to the community.

Of the cases frequently cited to illustrate that principle many involve an application of two or more of the powers enumerated, while in others the line of distinction is by no means clearly apparent. Many attempts at defining the police power have been made, but in none has the limit of its exercise been defined with precision. It is, in the language of Chief Justice Shaw in *Commonwealth v. Alger*, 7 Cush, 53, "much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." Doubtless, the safe course to pursue in attaining the desired result is that which is characterized by Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 97, as "the gradual process of judicial inclusion and exclusion." We held in *Smiley v. McDonald*, 42 Neb. 5, 47 Am. St. Rep. 684, that the legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights, but that the court must be able to perceive some clear and real connection between the assumed purpose of the law and its actual provisions. The obvious purpose of the legislation in this case, both state and ⁵⁶⁶ municipal, is to promote the convenience and safety of the public at a grade crossing which is judicially recognized as a place of danger. It is, in short, the exercise of the governmental power and duty to secure a safe and necessary highway, and must be upheld, if at all, as a legitimate exercise of the police power of the state. The authorities which fully sustain this proposition will be noticed in the course of our further examination of this case, and need not be here cited. The questions presented by this assignment are in principle nearly allied, covering substantially the same field of inquiry, and will, for convenience, be considered together.

The proceeding by the mayor and council is, it is claimed, essentially judicial in character, and, to use the language of the respondent, "such a proceeding, without notice to those concerned, and without giving them an opportunity to be heard, violates every maxim and principle of constitutional government." The term "due process of law" is, like the police power of the state, not susceptible of a precise definition. However, that of Judge Cooley appears to have proved the most acceptable to the courts of this country, viz: "Due process of law in each particular case means an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs." In *Board of Directors v. Collins*, 46 Neb. 411, we held, in effect, that the constitutional requirement with re-

spect to that subject does not imply a hearing according to the established practice in courts of common law or equity, but that it ⁵⁶⁷ is satisfied whenever the citizen, whose property is taken or damaged for public use, is afforded an adequate remedy therefor in a court of competent jurisdiction; and the doctrine is now firmly established, although after some diversity of opinion, that previous notice and an opportunity to be heard by persons thereby affected is not indispensable to a valid exercise of the police power, or the power to levy and collect taxes, whether ad valorem, by the ordinary means, or such as are denominated special assessments and chargeable against particular property. In *McMillen v. Anderson*, 95 U. S. 37, Mr. Justice Miller, in holding that the courts of the United States could not be invoked to prevent the collection of an alleged illegal license tax levied by the state of Louisiana, on the ground that the effect thereof was to take the petitioner's property without due process of law, said: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present in some tribunal when it was assessed. But this is not, and never has been, considered necessary to the validity of a tax; . . . nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party and recover back the money as paid under duress if the tax was illegal." True, it was said in *Barker v. Omaha*, 16 Neb. 269, that "notice in some form must be given a property owner before a special assessment upon his property becomes fixed and irrevocable"; but the learned author of that opinion did not say, or imply, that the means ⁵⁶⁸ of redress afforded in other cases against illegal assessment fail to satisfy the constitutional inhibition against the taking of property without due process of law. What is meant, and what is the doctrine of the authorities there cited, is, that a property owner shall, before being required to pay, have an opportunity to be heard in the courts, in a proceeding instituted by himself or by the municipality to which the taxing power of the state has been by law intrusted. Although there are many cases in the state and federal courts in harmony with the opinion of Justice Miller, from which the foregoing is quoted, and fully sustaining the proposition here asserted, we prefer to confine our examination of such as involve an exercise of the police power rather than the power of taxation. In *Woodruff v. Catlin*, 54 Conn. 295, it is said: "The legislature, having determined that the intersection of two railways with a

highway in the city of Hartford, at grade, is a nuisance, dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land, and in such manner as will separate the grade of the railways from that of the highway at intersections; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both; . . . that the legislature of this state has the power to do all this for the specified purpose, and to do it through the instrumentality of a commission." Appeal of New York etc. R. R. Co., 58 Conn. 532, involved the constitutionality of an act of the legislature ⁵⁶⁹ limiting the amount chargeable to a town or village, on the separation of the grade of a highway from that of a railway track situated therein, to one-fourth of the whole cost of such improvement. Such a limitation, it was argued, authorized the taking of the appellant's property without due process of law, inasmuch as it prevented the commissioner to whom the discretion was intrusted from apportioning to the city a just and equitable share of the burden imposed by the act; but the court held otherwise. Carpenter, J., speaking for the court, after remarking that the policy of the law was to abolish grade crossings, said: "Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal, or that either may be required to pay the whole, and, if each contributes, that the proportion which each shall pay may be determined by the legislature in each case as it arises, or by general rule by itself, or by a delegation of its power to the railroad commissioners. This exercise of power is justifiable on the ground that government itself, in the discharge of its governmental duties, undertakes to remove the danger, and does it in the same manner and through the same instrumentalities that it provides and maintains highways through, and at the expense of, the towns and other corporations. So far as towns are concerned, it is a duty that has ever devolved upon them to keep the highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare. Railroad companies, in some sense, are but the agents of the government in affording to the public ⁵⁷⁰ a more expeditious and vastly improved method of travel. . . . Unlike towns, they do not act upon compulsion, but by choice. Their motive is private gain. Public benefit is incidental. . . . They

contribute largely to the danger, and the state may well require them to contribute largely to its removal. . . . Requiring the railroad company to pay three-fourths of the expense, however just it might be to require the town to pay more than one-fourth, is not a matter of which the railroad company can legally complain." That doctrine was reasserted by the same court in Appeal of New York etc. R. R. Co., 62 Conn. 527, which was, upon proceedings in error to the supreme court of the United States, affirmed and the validity of the act in question expressly upheld: See New York etc. R. R. Co. v. Bristol, 151 U. S. 556. In the opinion last referred to, this language was used by Chief Justice Fuller: "Nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them [railroad companies] in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that in such particulars a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States"; and substantially similar views are expressed by ⁵⁷¹ that court in Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512, and Eldridge v. Trezerant, 160 U. S. 452. In Train v. Boston Disinfecting Co., 144 Mass. 529, 59 Am. Rep. 113, a regulation of the board of health for the disinfecting of certain vessels, and goods imported therein, at the owner's expense, was assailed on the ground that no provision was by law made for a hearing, or for review by appeal or otherwise; but the court pronounced the regulation a reasonable one, and defensible as an exercise of the police power of the state. In Commonwealth v. Roberts, 155 Mass. 281, an act required all buildings used for a designated purpose to be supplied with sufficient water-closet connections. It was held, although there was no provision for notice or hearing, that said act was a valid exercise of the police power and applicable to buildings erected before its enactment as well as to those subsequently constructed. In People v. Boston etc. R. R. Co., 70 N. Y. 569, the appellant company was required to construct a bridge over a turnpike road, on the ground that the state may, under the powers reserved to the legislature, impose upon railroad corporations such additional burdens as are essential to the public welfare. In State v. Missouri Pac. Ry. Co., 33 Kan. 176, the power

of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation substantially like that here involved. Referring to the subject of notice, the court, by Valentine, J., observed: "We might, however, say that we do not think it necessary that the city should have given the railroad company notice before passing the ordinance requiring them [respondents] to construct the viaduct. Notice afterward, with an opportunity on the part of the railroad companies ⁵⁷² to contest the validity of the ordinance, and the right of the city to compel them to construct the viaduct, is sufficient." But the clearest and most satisfactory exposition of the subject is found in *Health Department v. Rector of Trinity Church*, 145 N. Y. 32, 45 Am. St. Rep. 579, which was an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied, or intended to be occupied, by one or more families, whenever so directed by the board of health. The statute made no provision for notice to property owners, and none was in fact given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board. In the opinion of Peckham, J., it is said: "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. . . . The fact that the legislature has chosen to delegate a certain portion of its power to the board of health . . . would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order." And in answer to the argument that the effect of the act was to impair contract obligations, the same learned judge said: "Laws and regulations of a police nature, though they may disturb the ⁵⁷³ enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it, by sharing in the general benefits which the regulations are intended and calculated to secure: See, also, *People v. Union Pac. Ry. Co.*, 20 Colo. 186; 1 *Dillon on Municipal Corporations*, 4th ed., sec. 141, and note; *Commonwealth v. Alger*, 7 Cush. 83; *Baker v. Boston*, 12 Pick. 183; *Thorpe v. Rutland*

etc. R. R. Co., 27 Vt. 140; 62 Am. Dec. 625; Tiedeman on Limitations of Police Power, sec. 124; Prentice on Police Power, 57, 58. And the principle which underlies all of the cases cited was distinctly recognized by this court in *State v. Chicago etc. Ry. Co.*, 29 Neb. 412. It will not, of course, be contended that the power of the legislature is, in that respect, absolute, or that it may at will impose upon property burdens so unreasonable as to work a practical confiscation. There is, as all admit, a limit beyond which it cannot go and within which it will be confined by the judicial power of the state: Prentice on Police Power, 31; *Minnesota v. Barber*, 136 U. S. 313. But it is unnecessary, if it were possible, to point out the boundary line between reasonable and unreasonable exactions. It is enough that the courts will not interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making branch of the government respecting the wisdom or necessity of particular measures. To summarize briefly, we conclude, ⁵⁷⁴ from the foregoing authorities and many others examined, that the legislation assailed in this cause is a valid exercise of the police power of the state over the subject to which it applies; that it does not authorize the appropriation of the respondent's property without due process of law in a constitutional sense, since the latter is enabled to invoke the equal protection of the law by any appropriate proceeding, and because it did in fact put in issue by the answer both the validity of the ordinance and the reasonableness of the amount apportioned to it for the repair of the viaduct in question. Nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise. Such power is inherent in the sovereignty of the state, and may be asserted directly by the legislature, or may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The single purpose of the legislation, whether contemplating the erection or reconstruction of the viaduct, is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible, and it is not unreasonable to require the parties to maintain the street in a condition of safety, for whose benefit and convenience it was originally rendered unsafe.

The argument assailing the ordinance on the ground that it requires the respondent to repair the south one-third of the via-

duct, instead of contributing a designated part of the entire cost, is, we think, without merit. Section 48, above set ⁵⁷⁵ out, confers upon the mayor and council of the city plenary powers with respect to the subject. They may, by ordinance, determine the proportion of the viaduct and approaches to be constructed by two or more railroad companies owning or operating separate lines of track to be crossed thereby, or may determine the cost thereof to be borne by each. The ordinance, if not within the letter of the city's charter, is clearly within its declared scope and purpose. But in the absence of any statute regulating the manner of apportioning the cost of such repairs, it cannot be said that the plan adopted is either so inequitable or unreasonable as to amount to an abuse of the discretion conferred upon the officers of the city. Equally groundless is the contention that the city was required to proceed against the Chicago, Rock Island & Pacific and the Chicago, Milwaukee & St. Paul railroad companies, then engaged in operating, jointly with the Union Pacific company, certain tracks belonging to the latter across Eleventh street and under said viaduct. The statute, as we have seen, authorizes the city to require two or more railroad companies owning or operating separate lines of track to erect, construct, reconstruct, or repair viaducts. If we admit the companies named, as lessees of the Union Pacific company, to be within the terms of the act, it does not follow that they are in any sense necessary parties to the proceeding, since the city might still have proceeded against the owners of the tracks operated by them. Such is the plain and necessary inference from the language of the statute.

Lastly, it is argued that, conceding the respondent's duty to repair the viaduct as commanded by ⁵⁷⁶ the ordinance, such duty is not one which will be enforced by means of the writ of mandamus. By reference to section 48 of the city's charter, it will be observed that authority to proceed by mandamus or other appropriate proceedings is therein expressly conferred; but, independent of that provision, mandamus has long been recognized as an appropriate remedy, if not the only adequate remedy, in cases of like character. Indeed, so firmly is that rule established by the decisions of this court as not to admit of a doubt at this time: See *State v. Republican etc. R. R. Co.*, 17 Neb. 647; 52 Am. Rep. 424; 18 Neb. 512; *State v. Grand Island etc. R. R. Co.*, 27 Neb. 694; *State v. Chicago etc. Ry. Co.*, 29 Neb. 412.

We discover no error in the record and the judgment of the district court is affirmed.

THE POLICE POWER is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state necessary for the public welfare: *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460; *Champer v. Greencastle*, 138 Ind. 339; 46 Am. St. Rep. 390. This power resides in the state in its sovereign capacity: *Champer v. Greencastle*, 138 Ind. 339; 46 Am. St. Rep. 390; and extends to all regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety of society: *State v. Heinemann*, 80 Wis. 253; 27 Am. St. Rep. 34. But statutes passed in pursuance of the police power must have some relation to the end sought to be accomplished. Where the ostensible object is to secure the public comfort, welfare, and safety, the statute must appear to be adapted to that end. It cannot invade the rights of persons and property under the guise of a mere police regulation, when such is not the effect: *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; *Smiley v. MacDonald*, 42 Am. St. Rep. 684. The boundaries of police power are not susceptible of precise definition, and the courts, therefore, must, as each case is presented, determine whether it falls within or without the appropriate limits: *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460. In enacting what shall be done by a citizen for the purposes of promoting the public health and safety, it is not usually necessary to the validity of the legislation upon that subject that he shall be heard before he is bound to comply with the direction of the legislation: *Health Department v. Rector*, 145 N. Y. 32; 45 Am. St. Rep. 579. Compare *People v. Board of Health*, 140 N. Y. 1; 37 Am. St. Rep. 522. Police power may be delegated to municipal corporations: *Walker v. Jameson*, 140 Ind. 591; 49 Am. St. Rep. 222; *Charleston v. Werner*, 38 S. C. 488; 37 Am. St. Rep. 776; and cannot be possessed and exercised by a municipal corporation, unless it has been delegated thereto by the legislature: *Champer v. Greencastle*, 138 Ind. 339; 46 Am. St. Rep. 390. The legislature has power to provide for the safety of persons going over highways: *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305; monographic note to *State v. Goodwill*, 25 Am. St. Rep. 890, on the Fourteenth Amendment, considered with relation to special privileges, burdens, and restrictions. The right to exercise police power cannot be parted with, or impaired by, contract: *Jacksonville v. Ledwith*, 26 Fla. 163; 23 Am. St. Rep. 558; monographic note to *Butler v. Chambers*, 1 Am. St. Rep. 645, on the power of the state to regulate or prohibit the sale or manufacture of articles. It rests solely within legislative discretion, inside of constitutional limits, to determine when public safety or welfare requires the exercise of the police power. Courts can interfere only when such exercise conflicts with the constitution; with the wisdom, policy, or necessity of such enactment they have nothing to do: *Walker v. Jameson*, 140 Ind. 591; 49 Am. St. Rep. 222. A railroad company, within the limits of a city, is subject to the police regulations and ordinances thereof: *City etc. Ry. Co. v. Mayor*, 77 Ga. 731; 4 Am. St. Rep. 106.

EVIDENCE.—JUDICIAL NOTICE will be taken of things that ought to be generally known: See monographic notes to *Lanfear v. Mestier*, 89 Am. Dec. 663, and *Temple v. State*, 49 Am. Rep. 201, on judicial notice.

CONSTITUTIONAL LAW.—“DUE PROCESS OF LAW” is difficult to define: See monographic note to *Bardwell v. Collins*, 20 Am. St. Rep. 554, showing that it does not always mean judicial process. It is generally conceded that it requires notice and a hearing, or an opportunity to be heard, before condemnation, and a judgment before dispossession; but personal notice is not always required: See monographic note to *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 271.

STATUTES.—A RETROSPECTIVE OR RETROACTIVE LAW is one which takes away or impairs vested rights acquired under existing laws: *Commissioners v. Rosche*, 50 Ohio St. 103; 40 Am. St. Rep. 653.

MANDAMUS lies to compel a railway corporation to construct a viaduct over its tracks, or to perform any other legal duty: See monographic note to *Potwin Place v. Topeka Ry. Co.*, 37 Am. St. Rep. 321.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

CLARK v. HILL.

[117 NORTH CAROLINA, 11.]

CONDITIONAL SALES.—A LEASE OF PERSONAL PROPERTY, containing conditions for the payment of rent at stated times, and on the last payment of rent the property to belong to the lessee, in the meantime the title to be retained by the lessor, is in effect a conditional sale, and, not being recorded, the stipulation for retention of title by the lessor is void as to third parties.

FIXTURES.—A “steam-feed” machine, attached by bolts to the sills of a sawmill resting on piling driven in the ground, is a fixture as between the mortgagor and mortgagee of the land on which the mill is located.

Action to recover possession of a steam-feed machine shipped by Clark to one Moss, under whom the defendant claims. The machine was shipped, received, and retained under conditions as stated in a letter written by plaintiff as follows: “In sending out our feeds in this way, we have the parties give us their notes, payable according to the terms of the lease, as rental on the same, and, when the notes are paid, we give them title to the machinery and a contract to refund or give back the notes if the machinery does not prove satisfactory.” On the trial, it appeared that the “feed” was attached by iron bolts to the sills of a sawmill resting on piling driven into the ground. The land on which the mill was located belonged to Moss, subject to a mortgage which was subsequently foreclosed. The defendant, Hill, claimed under a purchaser at a foreclosure sale, and was in possession of the property when this suit was brought, the “feed” not having been paid for. Judgment for plaintiff. Defendant appealed.

J. H. Small, for the appellant.

C. F. Warren, for the appellee.

12 CLARK, J. The plaintiffs earnestly contend that the terms of the contract were those set forth in their reply to Moss, when the "steam-feed" was shipped, i. e., a lease upon payments of rent, as stated, and, on the last payment of rent, the property to belong to Moss, in the meantime the title to be retained by the vendor. Conceding this to be correct, such contract was, in effect, a conditional sale. Calling it a "lease" did not make it one, when its terms showed it was not. This was held in *Puffer v. Lucas*, 112 N. C. 377, which has been since cited and approved in *Crinkley v. Egerton*, 113 N. C. 444; *Barrington v. Skinner*, 117 N. C. 47. This agreement not being registered, the stipulation for retention of the title by the vendors was invalid as to third parties: Code, sec. 1275. The property in dispute, by the mode of its attachment, became a "fixture" as between Moss and this defendant's assignor, they being **13** mortgagor and mortgagee (*Horne v. Smith*, 105 N. C. 322; 18 Am. St. Rep. 903; *Overman v. Sasser*, 107 N. C. 432), and inured to the benefit of the mortgagee: *Footte v. Gooch*, 96 N. C. 265; 60 Am. Rep. 411.

The court should have instructed the jury, as prayed by the defendant, that upon all the evidence the plaintiffs were not entitled to recover.

Error.

IN THE CASE of *Barrington v. Skinner*, 117 N. C. 47, the question was again presented respecting the effect of an instrument purporting to be a lease of personal property, containing a provision that, when certain notes that had been given should be paid, the title should vest in the lessee. The agreement in question recited that one Moses thereby leased to one Skinner a Sterling upright piano, stool, and cover, of the value of two hundred and sixty-five dollars, for the sum of fifty dollars in advance, his note payable in six months after date for ninety-six dollars and sixty-seven cents, his note payable nine months after date for sixty-six dollars and sixty-six cents, and his note payable twelve months after date for eighty-four dollars and sixteen cents, the cash payment and notes to bear interest at the rate of eight per cent per annum from date until maturity, to be paid for the use of said piano, and agreeing that, when the sum of two hundred and sixty-five dollars should have been paid, the said Moses would sell and deliver to said Skinner the said property, with a good and effectual bill of sale therefor, but, until the said sum should have been paid, the instrument should remain the property of the said Moses; and in the event of the failure to make payments on the instrument, and in the event of its return to said Moses, the said Skinner would pay rent therefor at the rate of nine dollars per month. The court was of the opinion that, under the decision in the principal case, the instrument was, in legal effect, a conditional sale, and that the vendor was entitled to recover the property against one

claiming under the vendee, unless payment should be made of the balance due under the agreement.

CONDITIONAL SALES—LEASE.—Any agreement by which the owner of personal property "leases" to another with a provision that upon the prompt payment of a sum of money named, to be paid as rental, the title to the property shall pass to the lessee, although called a lease, is neither a lease nor a chattel mortgage, but is a valid conditional sale; *Extended note to Andrews v. Colorado Sav. Bank*, 46 Am. St. Rep. 296.

FIXTURES.—MACHINERY, constructed and placed in a mill, to be used in and as a part of it, and which would pass by a grant of the mill, is a part of the real estate upon which the mill is situated and not personal property; *Havens v. Germania etc. Ins. Co.*, 123 Mo 403; 45 Am. St. Rep. 570, and note. To the same effect see *Feder Capehart v. Foster*, 61 Minn. 132; 52 Am. St. Rep. 582.

MOORE v. JORDAN.

[117 NORTH CAROLINA, 86.]

JUDGMENTS—LIEN OF—PRIORITIES.—Under a statute providing that the docketing of a judgment shall make it "a lien on the real property, in the county where docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the date of the rendition of the judgment," the lien of docketed judgments attaches to after-acquired lands in the same county at the moment that the title vests in the judgment debtor, and the proceeds of a sale under such judgments must be distributed pro rata among the judgment creditors without reference to the date when their judgments were docketed.

Special proceedings for the sale of certain lands. One W. S. Battle acquired such lands in Nash county, North Carolina, by descent, after judgments had been rendered against him in favor of one E. B. Lewis, and another in favor of one C. P. Cameron as administrator. The Lewis judgment was rendered and docketed prior to the rendition and docketing of the Cameron judgment. The court below decreed a sale of said lands, and that the proceeds thereof be distributed pro rata in satisfaction of said judgments, and Lewis appealed.

H. G. Connor, for the appellant.

R. B. Peebles, for the appellee.

⁸⁸ **FAIRCLOTH**, C. J. We are now confronted for the first time with the question whether previously docketed judgments take, by their priorities, according to the dates when ⁸⁹ docketed, the after-acquired lands of the judgment debtor, or whether they take pro rata, the after-acquired lands cast by descent on

the judgment debtor. The defendant Lewis contends that, as was the case under our former system, the lien when it attaches relates back to the day when the judgment was docketed. This is denied by the other defendants. It is conceded that the liens of the several judgments, on after-acquired lands, attach eo instanti, and at the moment when the title vests in the judgment debtor; also that the lien of each judgment attaches at the time it is docketed on all lands then owned by the debtor. It will be observed that those liens arise from the docketing and priorities accordingly are established and not by any principle of relation. Neither the court nor counsel have been able to find any decided case on this question in any of the states, except one in Oregon which will be referred to later. We are, therefore, to construe our statute (Code, sec. 435) according to its meaning and on general principles of reasoning. At common law, no judgment, proprio vigore, was a lien upon land. Under our former system, when an execution issued and was levied upon land, the lien thereby acquired related to the teste of the execution, not by reason of any self-executing force in the fieri facias or the judgment proper, but by force of a statute (West, 2), which was enacted expressly to give the lien created by the levy a relation to the teste of the writ. The relation was not given upon any idea of rewarding the diligent creditor, but to take from the debtor the power to transfer his property to others and thus deprive the creditor of the fruit of his recovery. This reason does not now exist under our system, because the docketed judgment fixes the lien and the debtor cannot escape it, and, if he sells thereafter, the purchaser takes subject to the statutory lien of our code, and the principle of relation is not ⁹⁰ necessary to protect the creditor. Cessante ratione cessat ipse lex. Whilst this question was not presented in *Sawyers v. Sawyers*, 93 N. C. 321, this court remarked: "This statutory legislation (Code, sec. 435) must therefore, to no inconsiderable extent, dispense with many rules before in force, and especially that of relation of the execution to its teste, as unnecessary and inapplicable to the new procedure and practice." We must then look to the act itself for its true intent. The code nowhere directly or indirectly enacts the doctrine of relation, except in section 433, which declares that all judgments rendered in the superior court, and docketed within ten days after the term, "shall be held and deemed to have been rendered and docketed on the first day of said term." So the legislature did advert to the doctrine of relation, but failed to declare that it should prevail, except in said section 433, and its silence in all other sections af-

fords a fair inference that it did not intend that it should prevail in section 435. *Expressio unius exclusio alterius*. Assuming that the legislature had power to give the lien a retroactive effect, as was done by Westminster 2, yet it has not done so, and it would be some strain on the legal mind to say that a docketed judgment, even in effect, was a lien upon land during a period when the judgment debtor had no land. A lien cannot antedate its origin without statutory aid.

There seems to be no reason why priority should be allowed when the title to the land and the several liens occur at the same moment. There is no equitable ground on which to place it, because one judgment debt, in the eye of the law, is as just as any other, and there is no natural justice in the proposition.

The court in *Creighton v. Leeds*, 9 Or. 215, under a similar statute and in a like case, held that the first docketed judgment had priority over the other judgments ⁹¹ on after-acquired lands, and this is the only case yet found. The reasoning in that case is not satisfactory. It is put: 1. On the ground that such is the meaning of the statute; 2. That the debtor has an inchoate interest in his future acquisitions on which the judgment acts and is a lien, and likens it to the inchoate interest of a married woman in the future acquired lands of her husband during coverture. We fail to see any similarity. The proposition loses sight of the true reason why dower was allowed in such lands. It is true that the marriage contract is the initial point of her rights, but the reason is the "sustenance of the wife, and the nurture and education of the younger children," and it was extended to future acquired lands in order to prevent the husband from defeating the object of the rule, which has no application to the code, section 435, as to judgments docketed before the estate falls in. The authorities quoted in the Oregon case do not support the conclusion, and are cited only to call attention to some supposed analogies under the former system. The contention in *Kollock v. Jackson*, 5 Ga. 153, was not between judgment creditors, but between a judgment and a factor's lien for goods and advances made to raise a crop, which factor's lien arose subsequent to the rendition of the judgment, and it was held that the judgment had preference because of their act of assembly of 1799 which declared that "all property of the party against whom a verdict shall be entered shall be bound from the signing of the first judgment." This decision does not fit the present question. Our conclusion is, that the proceeds of the land should be applied to the judgments *pro rata*.

Affirmed.

MR. JUSTICE CLARK dissented, and contended that "the distinction must be clearly kept in mind between the lien, which is the right accruing as between the judgment creditor and debtor, to subject the property to the payment of his debt, and the priority in the application of the proceeds of a sale, under execution, which is the apportionment of the rights of judgment creditors among themselves. The manner of acquiring the lien as to real estate has been changed by statute. The apportionment of the proceeds of sale according to priority has never been affected by statute, and, as the courts possess no legislative power, the law as to priorities among execution and judgment creditors necessarily remains as it has been uniformly recognized for an uncounted number of years. . . . The code, section 435, provides that the docketing a judgment shall make it a 'lien on the real property, in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years, from the date of the rendition of the judgment.' It will be noted that this statute only changes the mode of acquiring liens against the debtor's realty, and does not purport to change the long settled and well-recognized principle that though the liens may have been acquired, eo instanti, by a levy of several executions at once (or, as in this case, by the acquisition of property subsequent to docketing of the judgments), the priority among the creditors, in the application of the proceeds, goes to the oldest judgments in the order of their seniority. As the statute has not changed this, the courts have no power to do so. This section (Code, sec. 435) merely does away with the necessity and useless expense of issuing execution from each successive term by making the docketing a lien on all the judgment debtor's realty which he has, or may subsequently acquire, for ten years in the county where such judgment is docketed: *Sawyer v. Sawyer*, 93 N. C. 321. The statute gives no indication of a disposition to put the diligent creditors, who hold the oldest judgments, in any worse condition than formerly. This statute (Code, sec. 435) was indeed for their ease, by relieving them of the necessity of issuing a chain of successive executions to maintain their priority, and it is accordingly careful to make such judgments a lien also on all real property which the judgment debtor shall thereafter acquire. This view is sustained by a well-considered opinion in *Creighton v. Leeds*, 9 Or. 215; *Kollock v. Jackson*, 5 Ga. 153; 8 Am. & Eng. Ency. of Law, 988; *Titman v. Rhyne*, 89 N. C. 64-67. Mr. Justice Avery concurred in the dissenting opinion.

JUDGMENTS — AFTER-ACQUIRED LANDS. — Judgments are generally regarded as binding by lien realty acquired by the judgment debtor after the docketing of the judgments. There is no priority between the liens of judgments rendered before the acquisition of the property by the debtor, for, as all attach at the same time, they must stand on the same footing, though the judgments may have been recovered at different times: *Extended note to Filley v. Duncan*, 93 Am. Dec. 357.

STATE v. ELLINGTON.

[117 NORTH CAROLINA, 158.]

QUO WARRANTO—RIGHT TO RECOVER OFFICE.—In an action of quo warranto to recover an office, the right of plaintiff to recover depends upon his right and title to the office, and not upon the want of such right in another.

ELECTION—EVIDENCE OF.—A person claiming to have been elected to an office by the state legislature may introduce in evidence the record of such legislature for the purpose of proving his election and right to the office he is claiming.

PARLIAMENTARY LAW—QUORUM — PRESUMPTION.—It being shown that there was a quorum of a legislative body present in the morning, and it not appearing that there had been an adjournment, it is presumed that there continued to be a quorum present when certain proceedings were had that day.

PARLIAMENTARY LAW—QUORUM — PRESUMPTION.—If the records of a legislative body show that less than a quorum of its members were present when the roll was called and a vote taken, the presumption that a quorum shown to be present earlier in the day continued present when such vote was taken is overcome.

PARLIAMENTARY LAW—QUORUM.—Although a quorum of a body is actually present at the time a vote is taken, the presiding officer is powerless to make the members vote, or to count those not voting for the purpose of making up a quorum, in the absence of a rule or express authority to that effect.

PARLIAMENTARY LAW.—A QUORUM OF A LEGISLATIVE BODY is a majority of all the members thereof, in the absence of constitutional provision or rule prescribed by the power creating the body.

T. R. Purnell and MacRae & Day, for the appellant.

E. W. Pou and Shepherd & Busbee, for the appellee.

159 FURCHES, J. This is an action in the nature of quo warranto, in which plaintiff claims to be state librarian, and alleges that defendant is in possession of the office and unlawfully withholds the same from him. Defendant, answering, admits that he is in possession of the office, performing its duties and receiving its emoluments; but he denies that he is holding it wrongfully or unlawfully, and alleges that he was duly elected thereto on the eighth day of January, 1895, for a term of two years next ensuing.

Under the view we take of the case, it is not necessary for us to consider or pass upon defendant's right to this office. The plaintiff's right to recover depends upon his right to the office. If he is not entitled to it, it is a matter of no importance to him who is. It is true that if **160** plaintiff is entitled to the office, it necessarily follows that defendant is not; but it does not necessarily follow that defendant is entitled to it, if plaintiff is not.

Prior to the thirteenth day of March, 1895, the board of trus-

tees of the state library, under existing law elected to and filled this office. On that day (March 13, 1895) the legislature passed and ratified an act repealing the law authorizing the board of trustees to elect, and provided for the election of this officer by the legislature. And on the same day, to wit, the thirteenth day of March, 1895, the plaintiff claims that he was duly elected state librarian by the legislature pursuant to said act. And this not being a bill enacted into a law, ratified and signed by the presiding officers of senate and house, and deposited in the office of secretary of state, which then becomes the evidence of its passage (*Carr v. Coke*, 116 N. C. 223; 47 Am. St. Rep. 801; *United States v. Ballin*, 144 U. S. 4) it becomes necessary for plaintiff to introduce the record of the legislature for the purpose of proving his election and right to the office he was claiming. These records show that, on the morning of the 13th of March, there was a rollcall of the house, a quorum answered, and the house proceeded to business. They also show that there was a proposition in both branches of the assembly (senate and house) to go into the election of state librarian; that these motions prevailed, and both the president of the senate and the speaker of the house appointed two tellers each to take this vote. And they reported that in the senate there were twenty-six votes cast, twenty-five being for the plaintiff, and one against; and in the house there were forty-eight votes cast for the plaintiff, and none against him. It is admitted by plaintiff that there must be a quorum present to do business, or, in this case, to elect the plaintiff to the office he claims. But he claims that, it appearing there was a quorum present that morning, ¹⁸¹ and it not appearing there had been an adjournment since, it will be presumed that there continued to be a quorum present. We think this is undoubtedly true, that the quorum will be presumed until it shall appear there is not one: *Cushing on Elections*, 2d ed., 369. This is usually made to appear by what is called a division; and this is usually had after a vote by yeas and nays, when the presiding officer announces the votes and some opposing member doubts the correctness of the announcement and demands a division—a call of the body: *Cushing's Law of Legislative Assemblies*, sec. 1798. And, strictly speaking, this is what is called a division: *Cushing's Law of Legislative Assemblies*, sec. 1814.

The original purpose of a division was for the purpose of ascertaining who voted "aye" and who voted "no," and it was effected in this way: the ayes occupied one part of the hall and the noes another, and there remained until the tellers ap-

pointed counted them. In this way it came to be called a division. In more modern assemblies, it is more usually effected by a call of the house, a yea or nay vote when each member's name is called: Cushing's Law of Legislative Assemblies, sec. 1615. This mode is used for two purposes, one to determine on which side the majority voted, and also for the purpose of determining whether there is a quorum present: *United States v. Ballin*, 144 U. S. 4. In this case, there was no viva voce vote, preceding the rollcall. With this exception, there seems to have been all done that is usually done before a division, which is now usually had by a call of the roll: Cushing's Law of Legislative Assemblies, sec. 1615. Why this was not done, we do not know. Article 2, section 9, requires that in all elections under this constitution the vote shall be viva voce. And if this section applies to this election, it does not mean a rollcall, but a vote by voice, and not by ballot. And if the vote had been taken that way, and ¹⁶² announced by the presiding officers in favor of plaintiff and no division called for, the presumption contended for by plaintiff would have availed him. But when the roll was called, the name of each member voting recorded, and the tellers appointed report the number voting for plaintiff and the number voting against him—a modern division—we have the facts, and they must prevail over the presumption which existed in favor of a quorum before that time: Cooley's Constitutional Limitations, 168; *United States v. Ballin*, 144 U. S. 1. It may be there was a quorum present when this vote was taken. But if there was, it does not appear to us, and we have no means of finding out whether there was or not, and no authority to do so if we had the means. And if they were present, whether they could have been compelled to vote is not before us, as there was no such proposition made, so far as we know.

But it seems to be conceded that the speaker of the house of representatives of the United States could not compel a member to vote. Nor had he any right to count members present and not voting to make a quorum, until the house adopted a rule to that effect. He then counted nonvoting members present to make up a quorum, and the supreme court of the United States sustained his action: *United States v. Ballin*, 144 U. S. 1. So may the legislature of North Carolina adopt a similar rule as there is nothing in the constitution to prevent its doing so. But it has not adopted such a rule, and under the authority of *United States v. Ballin*, 144 U. S. 1, we suppose the presiding officers were powerless, if a quorum was actually present, either to make them vote or to count them to make up a quorum. This brings

us to the consideration of what is a quorum. They are of two kinds, one fixed by the constitution or power creating the body or assembly. In this way a majority of a majority may constitute a quorum and do business. ¹⁶³ But where the quorum is not fixed by the constitution or the power that creates the body, the general rule is, that a quorum is a majority of all the members (*Cleveland Cotton Mills v. Commissioners*, 108 N. C. 678; *Cushing's Law of Legislative Assemblies*, sec. 247; *United States v. Ballin*, 144 U. S. 1), and a majority of this majority may legislate and do the work of the whole. There is no constitutional quorum, that is, a number prescribed by our constitution that shall constitute a quorum. We therefore fall under the general rule applying to legislative bodies: *United States v. Ballin*, 144 U. S. 1.

The legislature of North Carolina consists of one hundred and seventy members, fifty in the senate and one hundred and twenty in the house. Therefore it takes the presence of twenty-six senators to constitute a quorum in the senate and sixty-one members of the house. In this election twenty-six senators voted, which was a majority of that body, and a quorum. But in the house there were but forty-eight members who voted. This we see was less than a quorum. For this reason, plaintiff has failed to establish his right to the office.

There were various questions presented as to the defendant's rights. But the view we have taken of the case makes it unnecessary for us to consider them, and we do not. The judgment of the court below is affirmed.

QUO WARRANTO—BURDEN OF PROOF.—In a quo warranto proceeding, the initial burden of proof rests upon the defendant, and he must disclose and prove his title to the office in controversy. In fine, the law imposes upon him the burden of proving such election or appointment as invests him with the legal right to the office in controversy: *Extended note to State v. Kupferle*, 100 Am. Dec. 268.

LEGISLATIVE JOURNALS AS EVIDENCE is discussed in the note to *Spangler v. Jacob*, 58 Am. Dec. 574, 575.

GATES v. LATTA.

[117 NORTH CAROLINA, 189.]

MASTER AND SERVANT—NEGLIGENCE—BLASTING.—If a servant, about to blast rock when it is almost dark, fails to cover the blast, or to give notice sufficient in time for those near by to make their retreat to a safe place, he is guilty of negligence, and, if a third person is injured thereby, both the servant and his master are liable in damages for such injury.

Shepherd, Manning & Foushee, for the appellants.

W. A. Guthrie and Boone, Merritt & Bryant, for the appellee.

190 FAIRCLOTH, C. J. The defendant Latta, as the employé of the defendant Geer, was engaged in blasting rock in his millrace near the public county road, where it crosses the river Eno, and the plaintiff was walking along said road when the injury occurred, about dusk, about one hundred or one hundred and fifty yards from the dam. When the blast went off, a five-pound piece of rock struck the plaintiff and broke her arm. They were each engaged in a lawful business, and the question of negligence depends upon the manner or method in which they exercised their rights. The burden was upon the plaintiff to prove to the satisfaction of the jury that she was injured, and that she was injured by the negligence of the defendant. And, if contributory negligence is relied upon as a defense in the answer, the burden of proving it to the satisfaction of the jury is upon the party pleading it: Acts 1887, c. 33. The issues submitted were: "1. Was the plaintiff injured by the negligence of the defendants or either of them? A. Yes. 3. Did the plaintiff by her own negligence contribute to her injury? A. No."

His honor instructed the jury that if the defendant set off the blast when it was dusky dark without giving any warning, this would be such negligence on his part as would make the defendants liable. There was conflicting evidence as to whether the defendants did give an alarm, but, from the verdict on the first issue under the above instruction, we are to take it that no danger notice was given, and that was assumed as a fact on the argument before us. Under the facts and circumstances of this case, we think it was the duty of the defendant to give notice, and that his failure to do so was negligence. Sometimes the blast is covered, or by other means the flight of the dangerous parts is restricted within safe limits, and notice is not necessary, but, in the absence of such precautions ¹⁹¹ a notice, sufficient in time for those near by to make their retreat to a safe place, is a reasonable requirement. It was so held in *Blackwell v.*

Lynchburg etc. R. R. Co., 111 N. C. 151, 32 Am. St. Rep. 786, a case similar to the present, where there is a full discussion of the subject, and we refer to it without repeating it. It was conceded on the argument that if the facts and circumstances of this case made it the duty of the defendant to give notice of the blast, then he was liable, and, having held that such was his duty, we need not further examine the instructions, unless we could find some manifest error calculated to mislead the jury in a material manner, which we do not. The duty of giving the danger notice in similar cases has been held in other states: *Wright v. Compton*, 53 Ind. 337; *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258; *Hay v. Cohoes Co.*, 51 Am. Dec. 279, note.

No error. Affirmed.

NEGLIGENCE—BLASTING.—The privilege of throwing stones or other material beyond the right of way by means of blasting in constructing a railway, so as to endanger the lives of owners of adjacent lands and of members of their families when engaged in domestic duties on their premises, does not pass with the right of way, as an incident thereto, and if such persons are thus injured through the negligence of the parties engaged in the work of construction, the latter are liable: *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151; 32 Am. St. Rep. 786, and note. See, especially, on this subject the extended notes to *St. Peter v. Denison*, 17 Am. Rep. 263, 264, and *Hay v. Cohoes Co.*, 51 Am. Dec. 283.

STRAUSS v. CAROLINA INTERSTATE BUILDING AND LOAN ASSOCIATION.

[117 NORTH CAROLINA, 308.]

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY.—Every person having stock in an insolvent building and loan society, whether as creditor or debtor, must be considered as a corporator, and each member indebted to the concern must be considered as a debtor, for the purpose of winding up its affairs.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—RIGHTS OF MEMBERS.—In a settlement of the affairs of an insolvent building and loan society, each borrowing member indebted to it must be charged with the amount received by him, with legal interest from the time of the loan, and must be credited with all payments made by him, whether as fines, penalties, dues, or otherwise; and each nonborrowing member must be credited with the sums paid in by him, with legal interest from the date of payment.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY.—THE APPOINTMENT OF A RECEIVER for an insolvent building and loan society causes the debts and mortgages due the concern to mature, and they may be collected at once.

BUILDING AND LOAN ASSOCIATIONS—RECEIVER—MORTGAGES—POWER OF SALE.—A receiver appointed for an insolvent building and loan society cannot enforce a power of sale

contained in mortgages made to the association, except by order of court.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—DISTRIBUTION OF ASSETS.—A court cannot instruct the receiver for an insolvent building and loan society how to distribute its funds until they are in court.

E. S. Martin, and Ricaud & Weill, for the appellants.

W. R. Allen and J. Battle, for the appellees.

300 **FURCHES, J.** The defendant is what is called a building and loan association, organized as a corporation under **310** the laws of North Carolina. Defendant becoming insolvent, the plaintiff brought an action in the superior court of New Hanover county to close out and wind up the concern. The petitioners Iredell Meares and P. B. Manning were appointed receivers, and filed their petition and asked instructions from the court, in which they say: "Your receivers respectfully report to the court that, in the attempt to collect the debts due to the defendant association by its members, they are met with the difficulty of how to adjust the balances that may be due the association, between the amount of the debt and the amount which may have been paid in by the borrowing members on their shares of stock. The complication arises from the fact that the borrowers, who are indebted to the association, are likewise stockholders therein, and, as stockholders, liable for their pro rata share of whatever losses that may have been incurred in the failure of the association. If the relationship between the borrower and the association was simply that of debtor and creditor, the balance could be easily ascertained. The association, however, under its plan, loaned money only to its members, and these members made monthly payments on their stock, which, when amounting, with accruing profits, to the par value of their stock, were expected to be applied to the extinguishment of their loan, the stock being then canceled. The failure of the association, however, eliminates the possibility of maturing the stock, and necessitates an equitable adjustment between its members for the collection and distribution of the assets."

Upon the hearing Judge Graham made the following order:

"This action coming on to be heard before his honor, A. W. Graham, judge, presiding in the sixth judicial district, at chambers, at Clinton, North Carolina, on the eleventh day **311** of October, 1895, by consent of all parties thereto, upon the petition of Iredell Meares and P. B. Manning, receivers of the defendant the Carolina Interstate Building and Loan Association, praying the court for direction and instruction as to the winding up and

settlement of the affairs of said corporation, with and among the members and shareholders thereof, and the same being argued by counsel for said receivers and borrowing members of said defendant corporation, respectively, and considered by the court;

"The court rejects all of the plans of settlement suggested in the petition of said receivers, and now orders, adjudges, and decrees, and the said receivers are hereby advised and directed to wind up, adjust, and settle the affairs of said corporation defendant, and distribute the assets thereof among the respective members or shareholders of said corporation upon the principles and in the manner following, that is to say: In the settlement with members of said corporation who have borrowed money therefrom and secured the said loan either by a pledge of stock or by pledge of stock and mortgage on property, and who are now indebted to said association, the said receivers shall charge the said borrowing member with the amount of money loaned to him by said association, charging interest thereon from the date of said loan to the twenty-fourth day of July, 1895, at the rate of six per cent per annum. And said member shall be credited with all sums of money paid in by him, whether paid as dues, fines, premiums, or in any other manner, and also with interest on all of said payments from the respective dates thereof until the said twenty-fourth day of July, 1895, and the sum so ascertained shall be deducted from the amount of the loan to said member by the association, and the balance remaining shall be the debt due and owing by said member to ³¹² the said association, and shall bear interest from the said twenty-fourth day of July, 1895, until paid at the rate of six per cent per annum, and be secured by the mortgage executed by said member to the association securing the original loan. And upon the payment of said balance so ascertained, with all interest thereon, the mortgage given as aforesaid shall be released and discharged by said receivers according to law.

"That the said receivers shall ascertain as aforesaid the amount due by each and every member or shareholder of said association, and shall notify him in writing of the same and demand payment thereof, and if the said amount due by such member shall not be paid within thirty days after service of said notice, the said receivers shall, in their discretion, proceed, either under the power of sale contained in said mortgage or by proceedings in the proper court having jurisdiction, to foreclose said mortgage and sell the property conveyed thereby upon such terms as to said receivers shall seem best or said court may prescribe. And in those cases where only a pledge of stock was made as security for

the loan, upon such default the said receivers shall, in their discretion, bring suit against said member personally to recover the balances due said association by him. Upon the ascertainment in the manner aforesaid of the balance due by the borrowing members to the association and the payment thereof, such borrowing member shall cease to be a member of said association, and shall be discharged from all further liability to said association, either as debtor or stockholder, and shall have no right to participate in the distribution of the assets of said association, but his stock shall be deemed canceled and surrendered.

"All sums of money collected from borrowing members as hereinbefore directed shall be held by said receivers and ³¹³ applied by them, with all other assets of said association: 1. To the payment of costs, charges, and expenses of executing the trust of said receivership; 2. To the payment of the creditors of said association in full; and the residue thereof shall be distributed equally and ratably among the nonborrowing members of the association in proportion to the amounts paid in by them respectively upon the shares of stock held by them, including the interest upon said several payments from the average date thereof until the said twenty-fourth day of July, 1895.

"And the court doth retain this cause for further direction."

To the order of Judge Graham, the receivers and nonborrowing stockholders excepted and appealed.

This is a new question to us. But it seems to us that the parties have applied too much refinement to their theories of settlement, when one more simple, based on plain business methods, would be better. The receivers say, in their application for instructions, that the whole trouble grows out of the fact that all the parties interested are both stockholders and debtors to the concern; that if the debtors were not stockholders, there would be no trouble in adjusting the matter. This being so, it seems to us to be of easy solution, by first considering everyone having stock in the concern, whether as creditor or debtor, as a corporation: Endlich on Building Associations, sec. 527. Then, consider each member indebted to the concern as a debtor, and you have the condition of things that the receivers say, if it existed, there would be no trouble in adjusting the whole matter. It seems to us that there can be no trouble in the mind, separating the parties interested upon the line we have indicated. And if this is so, it would seem that the greatest trouble in the way of a settlement has been removed.

³¹⁴ But there are other matters to be considered. On the 24th of July, the first receiver was appointed, and the corporation

ceased at that time: Endlich on Building Associations, sec. 528. This date is when the receivers' work commenced, and will be the dividing line between the work of the corporation and that of the receiver. Everyone who held stock in the concern on that day, whether as a borrowing or nonborrowing member, is a corporator, and must so remain until the concern is closed out, and will be subject to the burdens and entitled to the benefits according to his amount of stock: Endlich on Building Associations, sec. 528.

The capital of the concern will be the shares of stock it has issued, and which have not been redeemed. When redeemed in part, then only as to that part unredeemed, and any other available assets it may have. Its assets will be what money and effects it had on hand on the 24th of July, 1895, including, of course, what debts were then owing to the corporation. In making collections of the borrowing members, they should only be charged with the amounts they have received: Endlich on Building Associations, secs. 527, 528. And under our statutes, as construed in *Rowland v. Old Dominion etc. Assn.*, 115 N. C. 825, 116 N. C. 877, and *Meroney v. Atlantic etc. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, these borrowing members can only be charged six per cent interest on the amounts they received from the time they received them, and are entitled to credits on the amount for all they have paid into the concern since they borrowed the money, whether it was called fines, penalties, weekly dues, or by any other name. The nonborrowing members will be entitled to have interest computed on the amounts due them at the rate of six per cent. The receivers should be fully empowered by order of court to proceed to collect in the funds of the concern, and to do any other necessary act for the benefit of the concern, to employ attorneys if necessary, whose pay ³¹⁵ must be fixed by the court. The appointment of the receivers of this insolvent corporation caused the debts and mortgages due the concern to mature, and they may be collected at once: Endlich on Building Associations, sec. 523. This rule only applies to insolvent building and loan associations, so far as we have been able to see. But we know of no law that will authorize the receivers to foreclose under the power of sale contained in the mortgages, as we see they were made to the corporation, and the corporation alone is empowered to foreclose by sale.

At first we entertained some doubt as to whether we should review the judgment of the court below, and give instructions to the receivers. But as it seemed material, if not necessary to

their work, we have gone as far as we thought we were authorized in doing: Beach on Receivers, sec. 259. But we must decline to give any instruction as to the distribution of the funds, until the receivers have them in court. This, we think, is the well-settled rule of equity. Therefore, the order appealed from will be modified and reformed in accordance with this opinion.

Judgment modified.

BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF MEMBERS.—This subject is fully treated in the extended note to *Robertson v. American Homestead Assn.*, 69 Am. Dec. 152.

NEAL v. NELSON.

[117 NORTH CAROLINA, 393.]

EXECUTION SALES.—EVERY PRESUMPTION is indulged in favor of the regularity and validity of execution sales.

EXECUTION SALES—ADVERSE POSSESSION—COLOR OF TITLE.—A sheriff's return of execution showing a sale, a description of the land sold, the purchaser's name, and the payment of the purchase price, is such color of title as will, by adverse possession, ripen into a perfect title.

ADVERSE POSSESSION—WHAT CONSTITUTES.—A purchaser of land who has paid the price for which he bought, whether from a public officer under execution or from a private individual, and is in occupation of the land purchased, holds it adversely to all the world under any writing that describes the land and defines the nature of his claim. His holding, however, is subject to the registration laws of the state.

DEEDS TO DEAD PERSON—HEIRS.—A deed executed to one who is at the time dead, "or his heirs," is good, if his heirs can be identified, for the reason that he will take if living, and he has no heirs until his death.

DEED TO DEAD PERSON—WORDS OF LIMITATION.—A deed executed to a person not then living "and his heirs" is void, because the word "heirs" is a word of limitation and not of purchase.

STATUTE OF LIMITATIONS.—SUMMONS issued but neither docketed, nor returned served, nor followed by an alias summons, does not stop the running of the statute of limitations.

Action to try title. Plaintiff introduced in evidence a grant from the state to one McAnally and other evidence to show that it embraced the land in controversy. He also introduced a deed of this land from one Gentry, as sheriff, to W. Lash, Sr., bearing date November 2, 1869, and supported it by introducing an execution and a sheriff's return thereon showing a sale of the land and the purchase thereof by said Lash, Sr., on the date that such deed bears date. Lash went into possession of the land, November 2, 1869, and continued in possession until his death in De-

ember, 1877. After his death, the land was allotted in partition to his daughter, Mrs. Powell Hairston. Mr. and Mrs. Hairston deeded the land to plaintiff October 11, 1887. This deed was recorded October 14, 1887. The sheriff's deed from Gentry to W. A. Lash, Sr., though bearing date, November 2, 1869, was not delivered until after the death of said Lash. It was then delivered by Gentry, who was still sheriff, to W. A. Lash, Jr., in January, 1878. The defendant introduced a grant of the land in dispute from the state to himself, dated February 2, 1881, recorded February 25, 1881, and testified that he took possession under this grant in January, 1885, and had been in possession of the land ever since. In March, 1884, defendant, Nelson, began suit for the possession of the land against Hairston and wife. Summons in this suit was duly issued, but never returned or docketed, nor was there ever any alias summons issued. Judgment for plaintiff, and defendant appealed.

Glenn & Manby, for the appellant.

A. M. Stack, Watson & Buxton, and Jones & Patterson, for the appellee.

⁴⁰⁰ AVERY, J. The plaintiff introduced in support of the deed made by the sheriff to W. A. Lash, Sr., on January 1, 1878, but bearing date November 2, 1869, "an execution and sheriff's return showing the sale of the lands and ⁴⁰¹ purchase by" said Lash, "on the day this deed bears date." The irresistible inference growing out of this statement is, that the return identified "the lands" in controversy and showed that W. A. Lash, Sr., bought. "The presumption is, that public officers do as the law and their duty require them to do": Lawson on Presumptive Evidence, 58, rule 14. The law required the sheriff to make due return setting forth the amount of the bid and the fact of the payment of the money by the purchaser, and courts will act on the assumption that the return was true and that it reported the receipt of the money: *Hiatt v. Simpson*, 13 Ired. 72; *Lyle v. Siler*, 103 N. C. 261. It has been held that where the sheriff sells under execution, nothing more appearing, it will be presumed that he complied with the law by making due advertisement: *Jackson v. Shaffer*, 11 Johns. 513; Lawson on Presumptive Evidence, 56. Upon the same principle, until the contrary is shown, the law infers that he collected the amount of the bid and reported the fact with the name of the purchaser, which appeared on the return, as it was his duty to do. We have been led into this discussion probably by the omission to bring the execution and return as a part of the transcript, though it was sug-

gested on the argument that there had been some delay in making up a statement on account of the loss of court records and papers. If this return sufficiently described the land, as it is admitted it did, and evidenced, as we must assume it did, the payment of the purchase money, which was the amount offered as a bid, then it identified the subject matter and defined the nature, extent, and foundation of the claim, under which the agents and tenants of the purchaser entered November 2, 1869, and held undisputed possession from that date until December 14, 1877—more than seven years. If, therefore, the deed executed by Sheriff Gentry to W. A. Lash, Sr., after his death was ineffectual as a conveyance ⁴⁰² of the legal title and insufficient as color of title, W. A. Lash nevertheless acquired title before his death on the 27th of December, 1877, if the return of the sheriff constituted color. We are aware that in *Dobson v. Murphy*, 1 Dev. & B. 586, Judge Gaston delivering the opinion of the court, it was held that such a return upon a fieri facias was not color of title; but it was conceded that Ruffin, Chief Justice, yielded to the majority of the court with great hesitation. In *Tate v. Southard*, 1 Hawks, 45, Judge Henderson delivering the opinion of the court, it was decided that the return of a sheriff upon a fieri facias was colorable title. When the same case came before the court a second time, it appeared that an attachment had been levied on the land, the return on the writ being "attached one piece of land, that Richardson bought of Kennedy," and that a writ of fieri facias afterward issued with no other or better description of the land and was returned "satisfied." After giving the definition of color of title, which was substantially repeated by Gaston, J., in *Dobson v. Murphy*, 1 Dev. & B. 586, Judge Henderson said: "The color of title set up in this case not being in writing, for he proves the purchase by parol only, wants one of the essentials before mentioned and is therefore insufficient. If the purchase appeared in the sheriff's return, it would be necessary to examine whether such return professed to pass the title." The first opinion in which that learned judge had passed upon the question directly seems to have remained unchallenged until sixteen years afterward, when the case of *Dobson v. Murphy*, 1 Dev. & B. 586, construed his definition as excluding any sort of a sheriff's return on an execution. In the case of *Avent v. Arrington*, 105 N. C. 379, it appeared that there was no seal to the instrument under which the plaintiffs claimed, and this court, citing *Barger v. Hobbs*, 67 Ill. 592, which rested on the ground that such an instrument showed ⁴⁰³ the extent of the possession and the nature of the claim, held that it was sufficient as color

of title, though it passed only an equity in the land to the grantees.

In *Brown v. Brown*, 106 N. C. 451, Justice Davis delivering the opinion of the court and referring to the authorities cited in *Avent v. Arrington*, 105 N. C. 379, said, in discussing and giving the sanction of this court to the charge of the judge below: "The possession of Javan Davis and his assignee under the bond for title was the possession of the vendor, under whom they claim, until the purchase money was paid." Wood, in his valuable work on Limitations (2 Wood on Limitations, 648, 649) says: "But where a contract is made for the sale of land, upon the performance of certain conditions, and the purchaser enters into possession under the contract, his possession from the time of entry is adverse to all except his vendor, and it seems now to be well settled that after the performance by him of all the conditions of the contract, he from that time holds adversely to the vendor, and full performance is treated as a sale, and the party in possession may acquire a good title as against the vendor by the requisite period of occupancy." In a note the author cites numerous authorities from various courts sustaining the doctrine that whenever a person, occupying land under an executory agreement of another to convey, pays the purchase money, and places himself in such a position that he can demand title, his possession immediately becomes adverse to him who has contracted to convey: *Beard v. Ryan*, 78 Ala. 37; *Catlin v. Decker*, 38 Conn. 262; *Stamper v. Griffin*, 20 Ga. 312; 65 Am. Dec. 628; *Paxson v. Bailey*, 17 Ga. 600; *Brown v. King*, 5 Met. 173. The supreme court of Georgia defined color of title to be "anything in writing, connected with the title, which serves to define the extent of the claim": *Field v. Boynton*, 33 Ga. 242. In *Bell v. Longworth*, 6 Ind. 273, it was held that where one enters into possession ⁴⁰⁴ of land under any written agreement defining the character and extent of his claim and pays the purchase money, such entry is under color of title and is adverse to all the world. In giving its sanction to the same doctrine, the supreme court of Illinois, in *McClelland v. Kellogg*, 17 Ill. 501, cite a number of cases, chiefly from the courts of New York and Pennsylvania, to sustain the opinion. These authorities, and many others which might be added, show that the trend of judicial opinion is toward the reasonable view that a purchaser, who has paid the price for which he bought, whether from a public officer at auction sale or from an individual contractor, if he is in the occupation of the land bought, holds it adversely to all the world under any writing that describes the land and defines the

nature of his claim. As we find in our decisions serious conflict in the definitions of color of title, it seems the more reasonable to return to the consistent view taken by so eminent a jurist as Judge Henderson, and from which Judge Ruffin departed only because he was powerless, especially when the weight of reason and of authority elsewhere and the liberal tendency of our own later adjudications tend so strongly in that direction. It is but just to the purchaser that when he pays the price and is delayed in getting a perfect title he should have all of the benefit incidental to the ownership of the legal, as well as the equitable, estate. Of course, he would enjoy and exercise such right subordinate to the registration laws of the state, and would understand that it was to his interest to give constructive notice of his claim by registration of his contract, or his pendens, or both, where practicable, at the earliest possible moment after acquiring a complete equity. Though, since the passage of the act of 1887, chapter 147, an unregistered deed is available as color of title to one in possession, ordinarily (*Avent v. Arrington*, 105 N. C. 389) ⁴⁰⁵ the principle will not be extended in its application so far as to defeat the rights of a purchaser without notice. But while litigating with the sheriff when the latter refuses to make title, it seems but just to place him in the same position as if he had obtained a deed on the day when equity declares he has a right to it. The statute has provided for treating him as the owner by subjecting his land to sale under execution. While he is so exposed, courts administering equity should treat him at least as a colorable owner. It would seem but a fair implication that when the legislature declared, by the act of 1826, that a complete equity should be subject to sale under execution, the law-making branch of the government meant to treat the owner of such an equity as holding under at least colorable title. In holding that an occupation under a paper writing in the form of a deed, except that it wants a seal, or under a bond for title after the payment in full of the purchase money, is adverse to all the world, and will ripen into a perfect title at the end of the statutory period, this court is committed to the reasonable principle that one who has a perfect or complete equity in land has color of title. There can be no such thing as a complete equity without some paper writing, signed by the party to be charged, and setting forth in terms or by reference to some other paper the same description which will identify the land, as well as the consideration, the receipt of which may be shown aliunde. Our own adjudications have established the principle that a void deed is often, if not generally, color of title

(*McConnell v. McConnell*, 64 N. C. 342), and that a deed executed in pursuance of an act afterward declared unconstitutional is to be distinguished from one executed in contravention of an express statute or provision of the constitution: *Church v. Academy*, 2 Hawks, 234; *Ferguson v. Wright*, 113 N. C. 537. The occupant ⁴⁰⁶ is not generally presumed to know the law in so far as it prescribes the nature of conveyances and the usual requisites as to form and substance, and an instrument, though defective or informal, will be held sufficient, provided he seems to have acquired a right to land. This liberal rule, however, does not extend so far as to assume that he does not know what is expressly prohibited by law.

Viewing the sheriff's deed as an attempted conveyance executed to W. A. Lash, Sr., after his death, it would be obviously void for want of a grantee and for failure to deliver. But it was insisted that it would operate to pass the fee to his heirs who were known and could be identified. If we were at liberty to treat the words "W. A. Lash, Sr., and" as surplusage, then the delivery to W. A. Lash, Jr., who is shown to have been at the date of delivery one of the heirs, would inure to the benefit of the other heirs and tenants in common. But it seems to be a well-established principle of interpretation that a deed executed to A, who is at the time dead, or his heirs, is good, if his heirs can be identified, for the reason that he will take if living, and he has no heirs until his death. No such uncertainty arises, therefore, as in the case of a grant to A or B both living: 3 Washburn on Real Property, 279; *Hogan v. Page*, 2 Wall. 607; *Ready v. Kearsley*, 14 Mich. 224. But a deed to a person not then living "and his heirs" is void, because the word "heirs" is a word of limitation and not of purchase: *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543.

We concur with his honor in the opinion that the issuing of the summons by Nelson in 1884 did not, under the circumstances, arrest the running of the statute. We do not deem it necessary to notice the other assignments of error, though all have been carefully reviewed. We think, therefore, that as the return described the land, named the purchaser, and showed the payment of the purchase money, it ⁴⁰⁷ was effectual as color to mature title from its date. The jury found, under the instructions of the court below, that those under whom plaintiff claims (W. A. Lash Sr., and his heirs) held continuous possession for seven years, and such possession will subserve the same purpose, if the return was color of title, as if the deed had been valid or sufficient as color, and had related back to the sale. It is im-

material whether the return of the deed served the purpose of color so far as it affects the rights of the defendant. The error of the judge, therefore, did him no harm.

The judgment is affirmed.

EXECUTION SALES.—Judicial and execution sales are not scrutinized by the courts with a view to defeat them; on the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish: *Smith v. Crosby*, 86 Tex. 15; 40 Am. St. Rep. 818, and note.

DEEDS—COLOR OF TITLE.—A grantee of land has a claim and color of title where his deed on its face purports to convey the title. It is not necessary that his title, when traced back to its source, should prove to be an apparently legal and valid title: *Nelson v. Davidson*, 160 Ill. 254; 52 Am. St. Rep. 338, and note. See, also, the extended note to *Tate v. Southard*, 14 Am. Dec. 583.

DEEDS.—A deed to one who is dead at the time of the execution is a nullity: *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543, and note.

IN RE ROBINSON.

[117 NORTH CAROLINA, 533.]

CONTEMPTS.—THE INHERENT POWER OF COURTS TO PUNISH summarily for contempt any act committed in their presence, or so near their sittings as to disturb their proceedings, or that is calculated to disturb their business or impair their usefulness or bring them into disrespect or contempt cannot be taken away by legislation.

CONTEMPTS.—POWER OF LEGISLATURE TO REGULATE.—The common-law power of courts to punish, for contempt, acts not committed in their presence, but calculated and intended to impair their usefulness and bring them into disrespect, may be regulated by the legislature.

CONTEMPT—RIGHT TO TRIAL—PUBLICATION OF COURT PROCEEDINGS.—Under a statute providing that "no person can be punished as for contempt for publishing a true, full, and fair report of any trial, argument, decision or proceeding had in court," a person cited to show cause why he should not be punished for contempt in publishing a report of a case tried in court, who answers, stating that he believed his publication to be correct and fair, and that it was not made to bring the court into contempt or ridicule, is entitled to have the issue tried, either by the court or by a jury, if there is nothing on the face of the publication showing it to be grossly incorrect, or calculated to bring the court into contempt or disrespect.

CONTEMPT—INTENT—CONCLUSIVENESS OF ANSWER.—In a proceeding to punish a person for contempt for a publication made in a newspaper, the answer of the respondent, as to the intent with which the publication was made, is conclusive.

Proceeding to punish one Robinson for contempt of court based upon the following order:

"It is ordered by the court that the following notice shall be issued *instanter* and served on Frank E. Robinson, editor, etc.,

of the Asheville Daily Citizen, and is in words and figures as follows: "In the Citizen, an afternoon paper, published in the city of Asheville, under date July 24, 1895, appears an editorial entitled, "The Removal." In this paper appears the following: "The reasons that Judge Ewart gave for the removal of the cause was founded on the unintentional error corrected by the context, which the Citizen made in reporting the testimony of John Sumner, and the affidavits of men from various parts of the county, stating that, in their opinion, Sumner could not obtain an impartial trial in Buncombe. The error was corrected the next day; but if it had gone uncorrected, it could have misled no man who had sufficient intelligence to read and comprehend the report of the testimony; the mistake is too shallow and too flimsy to deserve the consideration Judge Ewart seems to have given it.

"If Judge Ewart be justified in removing the case, any case of importance can always be removed, for anyone of standing can always get friends to say that, in their opinion, the county wherein the crime is committed is not the proper place to try the accused.

"Judge Ewart knows very well that it is far beyond the power of the Lance family, or of any other family, or of an unintentional error in the Citizen, to so mold the public sentiment of Buncombe county as to make it impossible for one of her citizens to obtain justice in a trial for his life.

"The statute requires the court to be satisfied that justice cannot be done before a case can be removed. How can an intelligent citizen come to the conclusion that in this case this court was satisfied on this point? It is now Judge H. G. Ewart's work to satisfy the people of Buncombe that he has acted wisely in the matter.

"The removal of the case to Henderson is unnecessary, expensive, and a reflection on the intelligence of Buncombe county."

"It appearing to the court this publication is a grossly inaccurate report of the proceedings of this court had in this cause, to wit, the case of the state against Jesse Sumner, and was made with intent to misrepresent this court and to bring into contempt and ridicule, it is ordered that a rule issue against Frank E. Robinson, editor of the Citizen, to appear before this court on Saturday next at 9 a. m., and show cause why he should not be attached for a contempt of this court. This 25th of July, 1895."

Robinson answered, denying the matter enumerated in the last paragraph of such order and without a trial of the issue thus raised, was found guilty and appealed.

Moore & Moore, Lock, Craig, and J. S. Adams, for the appellant.

W. W. Jones and J. M. Moody, for the appellee.

⁵³⁷ FURCHES, J. It is a delicate matter for a court to sit in judgment, when it is in any way connected with the matter under consideration. It is contrary to the spirit of our institutions, and should only be done when the public good and the public service demand it; then it should be done promptly, firmly, and without personal consideration.

Our courts constitute one of the co-ordinate departments of our government, established by the constitution and the legislation thereunder. They are not only a part of the government, but are necessary to the enforcement of the law and the protection of the lives, the liberty, and the property of our citizens. This they cannot do without the power to protect themselves by enforcing order and respect for the court and obedience to its mandates. To this end it is clothed with inherent power to punish summarily for any act committed in its presence, or so near its sittings as to disturb the proceedings of the court, in violation of its rules of orderly conduct, or that is calculated to disturb the business of the court, or to impair its usefulness, or to bring it into disrespect and contempt: *State v. Mott*, 4 Jones, 449; *Ex parte Schenck*, 65 N. C. 353; *Ex parte Moore*, 63 N. C. 397; *In re Deaton*, 105 N. C. 59, and cases cited.

These powers, it is conceded, cannot be taken from the courts by legislation. But at common law there were many other acts, not committed in the presence of the court, which were considered as calculated and intended to impair ⁵³⁸ the usefulness of the courts and to bring them into disrespect, and which the courts treated as contempts and punished the offenders. And it is held that this class of contempt may be regulated and prescribed by legislation: *Ex parte Schenck*, 65 N. C. 353, and cases cited in the argument in that case.

The case we are now considering falls under this class, and whatever may have been the law before, the act of the 4th of April, 1871, governs this case: *Ex parte Schenck*, 65 N. C. 353. It is contended that respondent violated section 648, subsection 7. of the code, in publishing the article set out in the rule to show cause, and is on that account guilty of contempt. This section is as follows: "The publication of grossly incorrect reports of the proceedings in any court, about any trial or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can

be punished as for contempt in publishing a true, full, and fair report of any trial, argument, decision, or proceeding had in court."

The only part of the article complained of that seems to undertake to give a report of the proceedings of the court, is as follows: "The reasons that Judge Ewart gave for the removal of the cause were founded on the unintentional error, corrected by the context, which the Citizen made in reporting the testimony of John Sumner, and the affidavits of men from various parts of the county, stating that, in their opinion, Sumner could not obtain an impartial trial in Buncombe." The respondent, in his answer to the rule, says this statement is not grossly incorrect, and that he believes it is a full and true report of the proceedings of the Sumner case.

There is nothing inherent in this statement that shows that it is grossly incorrect; the respondent says that, as he ⁵³⁹ is informed and believes, it is correct. The answer makes the issue as to whether it is correct or not, and, while we do not agree with the counsel for respondent that he was entitled to have it tried by a jury (if he had demanded a jury, which he did not), yet we are of the opinion that he was entitled to have this issue tried by the court, unless the court chose to submit it to a jury; because, if it was a correct statement of the facts, then, under the statute, it was no contempt to make the publication. It does not appear that the matter was tried in any way—the court simply holding that respondent's "answer was not responsive to the rule," and adjudged him guilty of contempt.

We do not see that that part of the publication purporting to give an account of the proceedings, of itself, is calculated to produce disrespect and contempt for the court; but, if it had been found to be grossly incorrect, pointed as it is, by the comments that followed, we do not say it would not amount to contempt under the statute.

But we must hold that, under the statute of 1871, the respondent cannot be punished for contempt for the language used in his comments upon the court, that we think were calculated and must have been intended to bring the court into ridicule and contempt only as they might point and furnish evidence of the intent with which the misrepresentations as to the trial were made, if it had been found they were grossly erroneous.

It is our duty to declare the law as we find it, and it is not within our province to say whether it is wise or not. There are two sides to it—on one side the protection of the citizen, on the other the usefulness and efficiency of the courts. The most

of our citizens and many of our newspaper men recognize the delicate position a judge occupies—that his position neither allows him to defend himself physically ⁵⁴⁰ or through the public press against false and slanderous charges, and these do not consider it manly to make such charges—and no judge ought to object to just and fair criticism by the press.

But respondent also puts his defense on another ground; he says under oath: "3. Affiant states that said publication was not made with intent to misrepresent this court, or to bring this court into contempt and ridicule."

It is not for the court to judge whether this was false or true; the law made him his own judge—his own trier—and as to how well he did this he will answer at another bar; we must take his verdict: *Ex parte Biggs*, 64 N. C. 202.

There is error in the judgment.

CONTEMPT—INHERENT POWER OF COURTS TO PUNISH FOR.—The power to punish for contempt is inherent in all courts of record, and is essential to the preservation of order in all judicial proceedings: *State v. Judge*, 45 La. Ann. 1250; 40 Am. St. Rep. 282, and note. This subject is fully discussed in the extended notes to *Percival v. State*, 50 Am. St. Rep. 573; *Clark v. People*, 12 Am. Dec. 178, and the note to *State v. Doty*, 90 Am. Dec. 674.

CONTEMPT—POWER OF THE LEGISLATURE TO REGULATE.—The great weight of authority is to the effect that though it may be competent for the legislature to regulate proceedings in cases where contempts are alleged to have been committed, it cannot thereby nor otherwise take from courts of general jurisdiction their inherent power to command the respect due them, and that, therefore, the authority to punish for contempt need not be founded on any statute, nor is it subject to statutory destruction: *Extended note to Percival v. State*, 50 Am. St. Rep. 573.

HANSLEY v. JAMESVILLE & WASHINGTON RAILROAD COMPANY.

[117 NORTH CAROLINA. 565.]

DAMAGES—EXEMPLARY—GROUND FOR.—The only true ground for allowing exemplary damages against a railroad company, in favor of a passenger, is personal injury to the latter caused by the negligence of the former, or, in the absence of such injury, then only for insult, indignity, contempt, or the like, from which the law imputes bad motive.

DAMAGES—EXEMPLARY—NEGLIGENCE OF RAILROAD COMPANY.—If a railroad company, without inflicting any personal injury, insult or indignity upon a passenger, negligently, and by reason of defective and inadequate means of conveyance, fails to carry him according to contract, his right of action is *ex contractu* and not in tort, and he can recover only compensatory damages and is not entitled to vindictive, punitive or exemplary damages.

DAMAGES—PUNITIVE, FOUNDED ONLY ON TORT.—Unless one has a right to maintain an action of tort, he cannot recover punitive or exemplary damages.

C. F. Warren and L. T. Beckwith, for the petitioner.

J. H. Small, MacRae & Day, and W. B. Rodman, for the respondent.

⁵⁶⁶ FURCHES, J. This is a petition to rehear this case, decided at September term, 1894, of this court, and published in *Hansley v. Jamesville etc. R. R. Co.*, 115 N. C. 602; 44 Am. St. Rep. 474. The defendant is a corporation under the laws of this state, running and operating its road between the towns of Washington and Jamesville, transporting both freight and passengers as a common carrier for pay. The plaintiff, a citizen of Washington, wanting to go to the town of Edenton and back, on the 7th of September, 1892, purchased a ticket of defendant to Jamesville, and from Jamesville back to Washington on the 9th. The defendant carried plaintiff to Jamesville on the 7th, and he went on to Edenton, and was in that town on the 8th of September. (It is not stated in this case that plaintiff went to Edenton and was there on the 8th, but this was stated and agreed to by counsel on the argument.)

On the 8th of September, soon after leaving Jamesville for Washington, the axle of defendant's engine broke, and when the plaintiff returned from Edentown to Jamesville on the 9th, the defendant was unable to carry him, on its road, ⁵⁶⁷ from Jamesville back to Washington, as it had contracted to do. Thereupon, plaintiff brings this action for damages, which he lays at five hundred dollars, and alleges that defendant's roadbed was in a bad, shackling, and ruinous condition. That defendant had but two engines, both of which were worn and in bad condition, one of them at that time being in the shops for repair and not in a condition to be used. That the bad condition of defendant's roadbed had rattled the other one so as to cause the axle to break. That all this showed such willful negligence on the part of defendant toward the public and toward the plaintiff as to entitle him, not only to compensatory damages, but to exemplary damages.

The defendant answered, denying the allegation of negligence, admits that the road was not in good condition, says it was poor and struggling for existence, and that it was expending the whole earnings of the road, and more, in trying to keep it in good repair, and was not able to do so. Therefore, defend-

ant denies that it is liable to plaintiff for anything, and certainly not for punitive damages.

And without reviewing the evidence, it is such as to warrant us in saying that the roadbed was in a dilapidated and ruinous condition, and that defendant had but two engines, and they were old, worn, and in bad condition.

That plaintiff is entitled to compensatory damages there can be no doubt. But as to whether he is entitled to exemplary damages is the question.

It is said that railroads are quasi public servants. That they are created by the public (the legislature) and owe duties to the public in return for their right of franchise. And while this is true, it can only be considered by us as a reason for establishing the law, as we shall find it, and not as a reason for us to establish the law.

Nor can we consider the question as to whether defendant's ⁵⁶⁸ road is a poor corporation, struggling for existence, and expending all its earnings, and more, on its road, or whether it is a rich corporation. These are questions we have no right to consider in passing upon the question of law as to whether the plaintiff is entitled to recover damages against defendant or not: Taylor v. Grand Trunk Ry. Co., 48 N. H. 317; 2 Am. Rep. 229.

The legal question involved in this case is conceded to be an important one, and is entitled to our best consideration. It is one that has been so much discussed by law-writers and by the courts in judicial opinions, in which different phases or facts appear, that it is somewhat difficult to establish ourselves on what we consider solid ground.

Often a very slight difference in the facts changes the reason upon which a case is decided. We find that decided cases, unless closely attended to, are often misleading. Also often a misunderstanding of some of the facts, or an inadvertence to some fact in the case, leads to error. This we think was the case with the learned justice who wrote the opinion we are now reviewing. In stating the facts in Purcell v. Richmond etc. R. R. Co., 108 N. C. 414, he stated that, when the defendant's train passed the depot, it "was overloaded," when there was evidence tending to show that there was room for a number of other passengers. And this was the hypothesis upon which the court was asked to charge the jury, and which was refused by the court. This inadvertence, as we think, led the court to overrule Purcell v. Richmond etc. R. R. Co., 108 N. C. 414.

After as full investigation as we have been able to give to this case, we are of the opinion that the true ground for allowing

exemplary damages is personal injury to plaintiff caused by the negligence of defendant (and we do not undertake here to enumerate all the causes for exemplary damages, where there is personal injury). And where ⁵⁶⁹ there is no personal injury, there must be insult, indignity, contempt, or something of the kind, to which the law imputes bad motive toward a plaintiff, and, when they are allowed, they are in addition to compensatory damages: Sedgwick on Damages, 520; 5 Am. & Ency. of Law, 43, note, and cases cited.

This principle we find is recognized and enforced in the following cases: A railroad conductor kissed a lady passenger on his train, and she was allowed to recover punitive damages, upon the ground that it was a personal indignity: 5 Am. & Eng. Ency. of Law, 43. Where a railroad conductor refused to carry a passenger after he had paid his fare, the road is liable to exemplary damages: 3 Sutherland on Damages, sec. 935, 937. This is upon the same ground. Plaintiff is not entitled to exemplary damages, unless there is a willful or intentional violation of plaintiff's personal rights: Milwaukee etc. Ry. Co. v. Arms, 91 U. S. 489. Where a railroad carried a lady passenger a few hundred yards beyond the station, and, upon application of the passenger, refused to back the train to the station, but put the passenger out in a driving rain with her infant child and baggage, the defendant was held to be liable to punitive damages. But this was put upon the ground of personal indignity and insult, as all cases we have cited are, and the fact that the passenger could not use her umbrella, got wet, and was sick from the effects, was only allowed in evidence upon the measure of damages. But the gravamen of the action was the personal indignity with which the plaintiff had been treated by the defendant: Alabama etc. R. R. Co. v. Sellers, 93 Ala. 13; 30 Am. St. Rep. 17. We might cite many other cases to sustain ⁵⁷⁰ the principle we have laid down, but do not deem it necessary.

We make no question, under our system of liberal pleading, that plaintiff may recover either in contract or tort if he has made out his case. But he can no more recover in tort without making out his case than he could recover in contract without making out his case.

The fact that the defendant's road was in bad condition was no insult or indignity to plaintiff. And, as there was no personal injury on account of its bad condition, this affords him no cause of action. The fact that defendant's engine broke down on the 8th, when plaintiff was in Edenton, was no personal insult, indignity, or intentional wrong to plaintiff. No doubt the

defendant regretted the breaking down of the engine as much as plaintiff. The fact that plaintiff had a right of action for breach of the contract given him no right of action for tort against the defendant. And, unless he had the right to maintain an action of tort, he had no right to punitive damages. There can be no damage recovered when there is no right of action. Damages are not the cause of action, but the result of the action.

Taking all the evidence in the case offered by the plaintiff, or that may be considered in his favor, we do not think it makes a cause of action against the defendant in tort, and that the defendant was entitled to have his second prayer for instruction submitted to the jury, to wit: "Taking the entire evidence in view, the plaintiff is not entitled to punitive damages." This was refused by the court, and we think there was error.

We have arrived at our conclusion by a different treatment of the case, to some extent, from that adopted by the court in the opinion in *Hansley v. Jamesville etc. R. R. Co.*, 115 N. C. 602; 44 Am. St. Rep. 474. But our judgment is the same. And in this opinion we do not think it necessary to disturb the judgment as announced ⁵⁷¹ in *Purcell v. Richmond etc. R. R. Co.*, 108 N. C. 414. But the judgment in that case should be put upon the ground that the defendant treated the plaintiff Purcell with indignity and contempt in rushing by the station at faster speed, when there was room for other passengers, or at least when there was evidence tending to show this, and the court refused the prayer for instruction submitting this question to the jury.

The petition is dismissed.

MR. JUSTICE CLARK concurred in the foregoing opinion in so far as it reinstates the authority of *Purcell v. Railroad*, 108 N. C. 414; but he maintained that a railroad corporation was liable in punitive damages for a willful and wanton violation by it of the regulations prescribed for its control by statute, regardless of whether or not such corporation had inflicted personal injury, or insult, or indignity upon the passenger complaining.

"The reasonable and impartial rule laid down by a unanimous court in *Purcell v. Railroad*, 108 N. C. 414, is, that if the breach of the statute 'was mere inadvertence or negligence, or was caused by an unforeseen number of passengers presenting themselves, which rendered it unsafe to take a greater number aboard, and the company could not, by reasonable diligence, have increased the number of cars, then the plaintiff could only recover compensatory damages. If, however, . . . the defendant, by reasonable diligence, could have ascertained that the number of cars was insufficient, and made no effort to supply the deficiency, but was regardless of its duties and of the rights of those whom it had invited to present themselves at its regular station for passage, or if, having room for additional persons, it passed without stopping, this displayed a gross and willful disre-

gard of the rights of the plaintiff which entitle him to recover punitive damages.' This is sustained by numerous authorities in other states: *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588; *Railroad v. Hurst*, 36 Miss. 660; 74 Am. Dec. 775; *Silver v. Kent*, 60 Miss. 124; *Wilson v. Railroad*, 63 Miss. 352; *Railroad v. Sellers*, 93 Ala. 9; 30 Am. St. Rep. 17; 3 *Sutherland on Damages*, sec. 937."

"In the present case, the learned judge charged the jury in accordance with the ruling of this court, that if the defendant was guilty of willful and gross negligence the plaintiff could recover, otherwise not, and further that, if the accident occurred, which they could not have, in the ordinary course of their business, foreseen and provided for, this would not be willful negligence, but, 'if the character of the negligence was such as to satisfy the jury that the defendant did not care or was indifferent as to whether they had the train there (to bring the passengers home) it would be willful negligence.' It was in evidence that when the plaintiff, who held a return ticket, applied for transportation, the official in charge gave himself no concern whatever, made no effort to have the plaintiff brought home, and refused the use of the handcar. His honor, after stating correctly and more fully what facts would constitute willful negligence and what would not, instructed the jury that only in the event they found willful negligence could the plaintiff recover. There was ample evidence to submit to the jury the inquiry whether or not there was willful negligence. Both authority and reason sustain the proposition that 'the liability of a railroad company for exemplary damages cannot be made to depend on the ability of the corporation to earn enough money to keep its road in such condition as to be operated with safety': *Railroad v. Johnson*, 75 Tex. 158, 162; *Taylor v. Railroad*, 48 N. H. 304, 317; 2 Am. Rep. 229. If the company is unwilling or unable to furnish money to run its trains according to the statutory requirements, it should cease to hold itself out to the public as a common carrier.

"The jury having found that there was a willful violation by the defendant of its statutory duty to transport the plaintiff and a wanton disregard of the plaintiff's rights in that respect, it is not the province of this appellate court to review the facts and disturb the verdict.

"The principle involved is one of universal interest. It is nothing less, when reduced to its last analysis, than whether these corporations, primarily created for the convenience and advantage of the public, with the incidental benefit of profit to their owners, are subject to exemplary damages when they willfully and wantonly violate the statutes passed for their regulation by the power which created them. If they are not, then clearly and unmistakably the public are in the power and at the mercy of the arbitrary will of corporations which, daily aggregating into larger and larger masses, are powerful beyond any control other than the law."

DAMAGES—EXEMPLARY—WHEN ALLOWED.—When a cause of action is an invasion of the rights of property of a person, natural or artificial, characterized by violence, fraud, malice, wantonness, or a reckless disregard of social or civil rights, exemplary damages may be recovered: *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; 23

Am. St. Rep. 858, and extended note. Exemplary damages arise from the malicious doing of an act: Davis v. Seeley, 91 Iowa, 583; 51 Am. St. Rep. 356, and note. See, also, the extended note to Austin v. Wilson, 50 Am. Dec. 767-775.

DAMAGES.—PUNITIVE damages may be given in an action by one person against another for an injury to his business: Graham v. St. Charles etc. R. R. Co., 47 La. Ann. 1656; 49 Am. St. Rep. 436. The doctrine of punitive damages is unsound in principle and unfair and dangerous in practice, and such damages cannot be recovered in Washington, although the defendant may have been guilty of gross negligence: Spokane Truck etc. Co. v. Hoefler, 2 Wash. 45; 26 Am. St. Rep. 842, and note. See, also, the extended note to Spellman v. Richmond etc. R. R. Co., 28 Am. St. Rep. 870.

FARMERS' CO-OPERATIVE MANUFACTURING COMPANY v. ALBEMARLE & RALEIGH RAILROAD COMPANY.

[117 NORTH CAROLINA, 579.]

HIGHWAYS — OBSTRUCTION — DAMAGES — SPECIAL INJURY.—Damages recoverable in a civil action founded upon an obstruction of a public highway must be such as is not common to the whole public, or to everyone who actually does pass, or may travel, over the highway. It must be special, unusual, or extraordinary, but not necessarily singular, and may be the common misfortune of a number, or even a class, of persons, and give to each a right of redress.

WATERS AND WATERCOURSES—OBSTRUCTION OF NAVIGABLE STREAM—SPECIAL INJURY—DAMAGES.—The obstruction of a navigable stream by the construction of a bridge across it without any draw to permit the passage of boats renders the wrongdoer liable to a boatowner whose business requires him to pass the bridge with his boat, and it is immaterial whether such boat is licensed, or does business as a common carrier, or whether other individuals own boats engaged in navigating the stream.

WATER AND WATERCOURSES.—NAVIGABLE STREAMS include all those which afford a channel for useful commerce, and such streams are public highways by common right.

WATER AND WATERCOURSES—NAVIGABLE STREAMS—OBSTRUCTION—DAMAGES.—If a navigable stream is obstructed by being crossed by a bridge without a draw therein for the passage of boats, the damage to a boatowner who is compelled to unload his cargo, but who, instead of procuring another conveyance, leaves the cargo exposed to the elements, is the value of the boat for the time it is delayed, and reasonable wages paid to the crew, but he is not entitled to recover for injury to the cargo from exposure, or for the cost of unloading or loading it.

NEW TRIAL MAY BE GRANTED SOLELY FOR THE PURPOSE of correcting error in instructions as to the amount of damages which the plaintiff is entitled to recover.

Action to recover damages from defendant for the obstruction of the passage of plaintiff's boat by defendant's bridge across Tar river, a navigable stream. Said bridge was built without any draw therein for the passage of boats, and, as a result, plain-

tiff's boat, loaded with cotton and cottonseed, was detained and prevented from passing along said river for a period of ten days or more. Plaintiff recovered a judgment for damages for the detention of the boat, the maintenance of the crew during detention, damage to the cottonseed, and the cost of loading and unloading the boat. Defendant appealed.

J. L. Bridgers, for the appellant.

H. G. Connor, for the appellee.

⁵⁸⁶ AVERY, J. The most interesting question presented by this appeal is, whether the plaintiff, in any aspect of the evidence, has shown such special damage as would entitle him to redress by civil action for a public nuisance.

The law provides an adequate remedy for the wrong to the public, and thereby prevents a multiplicity of vexatious private actions. But in order to the maintenance of a civil action by an individual, in addition to the indictment by the state, it is not made incumbent on him to show an injury from which he is the sole, or even a peculiar, sufferer. The damage recoverable in a civil action founded upon the obstruction of a public highway must, however, be such as is not common to everyone who actually does pass or may travel over the highway. It must be unusual or extraordinary, but not necessarily singular. While the wrong must be special, as contradistinguished ⁵⁸⁷ from a grievance common to the whole public, who have the right to use the highway, it may, nevertheless, be the common misfortune of a number or even a class of persons, and give to each a right of redress. The amounts of damage recoverable by them may vary according to the extent of the loss shown in each case, but every one of them may maintain his status in court by alleging and proving precisely the same sort of wrong caused by the same obstruction. For instance, in the familiar case of the plaintiff who was injured by falling into a ditch dug by another across the public highway, referred to by the elementary writers and the courts to illustrate the principle upon which civil actions are maintainable in such cases, it would not have impaired the right of the first man who suffered from falling into it, if a dozen of his neighbors had tumbled into it afterward on the same day and had received more serious injury than he. So in *Downs v. High Point*, 115 N. C. 182, where the municipality created a public nuisance by negligence in allowing a sewerage ditch to discharge its contents in a place where the nauseous smell annoyed the whole public, but gave to the plaintiff a right of action because of his sickness and that of members of his family, due

solely to the disagreeable odors, it would have been none the less competent for him to claim the right to show special damages, or such as was not common to the whole public, because it appeared that other families in the vicinity and on all sides of the defective ditch had suffered in a similar way and claimed like redress in the courts.

Bishop in his work on *Noncontract Law*, section 424, by way of illustrating the principle we are discussing, says: "So, likewise, it is a nuisance to obstruct a navigable stream; therefore, if one is by such obstruction prevented from fulfilling his contract, he can maintain a civil suit ⁵⁸⁸ against the obstructor." The first authority cited to sustain the author's view was *Dudley v. Kennedy*, 63 Me. 465, where the facts were, that the plaintiff, who had engaged to transport rocks and gravel in boats on the Kennebec river, which is a navigable stream, was prevented from carrying out his contract by a boom placed across the river between the point at which the rock and gravel were procured and the point of delivery, and the court held that the defendant was liable in a civil action for special damage. Though few of them are so directly in point as the case just cited, there is no dearth of authorities in which the general principle, as we have formulated it, is so fully sustained as to make its application to the case at bar obvious and the deduction inevitable: *Guesley v. Codling*, 2 Bing. 407; *Chichester v. Lithbridge*, Nile C. P. 70, 74; *Hughes v. Heiser*, 1 Binn. 463; 2 Am. Dec. 459; *Rose v. Miles*, 2 Maule & S. 101; *Burrows v. Pixley*, 1 Root, 362; 1 Am. Dec. 56.

It is not material whether this particular boat was licensed, or whether other individuals owned boats that were engaged in navigating the river. If plaintiff suffered damage common to a class whose business required the transportation of material for manufacturing purposes from a point below the obstruction to a plant located above it, but not common to the whole public, his right is not impaired by the fact that the boat was doing business as a common carrier as well as for the manufacturers who owned it. The case of *Dunn v. Stove*, 2 Car. Law Rep. 241, falls far short of sustaining the defendant's contention. There, the plaintiff claimed special damage because a dam placed by the defendant across the stream below the plaintiff's riparian possessions obstructed the passage of fish, and prevented the plaintiff from catching and ⁵⁸⁹ using them. The court seem to have rested the decision entirely upon the ground that the fish were not the property of the plaintiff, but were subject to become the property of any person living on the stream upon reclaiming

them. Chief Justice Taylor, delivering the opinion, said: "But what property could plaintiff have in the fish in their wild state, before they ascended to the water flowing over his land? In animals *ferae naturae* a man may have a qualified property, which continues only while they are in his possession or under his control, and so long they are under the protection of the law. But the defendant has the same extent of ownership in them, in virtue of which he might have caught them in his own waters and thus have done an equal injury to the plaintiff's fishery." The cottonseed which the plaintiff was transporting up the river was its property, and was in a boat, which was private property, and was entitled, under the protection of the law, to pass over the highway without obstruction and damage growing out of detention. We understand the court to broadly intimate that, had the injury complained of in *Dunn v. Stove*, 2 Car. Law Rep. 241, grown out of the detention of property instead of fish by the obstruction, a different principle would have applied. Though any and every person had the right to transport goods and chattels along the river, just as the whole public might have enjoyed the use of the highway which was traversed by the ditch, a right of action accrued only to those who attempted to avail themselves of this privilege, and suffered by the detention of goods in the one case and from injury to their persons or property in the other: *Rose v. Miles*, 2 Maule & S. 101.

"Navigable waters include all those which afford a channel for useful commerce. Such waters are public highways of common right": 16 Am. & Eng. Ency. of Law, 236. "It is not necessary that such waters be fit for navigation at all ⁵⁹⁰ times, but their capacity therefor must recur with regularity": 16 Am. & Eng. Ency. of Law, 243, note 1; *Commissioners v. Catawba Lumber Co.*, 116 N. C. 731; 47 Am. St. Rep. 829. Upon the testimony, which was not controverted, the defendant clearly had no cause to complain of the instruction which left the question of navigability to the jury under the foregoing rule.

We are of opinion, however, that the court erred in allowing the jury to consider the cost of loading and unloading the cotton, and of damage to the cottonseed by exposure after they were unloaded. The damage to the cottonseed was caused directly by leaving them exposed, not by the obstruction. If they had been kept in the boat or stored in a well-constructed warehouse, they would have remained uninjured after being detained with the boat for want of a draw in the bridge. The plaintiff was clearly entitled, as damages, to the reasonable worth of the boat for such time as it was detained by the obstruction; and, in determining what the boat was worth, it was competent to con-

sider wages, if reasonable, paid to the hands, as the value of its services were to some extent dependent upon the cost of the crew: *Guesley v. Codling*, 2 Bing. 407. If the plaintiff during the period of detention had provided other means of transporting the cottonseed around the bridge to the mill above, the rule would have been the same as that applicable to detained passengers (*Hansley v. Jamesville etc. R. R. Co.*, 115 N. C. 609; 44 Am. St. Rep. 474, and the authorities there cited), and the reasonable cost of carrying them by another route might have become an element of the damage assessed. In the case of *Rose v. Miles*, 2 Maule & S. 101, Lord Ellenborough said: "He (the plaintiff) has been impeded in his progress by the defendants wrongfully moving their barge across, and has been compelled to unload and carry his goods over land, by which he has ⁵⁹¹ incurred expense, and that expense is caused by the act of the defendants. If a man's time or his money is of any value, it seems to me that this plaintiff has shown a particular damage." Bayley, J., said that the plaintiff had placed the defendant in a situation that he unavoidably must incur expense in order to carry his goods another way, while Damper, J., said: "The expense was incurred by the immediate act of the defendant, for the plaintiff was forced to unload his goods and carry them overland. If this is not a particular damage, I scarcely know what it is": *Chichester v. Lithbridge*, Niles C. P. 70. But the plaintiff, instead of procuring another conveyance for the cottonseed, left them exposed, so that they were injured. The measure of damage, therefore, was the reasonable cost of the boat, which was in the employment of the plaintiff during the period of detention. It is true that, upon a familiar principle, the defendant might have claimed a deduction from the aggregate value of its services during such time of any sum which the boat and crew actually earned, but no evidence of that nature was introduced: *Hassard-Short v. Hardison*, 114 N. C. 482.

A different case might have been presented if the plaintiff had been transporting a cargo to a market above, and had lost the advantage of the market: *Dudley v. Kennedy*, 63 Me. 465; but the gravamen of the complaint here is the cost incurred by detaining the boat: See *Guesley v. Codling*, 2 Bing. 407.

We conclude, therefore, that there was error in the instruction given as to the proper measure of damage, while there was no error in the other rulings complained of, and a new trial will be awarded only upon the question of the amount of damage which the plaintiff is entitled to recover: *Tillett v. Lynchburg etc. R. R. Co.*, 115 N. C. 662. New trial as to damage.

HIGHWAYS—OBSTRUCTION—PRIVATE ACTION.—An individual suffering special damage from the obstruction of a highway may have his action therefor, although the act is indictable: *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157, and note. A private person can recover for obstruction to a public way, although it might also be a public nuisance, where the obstruction would constitute an invasion of his rights, causing special damage to him not common to others, for which an action would lie: *Cole v. Sprowl*, 35 Me. 161; 56 Am. Dec. 696, and note; *Houck v. Wachter*, 34 Md. 265; 6 Am. Rep. 332.

WATERCOURSES—OBSTRUCTION OF.—Bridges constructed over floatable streams, so as, by interposing a barrier to floating logs every time the streams rise sufficiently high to carry logs over the shoals, to practically prevent their use by the public, are nuisances and unlawful obstructions: *Commissioners v. Catawba Lumber Co.*, 116 N. C. 731; 47 Am. St. Rep. 829, and note.

WATERCOURSES.—TO BE NAVIGABLE. a stream must have sufficient depth and width to float useful commerce, the test being navigable capacity, without regard to present use or whether the surroundings are such as to make it presently useful for commerce: *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 46 Am. St. Rep. 702, and note with the cases collected.

NEW TRIAL—DAMAGES.—New trial may be granted solely upon the ground of error in instructions as to the amount of damages to which plaintiff is entitled, but the new trial thus granted is for inquiry into that subject alone: *Pickett v. Wilmington etc. R. R. Co.*, 117 N. C. 616; post, p. 610.

PICKETT v. WILMINGTON & WELDON RAILROAD CO.

[117 NORTH CAROLINA, 616.]

NEGLIGENCE—PROXIMATE CAUSE.—If an original wrong only becomes injurious in consequence of the intervention of a distinct wrongful act or omission by another, the injury must be imputed to the last wrong as the proximate cause, and not to that which was more remote.

NEGLIGENCE—PROXIMATE CAUSE.—He who has the last clear chance to avert injury, notwithstanding the previous negligence of the injured party, is solely responsible for such injury resulting from his failure to exercise ordinary care.

NEGLIGENCE—PROXIMATE CAUSE.—When, by the exercise of ordinary care, a railway engineer can see that a human being is lying, apparently helpless, on the track in front of his engine, in time to stop the train by the use of the appliances at his command, and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to exercise such ordinary care. Such failure is the proximate cause of the injury, although the party injured was originally guilty of negligence in getting upon the track.

TRIAL—FRAMING ISSUES—DISCRETION.—It is within the sound discretion of the trial court to frame the issues; and the complaining party must show that the exercise of such discretion operated to his injury before he can assign it as error on appeal.

NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTIONS.—An instruction that plaintiff's previous negligence is immaterial, if defendant's subsequent negligence was the proximate cause of the injury to plaintiff, is proper.

DAMAGES—MEASURE OF FOR NEGLIGENCE RESULTING IN DEATH.—The measure of damages for the loss of human life, resulting from negligence, is the present value of the net income, ascertained by deducting the cost of living, and expenditures, from the gross income; and no more can be allowed than the present value of accumulation arising from such net income, based upon the expectancy of life.

NEW TRIAL MAY BE GRANTED SOLELY upon the ground of error in instructions as to the amount of damages to which plaintiff is entitled, but the new trial thus granted is for inquiry into that subject alone.

Action to recover damages for the negligent killing of plaintiff's intestate, a boy seventeen years of age, by the defendant. Judgment for plaintiff. Defendant appealed.

W. R. Allen and H. L. Stevens, for the appellant.

A. D. Ward and N. J. Rouse, for the appellee.

628 **EVERY, J.** The most important question presented by the appeal is, whether the court erred in refusing to instruct the jury that if the plaintiff's intestate deliberately laid down upon the track, and either carelessly or intentionally fell asleep there, the defendant was not liable, unless the engineer actually saw that he was lying there in time, by the reasonable use of appliances at his command, to have stopped the train before it reached him. In the headnote to *Smith v. Norfolk etc. R. R. Co.*, 114 N. C. 729, it seems that the intelligent reporter deduced from the opinion of the court the principle that while the mere going upon the track of a railroad is not contributory negligence, any injury subsequently inflicted by a collision with a passing train is deemed to be due to the carelessness of the person who goes upon it, unless it is shown that he looked and listened for its approach. While such an abstract proposition may be fairly drawn from the reasoning upon which the opinion is founded, the new trial was **629** in fact awarded because the court below refused to instruct the jury that if the plaintiff's intestate was drunk, though he was lying apparently helpless upon the track, the defendant was not liable, unless its engineer actually saw that he was in danger in time to avert the injury by reasonable care.

The learned counsel who argued this case for the defendant, without citing *Smith v. Norfolk etc. R. R. Co.*, 114 N. C. 729, in support of his contention, obviously invoked the aid of the principle there decided, when he rested his argument upon the proposition that one who carelessly or purposely falls asleep on a railway track is not only negligent in exposing himself upon first going there, but, that although he afterward becomes utterly

unconscious, there is, in contemplation of law, a continuing carelessness on his part up to the moment of a collision, which is, concurrently with the fault of the defendant, a proximate cause of an ensuing injury, or operates to acquit the carrier of what would have been culpable carelessness and a *causa causans*, if the injury had been inflicted on a horse, a pig, a cow, or person rendered insensible in any manner than by drunkenness, or deliberately or carelessly falling asleep. So that we are again called upon to review *Smith v. Norfolk etc. R. R. Co.*, 114 N. C. 729, and to determine whether we will modify the principle there laid down or extend its operation to other cases coming within the reason upon which it is founded.

The language of Judge Cooley, which is cited in *Clark v. Wilmington etc. R. R. Co.*, 109 N. C. 449, is that "if the original wrong becomes injurious in consequence of the intervention of the distinct wrongful act or omission by another, the injury will be imputed to the last wrong which was the proximate cause, and not to that which was more remote." If, in the case at bar, the plaintiff's intestate was in fault in lying down upon the track, and his carelessness ⁶³⁰ culminated in doing so, then it is clear that the engineer was in fault in failing to keep a proper lookout, if he could, by doing so, have seen the deceased in time, through the reasonable use of the appliances at his command, to have averted the injury, and his carelessness of course intervened after that of plaintiff's intestate. If he had looked and stopped the train, the collision would have been prevented, notwithstanding the previous want of care on the part of the boy who was killed. In *Herring v. Wilmington etc. R. R. Co.*, 10 Ired. 402, 51 Am. Dec. 395, this court followed what was at the time the generally accepted doctrine, that persons who went upon railroad tracks at places other than public crossings were trespassers, to whom the carrier owed no duty of watchfulness, and for whose safety it was in nowise liable, unless its engineer actually saw that there was danger of injury from a collision and willfully refused to use means by which he could have averted it.

In *Gunter v. Wicker*, 85 N. C. 310, this court gave its sanction to the principle first distinctly formulated in *Davies v. Mann*, 10 Mees. & W. 545, that "notwithstanding the previous negligence of the plaintiff, if at the time the injury was done it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages." This doctrine was subsequently approved in *Saulter v. New York etc. S. S. Co.*, 88 N. C. 123; 43 Am. Rep. 736; *Turrentine v. Richmond etc. R. R. Co.*, 92 N. C. 638; *Meredith v. Cranberry etc.*

Iron Co., 99 N. C. 576; Roberts v. Richmond etc. R. R. Co., 88 N. C. 560; Farmer v. Wilmington etc. R. R. Co., 88 N. C. 564; Bullock v. Wilmington etc. R. R. Co., 105 N. C. 180; Wilson v. Norfolk etc. R. R. Co., 90 N. C. 69; Snowden v. Norfolk etc. R. R. Co., 95 N. C. 93; Carlton v. Wilmington etc. R. R. Co., 104 N. C. 365; Randall v. Richmond etc. R. R. Co., 104 N. C. 410; Bullock v. Wilmington etc. R. R. Co., 105 N. C. 180; and it was repeatedly declared in those cases that it was negligence on the part of the engineer of a railway company to fail to ⁶³¹ exercise reasonable care in keeping a lookout, not only for stock and obstructions, but for apparently helpless or infirm human beings on the track, and that the failure to do so supervening after the negligence of another, where persons or animals were exposed to danger, would be deemed the proximate cause of any resulting injury.

It was after all of these precedents following Gunter v. Wicker, 85 N. C. 310, that the court, in Deans v. Wilmington etc. R. R. Co., 107 N. C. 686, 22 Am. St. Rep. 902, was confronted with the question whether a railway company was liable where, by ordinary care, its engineer could have stopped its train in time to prevent its running over a man lying asleep upon its track, under the doctrine of Gunter v. Wicker, 85 N. C. 310, or whether, the accident having occurred at a place other than a public crossing, the company could be held answerable, under the rule as stated in Herring v. Wilmington etc. R. R. Co., 10 Ired. 402, 51 Am. Dec. 395, only where it was shown that the engineer actually saw the trespasser and had reasonable ground to comprehend his condition. Upon mature consideration, the court overruled Herring v. Wilmington etc. R. R. Co., 10 Ired. 402, 51 Am. Dec. 395, and stated the rule applicable in such cases to be that "if the engineer discover, or by reasonable watchfulness may discover, a person lying on the track asleep or drunk, or see a human being, who is known by him to be insane or otherwise insensible to danger or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of human life and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it." This rule was approved in express terms in Meredith v. Richmond etc. R. R. Co., 108 N. C. 616; Hinkle v. Richmond etc. R. R. Co., 109 N. C. 472; 26 Am. St. Rep. 581; Clark v. Wilmington etc. R. R. Co., 109 N. C. 444, 445; Norwood v. Raleigh etc. R. R. Co., 111 N. C. 236; Cawfield v. Asheville etc. Ry. Co., 111 N. C. 597.

In *Smith v. Norfolk etc. R. R. Co.*, 114 N.C. 729, the same questions were again presented, and this court was asked to overrule the doctrine ⁶³² of *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686, 22 Am. St. Rep. 902, and reinstate *Herring v. Wilmington etc. R. R. Co.*, 10 Ired. 402, 51 Am. Dec. 395, as authority. The court declined to overrule *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686, 22 Am. St. Rep. 902, and others which had followed it, but held that, in so far as the opinions purported to bring within the protection of the rule a person who is lying upon the track in an insensible state brought about by drunkenness, they were entitled only to the weight of dicta. No member of the court adopted this particular view but the chief justice who delivered the leading opinion. The other members of the court were either in favor of sustaining without any modification or of overruling in toto the principles as enunciated in *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686, 22 Am. St. Rep. 902. The learned counsel for the defendant now contends that one who deliberately incurs the risk of lying down upon the track is no more entitled to the protection of the law than a drunken person, and that where he is killed his personal representative cannot invoke the benefit of the rule which subserves the purpose of shielding even brutes from the same unnecessary peril. At common law, in England, the owner of cattle was required to keep them in or restrain them from trespassing on the lands of others: 2 *Shearman and Redfield on Negligence*, secs. 418, 626, 627. But in this country the rule has been either modified by statute, or, in a much larger number of states, entirely disregarded, because the reason upon which it was founded, under different conditions, had ceased to operate: 2 *Shearman and Redfield on Negligence*, secs. 419-422. The principle deduced from *Davies v. Mann*, 10 Mees. & W. 545, as is said by discriminating law-writers, is that "the party who has the last clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it": 2 *Shearman and Redfield on Negligence*, 165. This rule has now been adopted in almost all of the southern and western states. but has been construed in some of them and by a number of text-writers as applying to ⁶³³ injuries done by moving trains only, where the engineer actually sees an animal or person. But this court, soon after adopting the rule laid down in *Davies v. Mann*, 10 Mees. & W. 545 (in *Gunter v. Wicker*, 85 N. C. 310), construed in its application to animals in *Wilson v. Norfolk etc. R. R. Co.*, 90 N. C. 69, followed by *Snowden v. Norfolk etc. R.*

R. Co., 95 N. C. 93, Carlton v. Wilmington etc. R. R. Co., 104 N. C. 365, Bullock v. Wilmington etc. R. R. Co., 105 N. C. 180, and Randall v. Richmond etc. R. R. Co., 104 N. C. 410, to mean that an engineer was not only negligent in failing to avert an injury to animals actually seen, but those which might by proper vigilance have been seen by him in time, by the use of the appliances at his command and without peril to the safety of persons on the train, to avert the accident.

It is settled irrevocably in North Carolina that a railway company is answerable in damages for an injury to any valuable domestic animal, due to the failure of the engineer to exercise reasonable care in observing the track in his front, and to passengers on a train, when caused by a want of similar vigilance on the part of the same servant in keeping an outlook for obstructions. The question presented in this case, therefore, as in Smith v. Norfolk etc. R. R. Co., 114 N. C. 729, is whether, by any sort of legal fiction, we can hold a servant faultless for failure to see one who has voluntarily fallen upon the track and yielded to the influence of sleep, or who, overcome with drunkenness, lies prostrate in the way of a train, when either or both are sandwiched between obstructions, animals, children, or persons unconscious from sickness, or known by the engineer to be deaf, whom the law declares it is his duty to see if it is possible for him by the exercise of ordinary care to do so. The opinion of the court in Smith v. Norfolk etc. R. R. Co., 114 N. C. 729, not only concedes, but adduces much authority to sustain the correctness of the ruling in Deans v. Wilmington etc. R. R. Co., 107 N. C. 686, 22 Am. St. Rep. 902, and the later opinions approving it, as therein interpreted, but proceeds upon the idea that in so far as any previous opinion had stated ⁶³⁴ that a railway company owed the duty of watchfulness to drunken persons lying on its track or became liable for failure to discharge it, unless actually seen by the engineer, they were dicta only. It was true, however, as to Deans v. Wilmington etc. R. R. Co., 107 N. C. 686, 22 Am. St. Rep. 902, and Clark v. Wilmington etc. R. R. Co., 109 N. C. 449, that there was some evidence tending to show that in the one instance the person who fell asleep on the track was drunk and in the other that the man killed was intoxicated when he went upon the trestle.

To illustrate the operation of the conflicting rules as they now stand: Suppose that the engineer is approaching a straight cut, through which he can see for one-fourth of a mile or for a sufficient distance to stop his train without breach of his duty to those on it before reaching the cut, and that at the entrance nearest

him a sleeping child, ten feet further a cow, and ten feet further still a large bowlder with a drunken man or one who has deliberately laid down, resting asleep and unconscious upon it, are arranged successively. Suppose, then, that the engineer carelessly fails to look out and see the sleeping child, the cow, or the bowlder, and by successive collisions kills the child, the cow, and the man on the bowlder, and the train is wrecked by striking the bowlder, so that a number of passengers are likewise killed. The result would present a legal paradox under the law as it now stands. The servant who represents the company would render it liable for his omission of the duty of keeping a lookout, for which the company could be mulcted in damages by the personal representatives of the child and of the passengers and by the owner of the cow, and yet, though the engineer could not discharge the duty which never ceased, of watching for the bowlder without seeing the drunkard or the sleeping man, the failure to see either is, in contemplation of law, no culpable breach of duty. The learned counsel for the defendant has given, it seems to us, quite as cogent reasons for ⁶³⁵ holding that a railroad company is absolved from duty to one who willfully or carelessly exposes himself to peril by sleeping upon a track as to one who falls down in a state of utter unconsciousness superinduced by drinking, and cited equally as strong and numerous authorities in support of his contention. But the reasons and the authorities relied upon emanate generally from courts which hold that both persons and animals upon a track are trespassers and entitled to consideration only where actually seen in time to save them. It is not strange that courts, where it is held that railway companies owe no duty to anyone who goes on their track and is not seen should have sought support for their position, where a drunken man happened to be the victim of carelessness, in the theory that he was deemed to be still concurring up to the time of the accident, and was less deserving of consideration than a sober trespasser. But it must not be forgotten that in the last analysis, notwithstanding the additional reason assigned, the drunkard, in the states holding to the principle that we have repudiated, is excluded from the right to recover because he is a trespasser, just as his sober neighbor would be barred of the right if he were injured by his side, and, when actually seen, the same duty of protection arises as to both.

The admitted test rule to which we have adverted, that he who has the last clear chance, notwithstanding the negligence of the adverse party, is considered solely responsible, must be applied in contemplation of the law which prescribes and fixes their rela-

tive duties. The law, as settled by two lines of authorities here, imposes upon the engineer of a moving train the duty of reasonable care in observing the track, and if, by reason of his omission to look out for cows, horses, and hogs, he fails to see a drunken man or a reckless boy asleep on the track, it cannot be ⁶³⁶ denied that he is guilty of a dereliction of duty. If he is guilty of a breach of duty, we cannot controvert the propositions which necessarily follow from the admission that but for such omission, or if he had taken advantage of the last clear opportunity to perform a duty imposed by law, the train would have been stopped and a life saved. It cannot be denied that, in a number of the states which have adopted the doctrine of *Davies v. Mann*, 10 Mees. & W. 545, it has also been held that both man and beast were trespassers when they went upon a railway track, and, except at public crossings or in towns, it was not the duty of the engineer to exercise care in looking to his front with a view to the protection of either. Where the law does not impose the duty of watchfulness, it follows that the failure to watch is not an omission of duty intervening between the negligence of the plaintiff in exposing himself and the accident, unless he be actually seen in time to avert it. The negligence of the corporation grows out of omission of a legal duty, and there can be no omission where there is no duty prescribed. But when this court declared it the duty of an engineer to exercise reasonable care in looking out for animals on the track, it became equally a duty as to all those classes of persons who, if actually seen by him, would be entitled to demand that he use all the means at his command to avert injury to them.

Where the rule prevails that no liability attaches for a failure of the engineer to keep a lookout, except in towns and at crossings, the same test is applied by the courts. So soon as the duty arises, the failure to perform it, if intervening after the negligence of a person in exposing himself to peril, is held to be the last clear opportunity to discharge it, and therefore the proximate cause of the injury, if it could have been averted by the use of the means at his command after the law required him to have seen it. ³³⁷ As we hold that the duty on the part of the engineer of watchfulness to protect life is an ever present one, attending him everywhere, and extending to the people in the remote country as well as in the towns, it necessarily follows that the opportunities that grow out of the duty performed are coextensive with the duty prescribed, and may arise wherever it exists. We are of opinion that when, by the exercise of ordinary care, an engineer can see that a human being is lying, apparently

helpless from any cause, on the track in front of his engine in time to stop the train by the use of the appliances at his command and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to perform his duty. If it is the settled law of North Carolina (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonably vigilant outlook along the track in his front, then the failure to do so is an omission of a legal duty. If, by the performance of that duty, an accident might have been averted, notwithstanding the previous negligence of another, then, under the doctrine of *Davies v. Mann*, 10 Mees. & W. 545, and *Gunter v. Wicker*, 85 N. C. 310, the breach of duty was the proximate cause of any injury growing out of such accident, and where it is a proximate cause, the company is liable to respond in damages. Having adopted the principle that one whose duty it is to see does see, we must follow it to its logical results. The court committed no error of which the defendant could justly complain in stating the general rule which we have been discussing.

Considered in connection with other portions of the charge, the statement of the distances, as proved by defendant's witnesses, was but a fair submission of the view argued by defendant's counsel, and affords no ground for exception. Under the general principle laid down in *Emry v. Raleigh etc. R. R. Co.*, 102 N. C. 209, 11 Am. St. Rep. 727, and the numerous cases ⁶³⁸ which have followed it, it was within the sound discretion of the court to frame the issues, and the defendant must show that the exercise of that discretion operated to his injury if he would assign it as error. But in *Scott v. Wilmington etc. R. R. Co.*, 96 N. C. 428, and *Denmark v. Atlantic etc. R. R. Co.*, 107 N. C. 185, and other cases, it has been declared that the judge was clothed with discretion to submit one, two, or three issues where the controversy hinges upon a controverted allegation of negligence, as he might think best, provided he should give appropriate instructions. Where the first issue (here the second) raises, not only the question whether the defendant was negligent, but also whether it was the proximate cause, the judge is at liberty to tell the jury, if they should find that the defendant was negligent and its negligence was the proximate cause of the injury, it was immaterial to determine whether or not the plaintiff had been previously negligent.

The question propounded to the witness Wilson was intended to elicit an opinion, which it was the province of the court to

decide that he had not qualified himself to give: *State v. Hinson*, 103 N. C. 374.

The court below was requested, however, in substance, to instruct the jury that the measure of damage for the loss of a human life was the present value of the net income which would be ascertained by deducting the cost of living and expenditures from the gross income, and that the jury could not allow more than the present value of accumulation arising from such net income based upon the expectancy of life. The court, in lieu of the instruction asked, told the jury that the measure of damage was the reasonable expectation of pecuniary benefit from the continued life of the deceased to those who would have been dependent on him, had he continued to live out his natural life; that the expectation of one seventeen years old would be ⁶³⁹ forty-four and two-tenths years, and the damage would be the net moneyed value of intestate's life to those dependent upon him, had he continued to live out his appointed time. Though the court stated the abstract proposition, as we find it formulated in the books, in the first clause of that portion of the charge relating to damages, we think that the substitution of the subsequent portion of it for the more specific instruction to which the defendant was entitled and for which he asked was erroneous. The instruction given, viewed without reference to the prayer of the defendant, was objectionable, in that it left the question of the date, which should be the basis of the final calculation, to say the least, uncertain, if his language was not susceptible of the construction that the net income would be estimated as of the period when those dependent on him would have realized the benefits of his labor had he not come to an untimely end.

We are of opinion, therefore, that following as a precedent *Tillett v. Lynchburg etc. R. R. Co.*, 115 N. C. 662, a new trial should be granted, for the error complained of, only as to the issue to which the erroneous instruction related. The jury found the fact upon full instruction as to the law in connection with other issues, which left the defendant no just reason to complain. But another opportunity must be given to assess the damage in the light of a more explicit statement of the law applicable. A new trial is granted, therefore, solely for the purpose of inquiring as to damages. The case will be remanded to the end that the jury may ascertain what is the present value of intestate's life.

Partial new trial.

NEGLIGENCE — PROXIMATE CAUSE — INTERVENING AGENCY.—Proximate cause is that which is a natural and continuous sequence, unbroken by any efficient, intervening cause producing the result complained of, without which that result would not have occurred: *Western Ry. v. Mutch*, 97 Ala. 194; 38 Am. St. Rep. 179, and note. See the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 809.

RAILROADS — ENGINEER'S DUTY TO TRESPASSERS ON TRACK.—It has been held that when an engineer discovers, or by reasonable watchfulness may discover, a person lying upon the track asleep or drunk, or see a human being, known by him to be insane or otherwise insensible to danger, or unable to avoid it, upon the track in front, it is his duty to resolve all doubt in favor of the preservation of life and immediately use every available means, short of imperiling the lives of passengers on the train, to stop it: Note to *Central R. R. etc. Co. v. Vaughan*, 30 Am. St. Rep. 54.

DAMAGES IN AN ACTION FOR DEATH.—In an action brought for the death of a person, who is shown to have been capable of earning a small amount of money, all of which he has been appropriating to the comfort and support of himself and his family, such family have no pecuniary interest in his life except by way of support and maintenance, and the jury should not be authorized in the instruction of the court to give damages based upon the probability that he might have accumulated an estate which would have gone to his family at his death: *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160; 49 Am. St. Rep. 21. See, also, the note to *Mattise v. Consumers' Ice etc. Co.*, 49 Am. St. Rep. 362.

CASES
IN THE
SUPREME COURT
OF
OHIO

COAL COMPANY v. ROSSER.

[53 OHIO STATE, 12.]

CONSTITUTIONAL LAW—CLASS LEGISLATION—ATTORNEYS' FEES AS COSTS.—A statute giving the plaintiff in every action for wages in which he shall recover the sum named in his complaint or bill of particulars such costs as the court may allow, not exceeding five dollars, for his attorneys' fees, if, before bringing such action, he has made a written demand for the sum due him, is in conflict with the provision of the state constitution affirming the right to possess and protect property, and declaring that government is instituted for the equal benefit and protection of all persons.

CONSTITUTIONAL LAW—ATTORNEYS' FEES, STATUTES ALLOWING.—A statute undertaking to compel an unsuccessful litigant to pay the attorneys' fees of his opponent, where the former has not been guilty of any wrongful or negligent act, is unconstitutional.

Action originally brought before a justice of the peace, and, after judgment rendered by him against the defendant, appealed to the court of common pleas. In both courts judgment was entered in favor of the plaintiff for the amount sued for by him and attorney's fees. The cause of action was for work and labor, and the only litigated question was whether the statute allowing attorney's fees was constitutional. From the judgment of the circuit court an appeal was taken to the supreme court.

L. D. Vickers and Arnold, Morton & Guerin, for the plaintiff in error.

L. M. Jewett, Asher, Buckley, and J. C. Pettit, for the defendant in error.

¹⁸ BRADBURY, J. The defendant in error, on August 22, 1893, filed before R. R. Patterson, a justice of the peace in and for Athens county, Ohio, the following bill of particulars:

costs by striking out the items relating to such fees. The court of common pleas overruled the motion, and exceptions were duly noted. This ruling of the court of common pleas having been sustained by the circuit court, the cause was brought to this court to reverse the action of those courts, upon the ground that the statute upon the provisions of which their rulings rest is unconstitutional, and therefore void.

This statute (89 Ohio Laws, 59, sec. 6563 a) provides: "If the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but not in excess of five dollars for his attorney. But no such attorney fee shall be taxed unless said wages have been demanded in writing and not paid within three days after such demand. If the defendant appeal from any such judgment, and the plaintiff on appeal recover a like sum, exclusive of the interest from the rendition of the judgment before the justice, there shall be included in his costs such additional fee, not in excess of fifteen dollars, for his attorney as the court may allow."

By virtue of the provisions of this statute, any claimant of wages may, in the first instance, determine the amount due him for wages from his employer, make written demand for its payment, ²¹ which, if not complied with within three days, subjects the employer to the penalty of an attorney fee, if an action is afterward brought to enforce the demand and the amount claimed is recovered therein. The amount due may, and often does, depend upon a numerous train of facts and circumstances, many of which may be in dispute between the parties. The most obvious of which is the number of days, weeks, or months during which the service had been continued, the rate of wages agreed upon, or, if no rate had been fixed, the reasonable value of the services rendered; whether payments had been made from time to time on account, or whether a setoff or counterclaim existed between the parties by which the amount otherwise due would be reduced or entirely extinguished. Mutual accounts may have run between the employé and employer for years, become complicated and of doubtful and difficult solution. Whether this condition of things exists, or whether the claim is simply for the wages of a single day or week at a fixed price, is immaterial in the purview of this statute. In either case, by its terms the employé may, in the first instance, fix the amount of his demand, and if he does this, and serves the written notice prescribed, the employer contests the claim at his peril.

The language of the statute is imperative: "If the plaintiff

... recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow," not to exceed five dollars in the court of the justice of the peace, or, should the defendant appeal the case, a total of fifteen dollars by the court of common pleas. The language requiring that the fee be allowed is mandatory; the court or justice ²² has no discretion in this respect; it must allow an attorney fee; the amount only is discretionary, within the limit prescribed; and that means that, within such limits, the tribunal by which the judgment is rendered is bound to allow the value of the services rendered. Under the statute, to entitle the plaintiff to have an attorney fee taxed against the defendant, he is not required to show that the debtor had funds, which he willfully or arbitrarily, or even carelessly, refused to apply to pay his debt, nor that a vexatious or dilatory defense had been made to defeat or delay the judgment. No other misconduct by the defendant is required than such as may be implied from a failure to comply with the peremptory written demand made upon him.

Whether the debtor interposes a vexatious defense, whether he makes an honest though unsuccessful one, or whether he makes none at all, but instead suffers judgment to be taken against him by default, are all equally immaterial; in either case, the statute denounces against him a penalty called an attorney fee, if an action is brought on the claim and judgment recovered for the sum demanded. The debtor may even acknowledge the debt and be solicitous for its payment, but, owing to straitened circumstances, fails to pay within the prescribed time; nevertheless, the penalty is incurred.

In the case under consideration, it appears by the bill of particulars that the written demand prescribed by the statute was made, and that it was not complied with within the three days. No other ground was alleged as the basis of the penalty. The record does not show any denial of the debt, by debtor, at the time the demand was made ²³ or afterward, or that it had funds with which it could have paid the sum demanded. Afterward, when an action was brought in the justice's court on the claim, no defense was made, or obstacle whatever interposed to delay or embarrass the proceedings. Under these circumstances, no intent to vex or harass the claimant, or delay the action, can be imputed to the plaintiff in error. The question submitted by it to the circuit court, and to this court, shows that its object in taking an appeal from the judgment of the justice of the peace may be fairly attributed to its desire to be relieved from paying an attorney fee for the benefit of its antagonist, and thereby

assert and vindicate an equal right to the protection of the courts of the state.

Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulct in an attorney fee, if an honest, but unsuccessful, defense should be imposed?

A statute that imposes this restriction upon one citizen, or class of citizens, only, denies to him or them the equal protection of the law.

It is true that no provision of the constitution of 1851 declares in direct and express terms that this may not be done, but, nevertheless, it violates the fundamental principles upon which our government rests, as they are enunciated and declared by that instrument in the bill of rights. The first section of the constitution declares that the right to acquire, possess, and protect property is inalienable, and the next section declares, among other things, that "government is instituted for their ²⁴ equal protection and benefit" of every person, while section 16 or article 1 provides that "all courts shall be open, and every person, for an injury done him in his lands, goods, persons, or reputation shall have remedy by due course of law, and justice shall be administered without denial or delay."

The right to protect property is declared, as well as that justice shall not be denied, and that everyone is entitled to equal protection. Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property.

If the general assembly has power to enact the statute in question, it could also enact one providing that lawyers, doctors, grocers, or any other class of citizens might make out their accounts, demand in writing their payment within a short time, which, if not complied with, would entitle the plaintiff to an attorney fee in addition to his claim if he recover the amount demanded. We do not think the general assembly has power to discriminate between persons or classes respecting the right to invoke the arbitrament of the courts in the adjustment of their respective rights.

The legislative power to compel an unsuccessful party to an action—generally the defendant—to pay an attorney fee to his

opponent has received the attention of a number of courts of last resort, as well as laws which impose as a penalty double ²⁵ damages or some similar penalty for some wrongful or negligent act injurious to another. Where the penalty has been imposed for some tortious or negligent act, the statute has generally, though not always, been sustained, but, on the contrary, where no wrongful or negligent conduct was imputed to the defeated party, any attempt to charge him with a penalty has not prevailed: *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869; *State v. Fire Creek Coal etc. Co.*, 33 W. Va. 188; 25 Am. St. Rep. 891; *Durkee v. Janesville*, 28 Wis. 464; 9 Am. Rep. 500; *South & North Alabama R. R. Co. v. Morris*, 65 Ala. 193; *Wilder v. Chicago etc. Ry. Co.*, 70 Mich. 382; *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206; *Wally v. Kennedy*, 2 Yerg. 554; 24 Am. Dec. 511; *Vanzant v. Waddel*, 2 Yerg. 260; *Atchinson etc. R. R. Co. v. Baty*, 6 Neb. 37; 29 Am. Rep. 356; *State v. Loomis*, 115 Mo. 307; *San Antonio etc. Ry. Co. v. Wilson* (Tex. App.), 19 S. W. Rep. 910; *Peoria etc. Ry. Co. v. Duggan*, 109 Ill. 537; 50 Am. Rep. 619.

Various phases of this subject have received attention in the foregoing cases, as well as in some others, to which we do not deem it necessary to refer. The general tendency of these authorities is toward the result we have reached; but, whether they do or do not support our conclusions, we are satisfied that the fundamental principles of government, declared by our bill of rights, clearly and unequivocally prohibits legislation of the character of that involved in this case.

Judgment allowing an attorney fee reversed.

IN THE CASE of *Jolliffe v. Brown*, 14 Wash. 155, post, p. 868, the question of the constitutionality of a statute requiring the payment by railway companies of attorneys' fees, in the case of their unsuccessfully litigating a claim where no such liability was imposed upon the plaintiff, if unsuccessful, was considered, and the statute in question pronounced unconstitutional: first, because the attorneys' fees could not be regarded as a penalty, it not being shown that the party on whom the penalty was imposed is in fault, or guilty of a wrong, and that, "considered as an attorney's fee pure and simple, it distinguished between classes of persons, and not as to subjects of litigation or classes of controversy."

CONSTITUTIONAL LAW.—ATTORNEYS' FEES — STATUTES ALLOWING.—The legislature may prescribe rules permitting the recovery of attorneys' fees in one class of cases and deny it in all others. A statute which permits the plaintiff, in an action against a railroad company for violation of its provisions, to recover, in addition to the damages therein provided for, an attorney's fee, confers no special privilege prohibited by the constitution, nor can it be regarded as imposing a penalty for exercising the right of defense: *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312; 31 Am. St. Rep. 477.

STATE v. BARGUS.

[53 OHIO STATE, 94.]

CONSTITUTIONAL LAW.—Acts of the assembly should not be adjudged void upon mere doubts of their constitutionality.

CONSTITUTIONAL LAW, MANDATORY PROVISIONS.—A provision of the constitution that all laws of a general nature shall have a uniform operation throughout the state is mandatory.

CONSTITUTIONAL LAW.—The term “laws of a general nature,” when employed in a constitution, includes those laws which, before its adoption, experience had shown ought to have a uniform operation throughout the state. Statutes providing for the relief of the poor are of this character.

CONSTITUTIONAL LAW.—THE UNIFORMITY OF OPERATION EXACTED by the constitution requires that laws shall operate in all parts of the state where are found the objects which are the subject of the legislation. The validity of a statute must be determined, not by its form, but by its substance and practical operation.

CONSTITUTIONAL LAW.—A TRIVIAL DIFFERENCE BETWEEN THE POPULATION of counties cannot justify the enactment of a general law which shall apply to one and not to the other of them.

Mandamus to compel the commissioners of Huron county to perform certain duties enjoined upon them by a statute of the state entitled, “An act to amend section 957 of the Revised Statutes of Ohio, as amended May 1, 1894,” passed May 14, 1894. The question at issue was whether the statute relied upon was constitutional. It made certain provisions respecting the infirmaries of the state, providing, among other things, that in counties having by the last federal census, or which may appear by any subsequent census to have, a population of not less than 31,940 nor more than 31,960, and in counties which by a like census should have a population of not less than 35,400, nor more than 35,500, no infirmary directors should be hereafter elected, and the terms of those then in office should expire on the first Monday of January, 1895, and that, in all such counties, the board of county commissioners should, at the expiration of such terms, become the successor in office of the board of infirmary directors, and discharge their powers and perform their duties. The statute which was thus attempted to be amended was a general statute, and the effect of the proviso respecting populations would prevent its operation in the counties of Huron and Erie and in those counties only.

S. A. Wildman and Andrews Brothers, for the relator.

L. C. Laylin and J. R. McKnight, for the respondents.

105 **SHAUCK, J.** The question of first importance, is whether this act meets the requirement of section 26, article 3

of the constitution, that "all laws of a general nature shall have a uniform operation throughout the state."

The briefs of counsel present in a strong light the real and apparent conflict of decision, and comment upon the application of this section to statutes said to be repugnant to its provisions. But a number of the cases cited may be dismissed, because they are really determined by the consideration believed to be due to other provisions of the constitution relating specially to the various subjects of the legislation whose validity was questioned; such as those relating to grants of corporate power and those enjoining upon the general assembly the duty of establishing and maintaining public schools.

Still, it would be difficult, if not impossible, to reconcile all the conclusions which have been reached concerning the effect of this section. Care seems to have been taken to avoid exact and comprehensive definitions of the phrases "general nature" and "uniform operation"; and from a course of interpretation intended to leave questions of conformity to be determined with respect to different statutes as they might arise, it has resulted that the apparent value of the legislation has sometimes affected the views that have been entertained respecting its validity. There may also be observed the effect of cautionary suggestions and admonitions supposed to be promotive of conservatism, if not helpful in the discovery of the truth nor likely to contribute to harmonious interpretation. In various phrases it has been said that the members of the law-making bodies have ¹⁰⁶ knowledge of the limitations upon their power, and are mindful of their duty not to transcend them. Harmony is not likely to be found among conclusions which result from the application of a rule of inconstant force. Some contradictory conclusions upon this subject are the play of the balance in which deference to the constitution has been weighed against deference to the general assembly. Of these cautionary rules one, however, is useful: Acts of the general assembly should not be adjudged void upon mere doubts as to their validity.

But it does not appear to have been advertently held in any case that this section belongs to the class of constitutional provisions which it has sometimes been thought safe to regard as directory, or, more accurately, advisory, merely. On the contrary, there seems to be general acquiescence in the view expressed by Scott, J., in *Kelley v. State*, 6 Ohio St. 269, where he says that this section is "a general, unqualified, and positive prohibition or limitation of legislative power, forbidding the giving of a partial operation to any law of a general nature, or—

in its own affirmative terms—requiring that a uniform operation throughout the state shall be given to all laws of a general nature.”

It is arguing in a circle to say that a law is not of a general nature because its operation is limited. It is implied in this section that there are subjects of legislation of a general nature as to which there is the imperative requirement that the operation of the laws shall be uniform and coextensive with the subjects. Those who framed and adopted the constitution used the phrase “general nature” without definition, as though its meaning were well ¹⁰⁷ understood. Whatever doubts may have arisen since the adoption of the constitution as to the effect of this provision when applied to statutes as a test of their validity, it is not supposed that the meaning of the phrase has changed. It is with evident propriety that counsel point to its prior and contemporaneous use in legislation, as indicating the sense in which it was employed in the constitution. Many members of the convention had been members of the general assembly, and others were entirely familiar with the course of legislation under the constitution of 1802. Unless terms which had a well-understood meaning are regarded as used according to that meaning, interpretation becomes mere speculation.

In volume 18 of the laws of Ohio, published in 1820, the acts of the general assembly were published under the titles of “Acts of a general nature” and “Acts of a local nature,” and these titles were used consistently during the thirty years following that date and preceding the adoption of the present constitution. It can hardly be doubted that in this manner these terms became familiar to the people, and their meanings were determined by such familiar usage. The laws published as “Acts of a general nature” were not always of uniform operation throughout the state, for that was not required by any provision of the constitution then in force. In the adoption of section 26, article 2, of the present constitution, the phrase “Laws of a general nature” was employed in the sense then familiar to designate the acts, which, as experience had demonstrated, should have a uniform operation throughout the state.

It will not aid present purposes to enter the interesting field of inquiry suggested, further than ¹⁰⁸ to ascertain whether acts providing for public aid to the poor were regarded as of a general nature. In volume 18 of the laws of Ohio, at page 208, is a republication of an act entitled “An act for the relief of the poor,” which had been passed February 10, 1816; and at page 223 of

the same volume is a republication of an act entitled "An act to authorize the establishment of poorhouses," which had been passed February 26, 1816. Both acts are published under the general title, "Acts of a general nature." There was further legislation upon this subject January 26, 1827, January 19, 1829, and March 14, 1831, and all the acts were published under the same general title as acts of a general nature.

That this has been regarded as a subject for laws of a general nature under the present constitution appears from the general course of legislation upon the subject. So far as we have observed, all the legislation of the state prior to the act now called in question has accorded with the general belief that the poor are always and everywhere with us.

Indeed, this act itself affords evidence that the belief continues to abide with the general assembly that laws upon this subject are of a general nature. If the subject were not general, the counties of Huron and Erie might have been named instead of described.

It is contended that the act is of uniform operation throughout the state. Counsel for the defendants, with much reason, insist that uniform operation is not necessarily universal operation. In the provision which limits its operation to counties having infirmaries, the act before us affords a convenient example of legislation that operates ¹⁰⁹ uniformly, though not universally. The act, but for the proviso, is of uniform operation, because it operates universally where are found the conditions for which legislative provisions are made; that is, in all counties having infirmaries. But the petition shows that these counties have infirmaries, and the purpose of the act is to exempt them from the operation of laws applicable to other counties presenting the same conditions. Uniformity of operation requires that laws shall operate in all parts of the state where are found the conditions which are the subjects of the legislation.

The case does not call upon us to determine whether the requirement of uniform operation forbids the reasonable classification of counties upon substantial differences in population. Isolation is not classification. The appearance of general and uniform legislation sought to be imparted to the act by the figures employed in the description of these counties, and the regard that is paid to changes in population which may be disclosed by a subsequent federal census, do not at all affect the character of the act. Its validity must be determined, not by its form, but by its substance and practical operation. It provides exceptiona

legislation on the basis of a difference in population so trivial that no one supposes it to be the real ground of the distinction, and it applies to no counties but to Erie and Huron.

With the wisdom or the policy which the general assembly has, through the provisions of this act, attempted to establish in the two counties named, we have nothing to do. If it be unwise, this section forbids its application to Erie and Huron counties, except by a law of uniform operation throughout the state which shall affect the ¹¹⁰ interests of all constituencies and thus challenge the attention and judgment of all representatives. If it be wise, this section beneficently requires that the people of the whole state shall share in its benefits. We are aware of no decision of this court in conflict with these views.

Demurrer overruled, and peremptory writ allowed.

CONSTITUTIONAL LAW.—An act will not be pronounced unconstitutional unless it is clearly so. A doubt of the constitutionality of an act is not sufficient to warrant its judicial condemnation: *Beverly v. Barnitz*, 55 Kan. 466; 49 Am. St. Rep. 257, and note.

STATUTES—UNIFORMITY OF OPERATION—GENERAL LAWS.—A general law is one which relates to or binds all within the jurisdiction of the law-making power, limited as that power may be by its territorial operation or by constitutional restraint: *Extended note to State v. Ellet*, 21 Am. St. Rep. 780-789, fully discussing this subject. See, also, the notes to *People v. Squire*, 1 Am. St. Rep. 903, 904, and *Allen v. Pioneer Press Co.*, 12 Am. St. Rep. 716.

EVERSMANN v. SCHMITT.

[58 OHIO STATE, 174.]

BUILDING AND LOAN ASSOCIATIONS—STOCK FULLY PAID.—When the aggregate dues, with the credited earnings, equal in amount the par value of a share of stock, it is paid up, and the owner for that share ceases to be a stockholder, and his relation to the corporation becomes simply that of a creditor until he is paid.

BUILDING AND LOAN ASSOCIATIONS.—WHEN LOSSES OCCUR, the burden must be borne by the stockholders according to the amount of their stock, whether they are borrowers or not.

BUILDING AND LOAN ASSOCIATIONS.—A BORROWER REMAINS A STOCKHOLDER, and participates in the benefits, and is subject to the obligations, of a stockholder until his shares, taking into account all profits and losses, reach their par value, and his loan thereby becomes liquidated, whereupon he ceases to be a member, as he would if he had not borrowed at all.

BUILDING AND LOAN ASSOCIATIONS, MORTGAGE TO, WHEN CANCELED.—A borrower is entitled to call for a cancellation of his mortgage when he would have been entitled to call for the par value of his stock, had no loan been made to him, and not otherwise. Though he has paid the entire sum contemplated by the mortgage and the constitution and by-laws of the association, if div-

dividends have been declared and paid to him, and, partly because such dividends were not earned, and partly because of the misapplication of moneys by the officers of the association, it is in debt and insolvent, he is answerable for his proportion of its liability, and is, therefore, not entitled to the cancellation of his mortgage.

A RECEIVER OF AN INSOLVENT BUILDING AND LOAN ASSOCIATION is charged with the duty of collecting the assets and winding up the affairs of the corporation, and, for that purpose, he is authorized to make such assessments against the shareholders as, when collected, will extinguish its liabilities, and, upon default in the payment of the assessments, to maintain actions at law for their recovery.

BUILDING AND LOAN ASSOCIATIONS.—MEMBERS OR STOCKHOLDERS of a building and loan association need not be made parties to a suit for the appointment of a receiver therefor, and though they are not formal parties to such suit, a receiver, if duly appointed therein, may make and collect from them such assessments as will satisfy the obligations of the corporation.

BUILDING AND LOAN ASSOCIATIONS.—MEMBERS WHO HAVE WITHDRAWN according to the by-laws and constitution cannot be again brought before the association for the settlement of losses, when the withdrawal was made in good faith. The members remaining are liable to such assessments as will satisfy the corporate obligations.

Suit by George H. Eversmann, receiver of the New Ohio Building Association, an insolvent corporation, brought to foreclose a mortgage made to it by the defendant, Maria T. Schmitt. She was, at and prior to the execution of the mortgage, a member of the association and the owner of twelve shares of its stock of the par value, when paid up, of two hundred and fifty dollars each. She had received a loan of the corporation for three thousand dollars, bidding therefor two hundred and forty dollars. To secure her obligations to the corporation, she executed a mortgage in its favor, among the conditions of which were that she would pay the dues on the stock and the interest on the loan "until such time as the weekly dues paid and dividends declared and unpaid, shall amount to said sum of three thousand dollars," and such assessments as might be levied upon her as a member of the association. The complaint averred that, by reason of the payment of dividends which had not been earned, and by the misappropriation of the funds of the corporation by its treasurer, its capital stock had become impaired to the extent of a little more than thirty-one per cent; that the defendant had participated in the receipt of these unearned dividends; that the plaintiff, after his appointment as receiver, had made an assessment on the stock of the members to meet the losses, the defendant's share of which was nine hundred and thirty-four dollars and seventeen cents, which she refused to pay. She had paid all dues and interest accruing and the aggregate of these was sufficient to have made her stock of the par value of three thou-

sand dollars, the amount of her loan; and the question was, whether, notwithstanding such payment, the plaintiff was entitled to foreclose the mortgage for the purpose of enforcing the assessment thus made against her. The constitution of the association contained the following articles:

"ARTICLE XI.

"1. All members shall pay for every share fifty (50) cents initiation fee, and an installment of fifty (50) cents per week.

"ARTICLE XII

"1. Every shareholder shall be entitled to a sum equal to the amount of \$250.00 for each share. . . .

"3. Every share for which money has been drawn shall be considered as a 'paid out' share, and shall bear six per cent interest (6 per cent) annually, and the premium must be paid in weekly rates. The interests and premiums shall be payable 'pro rata,' as soon as any part of the money is ready to be paid out. Interest will only be charged on the amount remaining due at the beginning of each year.

"4. Every member, who wishes to draw the amount of his or her shares, shall secure the payment by the executing of an acceptable mortgage on real estate, and this mortgage shall remain in force until the weekly dues and undrawn dividends make up the sum of \$250.00 on each share, the mortgage shall then be canceled, and such a member shall then cease, on the ground of such shares, to be a member.

"Those who have not yet drawn money can have their dividend paid to them; they may also draw their money before six months without the dividends."

The defendant had, from time to time, withdrawn dividends amounting to nine hundred and ninety-five dollars and ninety-two cents with the consent of the association. She made her last payment on November 27, 1889, that being the last regular meeting night before the appointment of the receiver, and she then demanded cancellation of her mortgage, which was refused. The trial judge held the defendant to be personally liable for her proportion of the losses of the corporation, but decided that the conditions of the mortgage had been performed, and that she was entitled to have it canceled. From the decree directing its cancellation the receiver prosecuted a writ of error.

Huntington & Holmes, for the plaintiff in error.

Tugman & Baker, for the defendant in error.

184 MINSHALL, C. J. Mutuality is the essential principle of a building association. Its business is confined to its own

members; its object being to raise a fund to be loaned among themselves, or such as may desire to avail themselves of the privilege. This is done by the payment, at stated times, of small sums, in the way of dues, interest on loans, and premiums for loans. Each shareholder, whether a borrower or nonborrower, participates alike in the earnings of the association, and alike assists in bearing the burden of losses sustained. It has what is called a capital stock. But this is only true in a modified sense. Unlike other corporations for profit, a share in a building association has, at the inception, only a nominal value. Its value is expected to increase by the lapse of time and the success of the association. It is contrary to the purpose and genius of a building association that a share in it should be paid up at the time of the subscription. This is done by the payment of small dues, and the crediting, at stated times, of the earnings in the way of dividends. When the aggregate dues with the credited earnings equal in amount the par value of a share of stock, it is paid up, and the owner, for that share, ceases to be a stockholder. He is entitled ¹⁸⁵ to the par value of his stock, but can no longer participate in the earnings of the association. His relation, then, becomes simply that of a creditor, until he is paid. Of course, what is here said is subject to the qualification that no losses have been sustained. Losses are incident to the most careful management of men; they cannot be wholly avoided; though it is worthy of note, that the smallness of the losses in the management of building associations, compared with that of other moneyed institutions, is remarkable. Still, agents may prove unfaithful, and bad loans be made. When this happens, the mutual character of the association prescribes that the burden must be sustained by the stockholders according to the amount of their stock; for he who participates in the benefit of a business must assist in bearing the burden.

As before observed, borrowers and nonborrowers participate alike in the earnings of a building association. The difference between them is simply in the time at which each class is paid the par value of his shares. A borrower before his stock is paid up receives from the association the par value of his shares, in the nature of an advance loan. For this, he agrees to pay the premium, if any, for the privilege, the interest on the money advanced, subject to abatements to be made at stated times, and the dues on his stock until it matures. In other words, he agrees to keep up and pay out his stock, as if he were a nonborrower, in consideration of the amount being advanced to him before that time. Hence, the borrower remains a stockholder, and par-

ticipates in all the privileges and benefits of a stockholder, has a voice in the management of the association, and participates in ¹⁸⁶ its earnings. The latter go toward discharging his obligations arising on the loan, and to shorten the time in which he will be fully discharged therefrom. For, taking all losses into account, whenever the shares of the borrower have reached their par value by the payment of dues and the apportionment of earnings, the loan is liquidated, and he ceases to be a member, as he would if he had not borrowed at all. In other words, with his shares paid up, he discharges his obligations as a borrower. And the exact test of his right to call for a cancellation of the mortgage given to secure his obligations as a borrower is the inquiry whether he would have been entitled to receive from the association the par value of the shares on which the loan was made had he not become a borrower.

In this case, Mrs. Schmitt subscribed for twelve shares, and received from the association their par value, three thousand dollars, as an advanced loan, at a premium of two hundred and forty dollars. She paid the premium, and agreed to pay the dues thereon, six dollars per week, and interest at the rate of six per cent, subject to an annual abatement, "until such time as the weekly dues paid and dividends declared and unpaid shall amount to the sum of three thousand dollars," and all "assessments" that might be levied upon her as a member of the association. She paid the premium, the dues, three thousand dollars, and the interest on the loan to the appointment of the receiver. These facts, standing alone, would satisfy the mortgage. But it is further found that the association is insolvent; that its capital is impaired to the extent of about thirty-one per cent, for which the receiver has made an assessment on the members, including the defendant; that the losses occurred during ¹⁸⁷ her membership, were caused by the payment of dividends that had not been earned, and the misapplication of moneys by the treasurer; and that she had withdrawn nine hundred and ninety-five dollars and ninety-two cents of these unearned dividends, although the right to draw earned dividends was limited by the constitution to those members who had not "drawn money." Can, then, a borrower under these circumstances claim the cancellation of his mortgage? We think not. To do so would, as we have shown, undermine the principles upon which these associations are organized. By the terms of the constitution of the association, on the cancellation of the mortgage, the borrower ceases to be a member, and all liability to it is at an end. We see no reason why the remaining mem-

bers should be left to bear all the burden, resulting from losses, for which they are no more to blame than she is. It is wholly unlike a savings society where the borrower is not a member or otherwise interested in its business. Having no voice in the management, nor interest in the earnings, of the society, the borrower and it sustains the simple relation of debtor and creditor. Here, as shown, the borrower is also interested as a creditor. The loan is for no definite period of time. It depends upon the management of the association, in which he continues as a member and has a voice. It is in view of the relation of the borrower to the association and the possibility of losses that the mortgage stipulates that, in addition to the specific conditions mentioned, the borrower shall pay all "assessments" that may be levied on him. The fourth section of the twelfth article of the constitution, on which much stress is laid, simply expresses what would be true in a safely conducted association. It does not include nor ¹⁸⁸ apply to the case where there are no earnings, and losses have to be met and borne. This was wisely provided for in the mortgage. It was a matter about which the parties could and have contracted. There is no suggestion of fraud or mistake in its execution, and their rights must be determined by its stipulations, conforming as they do to the equity and justice of the case. She has received from the association, in the way of unearned dividends, a sum greater than the assessment that has been made on her.

But it is insisted that Mrs. Schmitt and the other members were not parties to the suit in which the receiver was appointed, and that he had no power to make the assessment, and it is not binding upon them. This objection is without weight. It is not necessary that the members should, as individuals, have been made parties to that suit. They are parties in their corporate name and capacity, and, for the appointment of a receiver, that was sufficient. We will presume that the receiver was duly appointed, as there is nothing to the contrary. As receiver, it was his duty to collect the assets and wind up the affairs of the association. This could only be done by ascertaining the loss and making an assessment on the members to meet it. It was simply a matter of calculation; involved no matters of personal confidence, and could, therefore, be made by the receiver as well as by the members themselves or their chosen agents. Moreover, these had been displaced by the appointment of the receiver, and could not act in the premises.

It is, however, found that a large number of members, borrowing and nonborrowing, who were such during the time the

losses occurred, had withdrawn ¹⁵⁰ prior to the time the association went into the hands of a receiver. This does not affect the question here. In the absence of bad faith, such persons as had, according to the constitution and by-laws of the association, withdrawn and ceased to be members, cannot again be brought into the association for the settlement of losses: *Wangerien v. Aspell*, 47 Ohio St. 250, 261. The withdrawal being an executed transaction, can only be recalled by the association, and a remedy had, in conformity to the rules of equity jurisdiction.

It follows, as we think, that the judgment of the circuit court, dismissing the petition of the receiver, should be reversed, and judgment entered upon the findings as prayed for in the petition.

Judgment accordingly.

BUILDING AND LOAN ASSOCIATIONS—LOSSES.—Each member of the association is under an obligation to contribute his share of its necessary losses and expenses: *Extended note to Robertson v. American Homestead Assn.*, 69 Am. Dec. 154.

BUILDING AND LOAN ASSOCIATIONS—RIGHT OF STOCK-HOLDERS.—When stock in a building association has matured, although its maturity has not been declared by the association, the debt of the borrowing stockholder has been paid, and he is entitled to his securities, and the association has no right to recover a judgment against him for the amount of the loan: *Charles Tyrrell Loan etc. Assn. v. Haley*, 139 Pa. St. 476; 23 Am. St. Rep. 199.

BUILDING AND LOAN ASSOCIATIONS.—Right of members to withdraw, and the effect thereof, is discussed in the extended note to *Robertson v. American Homestead Assn.*, 69 Am. Dec. 155, 163.

JACKSON v. BRICK ASSOCIATION.

[53 OHIO STATE, 303.]

A PARTNERSHIP CANNOT BE FORMED FOR AN ILLEGAL PURPOSE or one contrary to public policy.

A PARTNERSHIP OR ASSOCIATION, FORMED FOR THE ILLEGAL PURPOSE of controlling and enhancing the price of brick, and in restraint of trade therein, cannot maintain an action in the partnership or association name for brick sold and delivered. The remedy, when one exists, is by an action in the names of the several persons constituting the unlawful association.

PUBLIC POLICY, ASSOCIATIONS IN RESTRAINT OF TRADE.—An association, formed for the purpose of controlling the price of brick in the interest of its members, is against public policy. It therefore cannot maintain any action in its association or partnership name.

PRACTICE.—THE DEFENSE that a partnership or association was formed for illegal purposes, when it does not appear on the face of the complaint, may be interposed by answer.

Kohler & Musser, for the plaintiffs in error.

Oviatt, Allen & Cobb, for the defendant in error.

³⁰³ MINSHALL, C. J. The action below was brought by the Akron Brick Association, claiming to be a partnership doing business under that name in the city of Akron, against Jackson and Lyman as defendants. The object of the suit was to recover on a contract, by which, as averred, Jackson and Lyman agreed to pay the association for brick it was then furnishing to Barnett & O'Near, subcontractors of the defendants. The defendants denied any liability upon the contract; and also denied that the plaintiff was a partnership doing business under the name of the Akron Brick Association. They also, as a separate and specific defense, averred "that said Akron Brick Association, so called, is not, in fact, a lawful partnership, but that said alleged partnership is a combination of all, or nearly all, of the several brick manufacturers and dealers in and about the city of Akron, in which place, and in order to accomplish its purposes, said association has established and now maintains a central office or agency through which ³⁰⁴ all purchases of brick must be made, and through which all sales of brick are made; that the object and purpose of forming and maintaining said association, and of said agency, was and is to control and enhance the price of brick, and in order to prevent and do away with a fair open competition among the several companies, firms, and individuals entering into and comprising said association; that the said union or association is in restraint of trade and contrary to sound public policy."

By a reply the averments of the answer were denied, and, in compliance with interrogations annexed to the answer, the plaintiff added a copy of the articles under which the association was formed and does business. From the view we take of the case, it is unnecessary to consider any of the errors assigned, other than the one that relates to the right of the plaintiff to sue by the assumed name of the Akron Brick Association. The articles of association in connection with the evidence support the averments of the defense. On the trial of the case, the court in its charge to the jury dispensed with any consideration of the question by the jury, saying: "In our jurisprudence, it is no defense to say that the contract was made with a bad man, or with persons engaged in prosecuting acts contrary to law, or the policy of the state, unless the contract grows immediately out of and in connection with an illegal or immoral act. A clear distinction exists in law, as well as ethics, between a contract entered into to do an unlawful or immoral act, or to promote a

course of conduct contrary to the policy of the state, and a contract entered into for a legitimate purpose, though made with persons who commit unlawful and immoral acts or promote schemes contrary to good policy."

³⁰⁵ We see no error in the court deciding the matter, nor in the law as stated by the learned judge; the error consists, as we think, in the application of it. The objection relates to the right of the persons composing the Akron Brick Association to sue by that name, instead of the names of those composing the association. If they have that right, it is derived from the provision of section 5011 of the Revised Statutes, which reads as follows: "A partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and in such case it shall not be necessary to allege or prove the names of the individual members thereof." A partnership is an association with certain incidents recognized by law for the convenient transaction of legitimate trade and business; it cannot, therefore, be formed for an illegal purpose, or one contrary to public policy: Metcalf on Contracts, 116; 1 Lindley on Partnership, 91; Sampson v. Shaw, 101 Mass. 145; 3 Am. Rep. 327. It therefore follows that, if the Akron Brick Association was organized for a purpose contrary to public policy, it has no right under the statute to sue by the name assumed in its business—it is not a partnership within the meaning of the statute. This does not deny to the persons comprising the association the right, in their individual names, to maintain an action for the price of brick sold and delivered to a third person, or the enforcement of any contract that in no way depends upon the illegal arrangement as between themselves. The law stated by the court in its charge properly applies to such a case, but does not to the question made here; which goes simply to the right of the persons comprising the association to sue in the name assumed ³⁰⁶ by them, under the provisions of the section above quoted. It is a right derived from the making of a lawful contract of partnership, and can only be exercised where a lawful contract of partnership has been made and entered into.

The evidence in the case tended to, if it did not conclusively, show that the association was formed for the simple purpose of controlling the price of brick in the interest of the members. Such combinations are against public policy, as has been frequently held in this state: Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Emery v. Ohio Candle Co., 47 Ohio St. 320; 21 Am. St. Rep. 819; State v. Standard Oil Co., 49 Ohio St. 137,

185; 34 Am. St. Rep. 541. The court refused to say to the jury that, if they found such to have been the object of the association, a recovery could not be had in favor of the association by its assumed partnership name, and charged the jury as before stated. This, we think, is error, for which the judgment should be reversed.

Our code does not provide for a plea in abatement. An association of persons suing under section 5011 of the Revised Statutes must bring themselves within its provisions by averment; if they do not, the omission is a proper ground of demurrer: *Haskins v. Alcott*, 13 Ohio St. 210. So that when the objection does not appear on the face of the petition, it must be made by answer if the defendant would rely on it. That was done in this case. The plaintiff then had an opportunity to dismiss its suit and bring it in the names of the proper parties, if it desired to do so. Instead of doing so, it took issue upon the answer, so that it became a question of fact to be determined by the jury under proper directions from the court.

Judgment reversed, and cause remanded for further proceedings.

COMBINATIONS TO STIFLE COMPETITION ILLEGAL.—Combinations of individuals formed for the purpose of stifling competition in trade are against public policy and illegal: *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690, and note; *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 21 Am. St. Rep. 819; *Nester v. Continental Brewing Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894, and note.

CONTRACTS—ILLEGAL—ENFORCEMENT OF.—Courts of justice will not enforce the execution of an illegal contract nor aid in the division of the profits of an illegal transaction between associates: *Goodrich v. Tenney*, 144 Ill. 422; 36 Am. St. Rep. 459, and note with the cases collected. A contract opposed to the public policy and laws of this state will not be enforced by its courts: *Rose v. Kimberly*, 89 Wis. 544; 46 Am. St. Rep. 855, and note.

RAILROAD COMPANY v. MACKEY.

[53 OHIO STATE, 370.]

PRACTICE—BILL OF EXCEPTIONS.—A paper claimed to be the identical paper given in evidence at the trial, which is attached to the bill of exceptions only by being pasted between the pasteboard back and the stenographer's report, in which position it was held with sufficient tenacity to retain its place, but which was not made or identified as an exhibit by anyone, cannot be treated as a part of the bill of exceptions.

NEGLIGENCE INFERABLE FROM THE VIOLATION OF A STATUTE.—If a railway train is left standing in or across a street in a city for a length of time forbidden by law, a neglect of duty is implied.

NEGLIGENCE—PLEADING.—A complaint alleging that the defendant negligently, unlawfully, and without due care on the part of its servants left a long train of cars, attached to a locomotive, standing over, obstructing, and blocking a crossing for a period of more than five minutes, and that while the train was so unlawfully standing on such crossing, the plaintiff, a child of tender years and incapable of judgment, was lawfully passing along such street, going to a point beyond such crossing, and that after remaining at the crossing for more than five minutes, and receiving no warning, he, in full view of defendant's engineer and other servants, attempted to pass over the obstruction, and that while plaintiff was so doing, defendant's servants, without warning or notice, negligently started the cars suddenly and violently backward, whereby plaintiff received personal injuries, states a good cause of action against the defendant, where a statute makes the permitting of a train for five minutes to remain across any road, street, or alley an offense punishable by fine.

NEGLIGENCE—PLEADING.—An allegation specifying the act, the doing of which caused an injury, and averring generally that it was negligently done, states a cause of action, though it is not apparent from the complaint how the injury resulted from the negligence alleged.

PLEADING—NEGLIGENCE, CONTRIBUTORY, ON THE PART OF A CHILD, WHEN NEED NOT BE DENIED.—A complaint averring an injury to a child of tender years in permitting a train of cars to remain for more than five minutes obstructing a crossing and then negligently starting them up without warning, need not negative the presumption of contributory negligence on its part.

A CHILD IS PRESUMED TO POSSESS ONLY SUCH DISCRETION as is common to children, and is, therefore, held answerable only to the exercise of such care as is reasonably to be expected from children of his age and capacity.

CHILDREN, NEGLIGENCE, WHEN WILL NOT BE IMPUTED TO.—A child under fourteen years of age will not be presumed, as a matter of law, to be capable of contributory negligence. Therefore, the absence of such negligence need not be averred in a complaint to recover for personal injuries suffered by him from the negligent act of another.

RAILWAY TRAIN, CHILDREN, WHEN TRESPASSERS.—If a train of cars has been left across a public street for a time greater than that allowed by law, a boy, who attempts to pass the obstruction thus created by climbing on the cars, is not necessarily a trespasser, and it should be left to the jury to determine, from all the circumstances, whether he was a trespasser or not.

NEGLIGENCE, CONTRIBUTORY, OF CHILD IN ATTEMPTING TO PASS OVER A FREIGHT TRAIN.—Whether the presence of a train of cars on a crossing should be intended as notice to a child nine years of age that it is likely to be moved at any time depends upon the degree of intelligence and judgment possessed by the child, and that is a question for the jury.

Action by a child by his next friend to recover for personal injuries claimed to have been received from the negligence of the defendant corporation and its servants. The judgment in the trial court was in favor of the plaintiff.

Marsh & Loree, W. E. Hackendorn, and John B. Cockrum, for the plaintiff in error.

Robert L. Mattingly, Patrick E. Kenney, and Edgar B. Kinkead, for the defendant in error.

379 SPEAR, J. 1. A preliminary question is made with respect to the action of the circuit court in overruling a motion to reattach certain depositions to the bill of exceptions. It is recited in the bill that depositions of the witnesses named were given in evidence, and that they are attached, marked respectively Exhibits "E" and "F." Proof was heard for and against the claim that the depositions were ever part of the bill. Giving to the testimony a construction most favorable to the plaintiff in error, the question, reduced to its last analysis, is whether a paper claimed to be the identical paper given in evidence at the trial, which was attached to the bill of exceptions only by being **380** placed between the pasteboard back and the stenographer's report, in which position it was held with sufficient tenacity to retain its place, but which paper was not marked nor identified as an exhibit, either by the trial judge or the stenographer, or by anyone, can be treated as a part of the bill. We think it cannot. The circuit court did not err in overruling the motion, nor in refusing to pass upon the weight of the evidence: Hicks v. Person, 19 Ohio, 426; Wells v. Martin, 1 Ohio St. 386; Busby v. Finn, 1 Ohio St. 409.

2. It is insisted that the petition fails to state a cause of action, and that the trial court therefore erred in overruling a general demurrer to that pleading. The criticisms are, that there is no averment that the train was unnecessarily detained on the crossing; that the allegations of negligence are mere epithets, and not a statement of the omission of any duty, and that the presumption of contributory negligence arising from the facts stated is not overcome by proper averments.

Omitting formal parts, the petition alleges in substance that the plaintiff was a minor of the age of nine years; that defendant's track through the village of Coldwater intersects and crosses Main street at grade; that Main street is a common thoroughfare and highway, the principal street of said village, and the point of junction both a public highway and street crossing, necessarily much used and frequented by the public. On June 5, 1890, the defendant did negligently and unlawfully, and without due care on the part of the servants of said defendant in charge thereof, leave a long train of freight-cars attached to a locomotive, standing upon and over, obstructing, and blocking said crossing for a period of more than five **381** minutes, without any attention to said crossing or the consequence to the convenience or life and limb of persons having occasion to pass such obstruction. That at the time aforesaid, during the hour of noon of said day, while said train was so unlawfully standing

on said crossing, the plaintiff, a child of tender years and immature experience and judgment, was lawfully passing along said street going to a point beyond said crossing on Main street. When, arriving at said crossing and in full view of the engineer's position, and in full view of any servant being on the lookout or keeping watch over said train, he found said crossing so obstructed and blocked by said defendant's train; that after remaining at said crossing for more than five minutes, and receiving no warning, plaintiff, in full view of the engineer's proper position, and within the knowledge of ordinary prudence of defendant's servants, attempted to pass over and cross such obstruction. While so passing over said cars, defendant's servants, without any care or attention to said crossing, or the consequence to anyone attempting to pass such unlawful obstruction, without due care, without signal, without notice, without warning, did then and there imprudently, carelessly, negligently and wrongfully start said cars suddenly and violently backward, whereby said plaintiff's right foot was caught between the couplings of two cars, and the injury followed.

If the action were to recover the penalty prescribed by section 4748 of the Revised Statutes, or to recover damages arising to any person by reason alone of the obstruction, it would be necessary to aver that the obstruction was continued unnecessarily, for that condition is incorporated in the ³⁸² statute. But section 6890 of the Revised Statutes, which provides that "any person who permits any car or locomotive of which he has charge to remain upon or within thirty feet of the center or across any public road, street, or alley, for a period longer than five minutes . . . shall be fined," etc., does not impose the requirement of showing that the cars were so permitted to remain unnecessarily, and the language quoted clearly implies the duty to remove the obstruction after the lapse of five minutes. Notice of this statute being taken, the neglect of duty is implied from the statement of the fact of continued obstruction. So construed, the petition makes a case of violation of duty, and this, with the averment that the act was negligently done and the further allegation that the starting of the cars, by which the injury was immediately caused, was done negligently, without warning and wrongfully, we think is sufficient charge of negligence as against a general demurrer. The general rule is, that allegations which adequately state the facts of negligence are sufficient to constitute a good pleading. An allegation specifying the act, the doing of which caused the injury, and averring generally that it was negligently done, states a cause of action, al-

though it be not apparent from the complaint how the injury resulted from the negligence alleged: Boone's Code Pleading, sec. 174; Bliss' Code Pleading, sec. 211 a; Maxwell's Code Pleading, 251; Gulf etc. R. R. Co. v. Washington, 49 Fed. Rep. 347; Rushville v. Adams, 107 Ind. 475; 57 Am. Rep. 124. Nor are the two negligent acts independent of each other. Both concur in constituting an act of negligence, viz., the negligent starting of a train, negligently and unlawfully obstructing a street crossing: Burger v. Missouri Pacific Ry. Co., 112 Mo. 238; 34 Am. St. Rep. 379.

³⁸³ Nor is the petition faulty in that it does not sufficiently negative the presumption of contributory negligence. It is well settled that a child is presumed to possess only such discretion as is common to children, and is, therefore, held only to the exercise of such care as is reasonably to be expected from children of his own age and capacity: Rolling Mill Co. v. Corrigan, 46 Ohio St. 283; 15 Am. St. Rep. 596. The law as to personal responsibility of a child for his acts is declared by Bishop, in his work upon Criminal Law, section 368, in these words: "Since, in reason, criminal capability depends on the understanding, rather than the age, there can be no fixed rule of age which will operate justly in every possible case. But an imperfect rule is practically better than none. Therefore, at the common law, a child under seven years is conclusively presumed incapable of crime. Between seven and fourteen the law also deems the child incapable, but only prima facie so, and evidence may be received to show criminal capacity." The rule is sustained by many authorities, and may be regarded as an accepted rule of criminal law; and it would seem that the principle should have application to a case of negligence. Professor Thompson, in his work on Negligence, at page 1181, comments as follows: "Two questions arise: 1. At what age or period of a child's development shall it be held to be sui juris for the purpose of cases of this kind; 2. Whether this is a question of law or a question of fact. When the age of the child admits of no doubt as to its capacity to avoid danger, the court will decide this question as a matter of law. . . . If there is any doubt as to the child being of the age and capacity that in law constitutes one sui juris, ³⁸⁴ it should be submitted to the jury to say by their verdict whether he is so or not." The rule is tersely stated by Mr. Justice Hunt, in Railroad Co. v. Gladmon, 15 Wall. 408, thus: "The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

Unless, therefore, it can be held as matter of law that the injured person had the capacity to foresee and avoid danger, negligence will not be imputed to him. And inasmuch as this presumption will not be visited upon children under the age of fourteen, it follows that the averment that the plaintiff was a boy of nine years of age, and that he was of immature experience and judgment, is sufficient to rebut any legal presumption of contributory negligence from other facts appearing in the petition: Sharswood's Blackstone, 435, 464; 4 Sharswood's Blackstone, 20; Rauch v. Lloyd, 31 Pa. St. 358; 72 Am. Dec. 747; Nagle v. Allegheny etc. R. R. Co., 88 Pa. St. 35, 39; 32 Am. Rep. 413; Rhodes v. Georgia R. R. etc. Co., 84 Ga. 320; 20 Am. St. Rep. 362; Thurber v. Harlem etc. R. R. Co., 60 N. Y. 326; Dowling v. New York etc. R. R. Co., 90 N. Y. 670.

3. Defendant's counsel asked the court to charge the jury that "If you find in this case from the evidence that defendant's train of cars occupied Main street crossing in Coldwater, Ohio, for a period exceeding five minutes and more than the statutory period, and you further find that plaintiff, while said train so occupied said crossing, climbed up between two of defendant's cars in said train, he, by so doing, became and was a trespasser, and while so trespassing the defendant owed him no duty in moving the train from such crossing, unless you find from the evidence that defendant and its servants operating the train knew of his presence there," which was refused.

This request implies that, under the circumstances ³⁸⁵ stated, the plaintiff would, as matter of law, be a trespasser if he climbed up between two of the cars while attempting to cross over. We think this a question of mixed fact and law. The evidence tended to show that, at the time the attempt to cross over was made, the crossing had been obstructed for more than five minutes, to the hindrance of travel thereon, which act of continued obstruction, if proven, was a violation of law and made the company itself a trespasser. Its cars were where they had no right to be, while, if the boy was rightfully upon the crossing, as the evidence tended to show he was, he was where he had a right to be, and his attempt to pass the obstruction by climbing upon the cars would not make him a trespasser. It was, we think, for the jury to say whether he was a trespasser or not.

Defendant's counsel also requested the court to charge "that if a public highway is completely blocked by a united freight train, attached to an engine, such possession of the highway by the train, even though such possession extends beyond the statutory time, is notice to all traveling public, children and adults

alike, of the presence of such train at such place, and that it is likely to be moved at any time, and such train in that condition is not an invitation to any of the traveling public to pass over the crossing by climbing upon or over such train," which was refused.

One objection to this request is, that it ignores the difference between the responsibility of adults and children already adverted to. Whether or not the presence of a train upon a crossing should be treated as notice to a child of nine years of age that it is likely to be moved at any time depends upon the degree of intelligence and judgment possessed by the child, and that, as we have already ³⁸⁶ found, is a question of fact for the jury. Besides this, it might be argued that the train would naturally furnish temptation to such a child, when desiring to pass, to take great risk in doing so, and that trainmen, as reasonable men, ought to anticipate that children would exercise only the discretion usual among children, and, if circumstances indicated their presence at the crossing, to take reasonable precautions for their safety.

The charge as a whole was excepted to. We think it correctly presents the law, and is as favorable to the defendant below as its counsel could well ask.

Other questions were argued. They have all been considered, but we do not find anything in the record which would warrant a reversal of the judgment.

Judgment affirmed.

RAILROADS—NEGLIGENCE—LEAVING TRAIN ON CROSSING.—The obstruction of a public crossing over a railroad is a nuisance, and the company is liable for all the consequences that may ensue from leaving a crossing obstructed by a train of cars: *Murray v. South Carolina R. R. Co.*, 10 Rich. 227; 70 Am. Dec. 219.

NEGLIGENCE—VIOLATION OF LAW AS.—One who neglects to perform a specific duty imposed upon him by a statute or municipal ordinance for the protection or benefit of others is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect: *Osborne v. McMasters*, 40 Minn. 103; 12 Am. St. Rep. 698, and note; to the same effect see *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692; 32 Am. St. Rep. 348, and note.

NEGLIGENCE—PLEADING.—A complaint in an action to recover for personal injuries caused by the negligence of the defendant need only allege that the injuries were so caused and the facts from which the negligence may be reasonably inferred by the jury: *Madden v. Port Royal etc. Ry. Co.*, 35 S. C. 381; 28 Am. St. Rep. 855, and note. A complaint charging negligence in general terms is good on demurrer: *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; 28 Am. St. Rep. 203.

NEGLIGENCE—CHILDREN—PRESUMPTION AS TO DISCRETION OF.—Contributory negligence on the part of a minor is to be

measured by his age and ability to discern and apprehend circumstances of danger. He is required to exercise only such prudence as one of his age may be expected to possess: *Queen v. Dayton Coal etc. Co.*, 95 Tenn. 458; 49 Am. St. Rep. 935, and note. A child is held to such care and prudence only as are usual among children of his age and capacity: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786, and note.

NEGLIGENCE CANNOT, AS A MATTER OF LAW, BE IMPUTED TO A CHILD eight years old, and prima facie he is incapable of exercising that degree of care and caution which the law requires of an adult: *Lorence v. Ellensburg*, 13 Wash. 341; 52 Am. St. Rep. 42, and note. Infants of tender years and wanting in discretion are not amenable to the disabling effects of contributory negligence: *Western Ry. v. Mutch*, 97 Ala. 194; 38 Am. St. Rep. 179, and note. See, also, the extended note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 590-596.

MORTON v. WESTERN UNION TELEGRAPH COMPANY.

[53 OHIO STATE, 431.]

TELEGRAPH CORPORATIONS—DAMAGES.—Mere mental pain and anxiety are too vague for legal redress, where no injury is done to person, property, health, or reputation. Hence, an action cannot be sustained for the nondelivery of a telegram, when the only resulting injuries were the leaving of the person to whom it was addressed in ignorance of the fatal illness of his mother, and depriving him of the comfort of being with her in such illness and attending the funeral.

Action to recover for the negligent failure to deliver a telegram. The judgment in the trial court was in favor of the defendant.

George B. Cannon, for the plaintiff in error.

John F. Locke, for the defendant in error.

⁴³¹ THE COURT. The plaintiff in error brought suit to recover damages for the negligent failure of the defendant ⁴³² to deliver to him at London, Ohio, a telegram as follows:

“Henly, O., Oct. 12, 1890.

“To Will Morton, London, Ohio:

“Mother dying. Come immediately

“FRANK MORTON.”

He alleges that the sender of the telegram, who was his brother, paid to the company the usual rates; that it negligently failed to deliver the message to him, whereby he was “left in total ignorance of his mother’s illness, and was deprived of the solace and comfort of attending her in her last sickness and of the privilege of attending her funeral, which he could and would

have done but for the default of the defendant, its agents, and employés, and that he was injured in his feelings and affections thereby in the sum of five thousand dollars."

A demurrer to the petition was sustained in the court of common pleas, and that judgment was affirmed by the circuit court.

The judgment rests upon the elementary principle that mere mental pain and anxiety are too vague for legal redress, where no injury is done to person, property, health, or reputation: Cooley on Torts, 2d ed., 716; Greenleaf on Evidence, sec. 267. Numerous reported cases show that this doctrine has been followed in cases of this character by the federal courts and the courts of last resort in nearly all of the states. The wisdom of the doctrine is well illustrated by the experience of the courts that have departed from it.

Judgment affirmed.

TELEGRAPH COMPANIES—DAMAGES—MENTAL ANGUISH. Damages cannot be recovered for mental suffering caused by the failure of a telegraph company to transmit and deliver a message. This under the rule that damages cannot be recovered for mental suffering resulting from the breach of a contract: *Francis v. Western Union Tel. Co.*, 58 Minn. 252; 49 Am. St. Rep. 507, and note. See, also, on this subject the extended note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 788-790.

TUTTLE v. BURGETT.

[53 OHIO STATE, 498.]

CONTRACT, PLACE OF PERFORMANCE.—If in a contract no place for its performance is mentioned, it is to be performed to the obligee in person, who may designate any reasonable place of performance.

CONTRACT, PLACE OF PERFORMANCE OF AGREEMENT TO SUPPORT ANOTHER.—One who, by virtue of an agreement, is entitled to receive support from another, and to be furnished with comfortable rooms, food, clothing, medicines, and medical attendance, cannot be required to receive them at the house of the promisor. The obligation of the latter is to supply them at any reasonable place designated by the former.

UNDER A MORTGAGE CONDITIONED THAT THE MORTGAGOR WILL SUPPORT THE MORTGAGEE during life, the latter has the right to support where he shall choose to reside, subject to the qualification that the place selected shall not impose needless expense on the mortgagor. The latter has no right to insist that such support shall be received at his place of residence.

CONTRACTS FOR SUPPORT, made by and in favor of persons of declining years with children or relatives, upon adequate consideration, should receive a liberal construction in favor of the obligees, and must be understood as entitling them to be comfortably situated, as well as to be supplied with adequate food, clothing, and other necessities. They should be allowed reasonable liberty in the choice

of their situation and surroundings, and not compelled to remain under the roof and within the control of the parties whose pecuniary interest it is to be relieved of the burden at the earliest moment.

EVIDENCE, PAROL TO CONTROL AGREEMENT FOR SUPPORT.—Testimony as to what was said prior to the execution of a mortgage conditioned for the support of the mortgagees as to where they were to live after such execution is not admissible to vary the effect of the mortgage, so as to obligate the mortgagor to furnish such support only at his own residence.

CONTRACT FOR SUPPORT, ATTEMPT TO RESCIND DOES NOT WAIVE RIGHT TO ENFORCE.—The fact that the mortgagee of a mortgage conditioned for his support during life brings suit to set it aside and a conveyance preceding it on the ground of alleged fraud and undue influence does not preclude him from subsequently maintaining a suit to foreclose the mortgage.

Suit to foreclose a mortgage made by P. W. H. Tuttle in favor of William Burgett. The mortgagee, being the owner of a considerable amount of real and personal property, conveyed both to his son in law, in consideration of an agreement made by the latter, and to secure the performance of this agreement received a mortgage upon the property thus conveyed, the condition of which recited the conveyance of the real and personal property, and that it was delivered in consideration of supporting said William Burgett and Mary Burgett during the terms of their lives, and the condition of such mortgage was further thus described therein: "To furnish each of them with comfortable rooms, food, clothing, medicines, and medical attendance in sickness, and at their death to place at the grave of each of them a marble slab properly inscribed; to pay to William Burgett fifty dollars each year, and to carefully provide for each of them the necessaries and comforts of life, suitable for persons of their age and situation in life." The deed and mortgage were executed April 4, 1884. A short time afterward, Burgett and his wife left the farm on which they had previously resided, and went to live with Tuttle in the village of Geneva, some miles distant. In February following, they became dissatisfied, and went to the home of their son Henry, after which they soon left there, and went to the home of another son in law, Woodruff, where they remained until their death, both dying on the same day, January 28, 1886. Tuttle, when Burgett and wife were leaving his house, forbade their doing so, and declared in the presence of their son Henry that he would not provide for them while they were away nor pay for anything furnished to them, and he subsequently gave the same information to the other son in law, Woodruff. Tuttle, however, pleaded in his answer that he was always ready and willing to furnish and provide at his home in Geneva everything that he was required to do by the

condition of the mortgage, and that he was prevented from doing so by the absence of Burgett and his wife. Burgett, after leaving Tuttle, brought a suit to set aside the deed and mortgage, and to recover back the property transferred by him to Tuttle, alleging that the conveyance and transfer were obtained by fraud and undue influence while he and his wife were incapacitated by age, sickness, and their enfeebled condition from transacting business. This action was never brought to trial, but was dismissed after the death of the mortgagees. While Burgett and his wife lived at their son Henry's, and also while they resided with their son in law Woodruff, it was under an agreement to pay reasonable compensation for their support. After the death of Burgett and his wife, administration was granted on the estate of the former, and the son Henry and the son in law Woodruff presented their claims for such support, which were allowed by the proper court; and this suit was brought to foreclose the mortgage for the amount found due upon the claims so allowed. Judgment was rendered in favor of the complainant in the trial court. During the progress of the trial, the defendant offered evidence of verbal declarations which he claimed were made by Burgett while negotiations were in progress between him and Tuttle, to the effect that if such negotiations were consummated, Burgett expected that he and his wife would live at Tuttle's at Geneva. Such evidence was rejected by the trial court. The defendant prosecuted a writ of error.

Barrows & Jerome and F. R. Smith, for the plaintiff in error.

Howland & Starkey, for the defendant in error.

502 WILLIAMS, J. In behalf of the plaintiff in error, it is claimed: 1. That under the agreement of the parties as expressed in the condition of the mortgage, Burgett and his wife were obliged to receive their maintenance and support at the residence of Tuttle, and, therefore, the failure or refusal to furnish it elsewhere constituted no breach of the condition; or 2. If such is not the legal effect of the condition as written, it was competent to prove by the verbal declarations of Burgett, made contemporaneously with the execution of the contract, or prior thereto, that the support and maintenance were to be provided at the house of the mortgagor; and 3. That the commencement of the suit by Burgett to set aside the conveyance was an abandonment and repudiation of the contract by him, which excused further performance of it by Tuttle.

1. The agreement as expressed in the mortgage contains no stipulation which makes it a condition to the right of the mortgagee and his wife to the support which Tuttle thereby agreed to furnish that it be accepted at the home of the latter, or which requires that it be either furnished or received at that or any other specified place. It is silent on that subject, and creates a general obligation on the part of Tuttle to supply Burgett and wife with whatever ⁵⁰³ he agreed to furnish them, without limitation as to the place where performance of the agreement should be made, or might be required. The obligation is expressed in the language of the promisor who executed the mortgage, and, according to a well-established rule, should be taken most strongly against him, if there be doubt or ambiguity in its terms. If it were the intention of the parties that performance of the obligation could be required only at a particular place, that intention could easily have been expressed, as could any other condition qualifying the rights of the promisee. As a general rule, where no place is mentioned for the performance of an obligation, it is to be performed to the obligee in person, who may designate any reasonable place of performance; and that rule has been held applicable, in many cases, to contracts of the kind we have under consideration: *Wilder v. Whittemore*, 15 Mass. 262; *Crocker v. Crocker*, 11 Pick. 252; *Thayer v. Richards*, 19 Pick. 398; *Pettee v. Case*, 2 Allen, 546; *Hubbard v. Hubbard*, 12 Allen, 586; *McArthur v. Gordon*, 126 N. Y. 597; *Stillwell v. Pease*, 4 N. J. Eq. 74; *Rowell v. Jewett*, 69 Me. 293.

In some of the cases cited, the question arose upon the construction of wills, requiring devisees or legatees to provide support for persons named; while in others, it was made on mortgages with conditions similar to that of the mortgage in question; and the rule as stated is recognized in all of them. In the case of *Wilder v. Whittemore*, 15 Mass. 262, it was held that: "Upon a mortgage, conditioned that the mortgagor shall maintain and support the mortgagee during life, the mortgagee has the right to support wherever he shall choose to reside, so that needless expense be not created to the mortgagor." ⁵⁰⁴ And in *Pettee v. Case*, 2 Allen, 546, the court held that the condition of a mortgage, not differing in any essential feature from the one before us, was broken when the mortgagor, after knowledge that the persons entitled to support are at a reasonable place, where they intend to receive their support, declares to the person in whose family they are that he will not pay for their support at that place, and does not pay therefor, though no special demand is made upon him for the support. It is said in the

opinion of the court that, under such a contract, the mortgagor "was bound to support the mortgagees, without their making a demand for support. And they were not bound to receive support at his house, but had a right to be supported wherever they might choose to live, provided they cause no needless expense." We concur in that interpretation, and find nothing in the obligation of the plaintiff in error which requires a different construction, or gives it any different effect.

Contracts of this nature, entered into by persons of declining years, when their capacity for business has in some measure become impaired, with children or relatives who receive not only a full consideration for their engagement, but usually something in the way of bounty also, should receive a liberal construction in favor of such elderly people, and the courts have enforced a corresponding performance in their behalf. A comfortable support and maintenance which Tuttle's agreement bound him to furnish, must have been understood by the parties to be such as would comfortably situate Burgett and his wife, as well as supply them with adequate food and clothing, and other necessities of life; and to afford them that comfort, they should be allowed reasonable ⁵⁰⁵ liberty in the choice of their situation and surroundings, there being no express limitation in that respect contained in the contract. To deny them that privilege, and compel them to remain under the control of the party whose pecuniary interest it is to be relieved of the burden at the earliest moment, would place them in a condition of dependence scarcely less in degree than that of persons under guardianship, and occasion a constant dissatisfaction and discomfort, which would defeat an important purpose, and the real spirit of the contract, though there should be the strictest observance of its letter in the supplies provided for them; and that restraint should not be imposed unless it is made to appear with reasonable certainty that such was the agreement of the parties.

The cases of *Parker v. Parker*, 126 Mass. 433, and *Currier v. Currier*, 2 N. H. 75, 9 Am. Dec. 43, are cited in support of the construction claimed by the plaintiff in error. In the former of these cases, in giving construction to a will by which the testator gave to his widow during life the use of all his property, including the homestead farm where he and his family had always lived, and to his unmarried daughter a small sum of money, and "a home and maintenance during the time she remained unmarried," it was held to be the intention of the testator that the daughter should have "the home and maintenance" given her on the farm where the family lived. It was evidently expected by

the testator that the widow would remain on the homestead devised to her, and that the daughter, while she remained unmarried, should live at home with her mother. In giving that construction to the will, the court said: "Where a testator provides in his will that his wife, child, or other person ⁵⁰⁶ shall be supported and maintained by his executor, or where the condition of a deed or mortgage recites that the grantee or mortgagor shall support the grantor or mortgagee, and the instrument does not point out that the support shall be provided in a particular place, then the party so entitled may have the support where, under reasonable limitations, he may choose to reside. But if the instrument points out the place where the support shall be furnished, it is not the right of the party entitled to receive it to demand that it shall be furnished elsewhere. Each case must be decided on its own facts, looking to the instrument and the surrounding circumstances." In *Currier v. Currier*, 2 N. H. 75, 9 Am. Dec. 43, a son in law, in consideration of a conveyance of land made to him by his father in law, agreed to pay the latter's debts and provide necessary support for him and his wife; or, on failure to do so, to lease to them for life the farm where he resided; which latter clause, it was held, sufficiently indicated the home of the son in law as the place of performance of his agreement. The court say that where, in contracts of that description, the parents retain a life lease or mortgage interest in the farm they occupied before, "the place of performance would then seem to be the house before occupied by the parents." What would be the proper interpretation of a mortgage, securing an engagement to support the mortgagee, taken upon lands granted to the mortgagor as the consideration of his promise, was not before the court, and the statement of what seemed to that court would be the proper construction of such an instrument concerning the place of performance is against the weight of authority, as will be seen by reference to the cases we have hereinbefore ⁵⁰⁷ cited, which, in our opinion, establish the better rule. But conceding the force of the circumstances mentioned as indicating the home occupied by the parents, or that of the testator, as the place for the performance of such an engagement, they are without force as tending to fix any other place where support shall be furnished; and, therefore, neither of the cases relied on by the plaintiff in error sustains his contention that his home in Geneva, remote from the Burgett homestead, was the place where he should perform his contract; and, as neither of the parties claim the homestead was such place of performance, the cases lose their applicability, and

leave the obligation of Tuttle in that class where no particular place of performance is specified.

2. The record shows that on the trial in the circuit court, counsel for the plaintiff in error asked of one of his witnesses what Burgett said, prior to the execution of the deed and mortgage, "as to where he was to live if this contract was entered into." An objection to the question was sustained, and an exception taken, counsel stating that he expected "the answer would be that, at the time the contract was made, it was understood between them, and Mr. Burgett said that he expected, if the contract was made, to live at Mr. Tuttle's in Geneva; that he was going to live with Mr. Tuttle; that one inducement in making the contract was to get off the farm." The exclusion of that testimony is assigned for error, and it is contended that it was admissible under the rule which permits proof of the circumstances surrounding the parties when a written contract is entered into.

508 There can be no doubt that, in giving construction to a written instrument, regard may be had to the situation of the parties and the surrounding circumstances; and these may be shown by parol, to enable the court called on to interpret the instrument the better to understand its terms, and arrive at the intention of the parties when not clearly expressed. But we do not understand that the oral declarations of a party made prior to or at the time of the execution of the instrument, of an intention or purpose not therein expressed, or different from that properly derived from its terms, are within the rule; and unless the evidence excluded by the court below had that effect, it was wholly immaterial and its exclusion of no legal significance. It was competent to show, as was done at the trial, that after the deed and mortgage was delivered, Burgett and wife went to live at the home of Tuttle; but, since by the terms of the mortgage they were entitled to receive their support and maintenance at such reasonable place as they might select, the fact that they accepted it for a time at Tuttle's house, was not inconsistent with their claim that they had a right to receive it elsewhere; nor did it establish a practical construction of the mortgage at variance with that claimed by the plaintiff in the action.

3. The claim most earnestly pressed by the plaintiff in error is, that the suit of Burgett to set aside his conveyance and recover back the property transferred to Tuttle, relieved the latter from the further performance of his agreement. It may be accepted as a general principle that where one party refuses performance of his part of an executory agreement, or denies his

obligation to perform, the other party cannot be compelled ⁵⁰⁰ to perform his part of the contract; but the application of that principle here is not so apparent. Burgett had fully performed his part of the contract made with Tuttle, by the conveyance of the farm and delivery of personal property in accordance with its terms. Nothing remained for him to do; but the contract was executory on the part of Tuttle only. Having concluded he had been overreached in the transaction, Burgett sued to rescind and recover what he had parted with under it. Tuttle might have accepted the offer of rescission thus made, which, if followed with a reconveyance and surrender of the property, or by a decree restoring the property, would undoubtedly have discharged him from all further liability. But he resisted the suit, which was abandoned and dismissed without trial, leaving the parties in the same situation as if it had never been commenced; and if the claim he now makes were sustained, he would be enabled to retain both the property and the consideration he agreed to pay for it. That, we think, he cannot be allowed to do. While he retained the property his obligation to furnish a support for Burgett and his wife was a continuing one so long as they lived, which could only be discharged by performance, or voluntary relinquishment. The trial court found there had been a failure to perform; and the suit afforded satisfactory evidence of a purpose on the part of Burgett to secure the whole of the property for his use, instead of so much only as could be enforced under the mortgage, from which an intention to forego the benefits of the mortgage, if he failed to establish his right to the restoration of the property, could not reasonably be inferred. The case of *Jenkins v. Stetson*, 9 Allen, 128, on which reliance ⁵¹⁰ is placed by plaintiff in error, rests upon the general principle we have stated. There, a suit was brought on a bond by which the plaintiff agreed to support a widow and her two daughters during their natural lives, in consideration of which the daughters agreed to leave him and his heirs all of their personal property, including what they should receive from their father's estate. The mother and one of her daughters having died, the surviving daughter took up her residence with a brother in law, and afterward left her personal estate, by will, to her sisters. There was no evidence that the plaintiff had been requested to furnish any support to the daughter after she went to her brother in law's house, but she was requested by the plaintiff to return to his house and receive her support there. It was held that, under the circumstances of that case, a failure by the plaintiff to tender the support at the brother in law's

house was not a breach of the bond. But it was not held that the daughter was not entitled to receive it there if she had so requested, nor that a failure to so furnish, after demand made, would not have been a breach. The proposition declared is: "It is not sufficient proof of a breach of a bond to support another during his natural life to show that he left the house of the person bound to furnish such support and resided elsewhere for several years, without at any time requesting him to fulfill his agreement or in any way exhibiting to him an intention or desire to hold him to the performance thereof." It will be observed that the agreement under which the party was entitled to support in that case was executory on her part, she having agreed to leave all her personal property to the plaintiff as the consideration ⁵¹¹ for his promise to support her; and that she did not perform her part of the agreement, but left her property to other persons. That feature of the case, the court say, tended "very strongly to show that it was her intention, without the knowledge or assent of the plaintiff, to avoid the obligation of the contract into which she had entered with him, and, by ceasing to receive support at his hands, to get rid of the performance of her part of this mutual obligation. Under such circumstances, a tender of performance by the plaintiff was not necessary, and no inference of a failure or omission by the plaintiff to fulfill the agreement would have been warranted."

We see nothing in that case which conflicts with the conclusion we have reached in this one. Here the contract, as we have seen, entitled Burgett and his wife to have performance of it by Tuttle at such reasonable place as they should select, and he having declared his intention not to furnish them support while absent from his house, no demand upon him was necessary to an action on the mortgage for the reasonable value of their support by others while so absent.

Judgment affirmed.

CONTRACTS—PLACE OF PERFORMANCE.—Where no place is designated for the performance of an obligation, it must as a general rule, be performed to the obligee in person: *Currier v. Currier*, 2 N. H. 75; 9 Am. Dec. 43, and note. The presumption is, that a contract was intended to be performed at the place where it was made: *Speed v. May*, 17 Pa. St. 91; 55 Am. Dec. 540; *Jones v. Perkins*, 29 Miss. 139; 64 Am. Dec. 136; *Lewis v. Headley*, 36 Ill. 433; 87 Am. Dec. 227, and note.

CONTRACT TO SUPPORT—PLACE OF PERFORMANCE.—On one person engaging to furnish support for another without designation of any place where it is to be furnished, the support must be provided where the person to be supported elects to receive it, without occasioning unnecessary expense: *Norton v. Webb*, 36 Me. 270; 58 Am. Dec. 745.

WEBSTER v. DWELLING HOUSE INSURANCE COMPANY.

[53 OHIO STATE, 558.]

A FORFEITURE IS a deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition.

FORFEITURES ARE NOT FAVORED either in law or in equity.

FORFEITURES ARE TO RECEIVE A STRICT CONSTRUCTION, when the intent is doubtful, against those for whose benefit they are introduced.

A POLICY OF INSURANCE ISSUED TO A HUSBAND AND WIFE cannot be avoided on the ground that the real property described therein was wholly hers and the personal property wholly his, while in the application it was represented as theirs jointly. By the use of this word they did not necessarily affirm that they were tenants in common, but merely that they together owned the property, and that no other person was interested in it, it being in their joint possession and use as husband and wife.

INSURANCE.—A JOINT ACTION MAY BE MAINTAINED BY A HUSBAND AND WIFE on a policy of insurance issued to them upon a dwelling used as a homestead, though the title thereto was vested wholly in the wife.

INSURANCE, ENCUMBRANCE UPON PROPERTY.—Though a policy of insurance provides that if an encumbrance shall be placed on the property without notice to, or consent by, the insurer, the policy shall become void, no recovery can be had if the condition is violated, though such violation does not increase the risk, and though a statute of the state requires every insurer before issuing a policy to examine the building or structure insured and the insurable value thereof, and that in the absence of any change increasing the risk without the consent of the insurer and also of intentional fraud, in case of total loss, the whole amount mentioned in the policy shall be recovered.

INSURANCE, CHANGE INCREASING RISK, CONSTRUCTION OF STATUTE.—A statute requiring every insurer before issuing a policy to examine the building or structure to be insured, and to fix the insurable value thereof, and that recovery may be had notwithstanding any subsequent change not affecting the risk, applies only to the condition of the building or structure, and does not impair the effect of the condition in the policy against the making of any subsequent encumbrance on the property without notice to, and consent by, the insurer.

Action on a policy of insurance against loss by fire issued to James E. Webster and wife for two thousand dollars on a dwelling-house and two hundred and fifty dollars on farm implements. The defenses were: 1. Misrepresentations by the insured in representing the property to be owned by them jointly, when, in fact, the house was owned wholly by the wife and the personal property wholly by the husband; and 2. That after receiving the policy, the persons insured had placed a mortgage on the real estate without notice to, or consent by, the insurer. In the trial court, no evidence was offered respecting the personal property, and judgment was entered in favor of the plaintiffs for the amount of the insurance upon the dwelling.

Edward H. Fitch and A. J. Trunkey, for the plaintiffs in error.

Squire, Sanders & Dempsey, for the defendant in error.

⁵⁶² SPEAR, J. The action of the trial court which was the ground of reversal may be more briefly treated by considering defendant's requests to charge which were refused than by a review at large of the charge as given.

1. As applicable to its defense of forfeiture by reason of alleged false representation and warranty regarding ownership of property, the defendant requested the court to charge that "no recovery can be had in this action for the loss of any property described in the policy if the jury are satisfied from the evidence that Mrs. Webster had no interest or ownership in the personal property mentioned in the policy, and that Mr. Webster had no ownership or interest in the dwelling-house described in the policy."

The claim of the company on this branch of the case was and is, that in the face of the representation and warranty of the insured that they jointly owned the property, there could be no recovery on a policy issued to them jointly, so long as the proof disclosed that the wife was sole owner of the dwelling and the husband sole owner of the personalty; in effect that the agreement was violated the moment it was made, and although the parties had paid the company forty-five dollars as premium, which the ⁵⁶³ company retained, yet that there never was any valid contract, and the insured, although acting in entire good faith, never had a dollar of insurance on their property.

Perhaps, technically speaking, the claim is not one of forfeiture, for forfeiture is a deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition, and we are not accustomed to associate the idea of forfeiture with a contract which has not existed; but, manifestly, the law as to forfeiture will furnish a guide to the proper disposition of the question. Relief against forfeitures is matter of equitable cognizance, but rules applicable to the subject are resorted to in courts of law, and there seems no good reason why the principles which govern courts of equity should not be available in a suit at law where the facts make such cognizance necessary to the ends of justice.

A primal rule is, that forfeitures are not favored either in equity or at law; indeed, it is declared as a universal rule that courts of equity will not lend their aid to enforce a forfeiture. Following as a corollary from this, provisions for forfeitures are

to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced: *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; 22 Am. Rep. 294; *Manhattan Ins. Co. v. Smith*, 44 Ohio St. 156; 58 Am. Rep. 806; *Blackwell v. Insurance Co.*, 48 Ohio St. 533; 29 Am. St. Rep. 574; *Livingston v. Stickles*, 7 Hill, 255; *Catlin v. Springfield F. Ins. Co.*, 1 Sum. 434; *Breasted v. Farmers' Loan etc. Co.*, 8 N. Y. 305; 59 Am. Dec. 482. As said by Sherman, J., in *Bond v. Swearingen*, 1 Ohio, 403, respecting a statutory forfeiture: "Whatever may be the nature or kind of forfeiture, it is never carried by construction beyond the clear expression of the ⁵⁶⁴ statute creating it." And by Porter, J., in *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 413; 88 Am. Dec. 337: "It is a rule of law, as well as of ethics, that when the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee: *Potter v. Onterio etc. Ins. Co.*, 5 Hill, 149; *Barlow v. Scott*, 24 N. Y. 40. It is also a familiar rule of law, that if it be left in doubt, in view of the general tenor of the instrument and the relation of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which it most beneficial to the promisee: *Coke on Littleton*, 183; *Bacon's Law Maxims*, reg. 3; *Doe v. Dixon*, 9 East, 16; *Marvin v. Stone*, 2 Cow. 806. This rule has been very uniformly applied to conditions and provisions in policies of insurance, on the ground that though they are inserted for the benefit of the underwriters, their office is to limit the force of the principal obligation: *Yeaton v. Fry*, 5 Cranch, 341; *Palmer v. Warren Ins. Co.*, 1 Story, 364, 365; *Petty v. Insurance Co.*, 1 Burr. 349." See, also, *Western etc. Pipe Line v. Home Ins. Co.*, 145 Pa. St. 346; 27 Am. St. Rep. 703; *Chandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386; *Baley v. Homestead etc. Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570; *Burleigh v. Gebhard F. Ins. Co.*, 90 N. Y. 221; *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417; 53 Am. Rep. 202.

Applying the foregoing rules, how stands the case? This defense is based entirely on the language of the representation. In giving construction to this representation, what meaning should be placed on the words used? Manifestly, such as was intended by the applicants, and which the company ⁵⁶⁵ knew, or ought to have known, they intended. Should the word "jointly" receive construction in accordance with strict legal ideas? If

so, does it mean that the plaintiffs were joint tenants as defined by Blackstone, giving right of survivorship? An Ohio lawyer, even, would hardly have that in mind, for joint tenancy does not exist in Ohio. Should the word be held to imply tenancy in common, where two or more hold by an undivided possession but several freeholds, neither being entitled to an exclusive part, but each entitled to occupy the whole in common with the others, and at the death of one his interest to pass to his heirs and not to the survivors? Plaintiffs claim that they did, in fact, state to the agent who filled up the application, the exact condition of the title, and it was not their fault if he did not so write it. But, be this as it may, and even though the word would suggest tenancy in common to the legal mind, these plaintiffs were not lawyers; the property was in the country, and they were, without doubt, plain country folk. Who would suspect them of intending to be understood that their ownership was that of joint tenants, or of tenants in common, within legal definitions? Rather is it natural to presume that they used the word in the popular sense, implying that they owned the property together, and that no other person was interested in it. And they did. They were in the joint possession of the real estate, and were enjoying the use of the personalty together, and no third person was the owner, in any sense, of any part of it. While the title to the real estate was in the wife, and while the husband had no estate in it, yet he had, by force of recent statutes, an inchoate dower right in it, liable to become vested in case she should die seised of it ⁵⁶⁶ leaving him her widower, a substantial property right, capable of valuation in a proper proceeding, and, under section 3111 of the Revised Statutes, he could not, even during her life, their marital relations remaining, be excluded from her dwelling.

Nor was the alleged failure to state the exact ownership prejudicial to the company. The purpose of statement of ownership is to prevent the making of wagering contracts, or such as would afford a temptation to the insured to purposely or negligently permit the property to burn; and this purpose would seem to be fully accomplished when it appears that the wife and husband own all the property covered by the policy, and are in possession and use of it in common, although there be a small portion of which the wife has not legal ownership, for usually there is no more vigilant guardian of the husband's interests than is the wife. The property is used by both, for their common comfort and welfare, and that of the family. In the hus-

band's absence, the wife has, ordinarily, the entire charge of it, and her interest in its preservation is scarcely second to his.

If the company may stand on a strict technical construction of the words used, and hold the plaintiffs to them, though they did not fully apprehend their legal effect, and ought not reasonably to have done so, it is placed in the position of tempting patrons into the payment of premiums, and into resting on a mistaken belief that they have indemnity, only to find, when the trial comes, that their reliance had been upon a broken reed. A court cannot sustain such a contention. If technical forfeitures are to be maintained on such grounds, confidence in commercial faith will be weakened and important property rights impaired. It would ⁵⁰⁷ be, as it seems to us, carrying technicality to a most unreasonable length, to hold that the representation as to ownership shall forfeit the policy.

Whether a joint action could have been maintained for the personal property we need not determine, for no proof of loss of personal property or its value having been offered, that claim dropped out. It was held in *Dwelling House Ins. Co. v. Leedy*, decided at January term, 1894 (though not reported), that the interest of the husband in the wife's dwelling-house, used as a homestead by the family, is sufficient to support a recovery by the two jointly on a policy issued to both, and we but follow that case in holding that the action was properly brought in the name of both in this case. The instruction was properly refused.

2. Defendant also requested the court to charge that "if the plaintiff, after the issuing of the policy sued upon and before the loss, placed a mortgage lien upon the real estate upon which the house burned was situated, without notice to the company, or its consent to such encumbrance, such action on the part of the plaintiff was in violation of the terms of the policy, and rendered the policy void, and the plaintiffs, if the jury find the facts as above stated, cannot recover in this action."

This the court refused to give, and charged in substance that the creating of a mortgage encumbrance after the issuing of the policy and before the fire, without notice or consent by the company would not of itself constitute a defense, but that it would constitute a defense if the jury should find that the giving of such mortgage materially increased the risk. This holding rests upon the proposition that the facts bring the case within the ⁵⁰⁸ operation of section 3643 of the Revised Statutes, and that it is governed by that part which reads as follows: "Any person, company, or association hereafter insuring any building or struc-

ture against loss or damage by fire or lightning, by a renewal of a policy heretofore issued, or otherwise, shall cause such building or structure to be examined by an agent of the insurer, and a full description thereof to be made, and the insurable value thereof to be fixed by such agent; in the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal upon which the insurers receive a premium shall be paid; and, in case of a partial loss, the full amount of the partial loss shall be paid."

No question is made as to the import of the language of the policy in respect to the creating of mortgage liens. It is so clear that its meaning could not have been misapprehended, and is to be enforced as written, unless the statute controls the case. We are not able to agree with the construction of this statute given by the learned trial judge. As we construe the statute, the examination required of the agent before taking the risk relates to the physical condition of the property, such as an inspection would disclose, and does not relate to the matter of encumbrances, and hence the change referred to in the statute relates to some physical change in the insured building, its use, or its surroundings, which would, by reason of changed condition, naturally increase the hazard incurred by the company, and does not relate to a change respecting ⁵⁰⁰ encumbrances. And that where a policy of insurance, as in this case, stipulates that if any part of the property shall be encumbered by mortgage without the consent of the company the policy shall be void, such stipulation is not within the provision of section 3643, and the right of the company to make such condition, and of the insured to accept it, remains notwithstanding the statute. So that if, after the issuing of the policy and before the loss, such encumbrance is created by the insured, without the consent of the company, the policy is thereby invalidated.

The question involved is not different in principle from one of the questions disposed of in *Sun Fire Office v. Clark*, 53 Ohio St. 414, and the reasoning of the opinion in that case is so satisfactory, and so well supports the conclusion here reached, that further discussion is deemed unnecessary. It is further supported by the able opinion of the learned judge of the circuit court in *Dwelling House Ins. Co. v. Webster*, 7 Ohio C. C. 511, to which special reference is here made. Our conclusion is also in harmony with the decision in *Insurance Co. v. Leslie*, 47 Ohio St. 409, and not inconsistent with the judgment of this court

affirming Insurance Co. v. Bowersox, 5 Ohio C. C. 444, and the judgment affirming Insurance Co. v. Krukall, 7 Ohio C. C. 356, when the records in those cases are understood.

It follows that in refusing this instruction, and in the charge as given, the common pleas erred.

Judgment affirmed.

FORFEITURES DO NOT FIND FAVOR IN THE LAW, and courts are reluctant to declare and enforce them, if, by reasonable interpretation, it can be avoided: Coleman v. Insurance Co., 49 Ohio St. 310; 34 Am. St. Rep. 565, and note. See, also, the extended note to Smith v. Mariner, 68 Am. Dec. 85.

INSURANCE—FORFEITURE—CONSTRUCTION.—A condition in a policy of insurance involving a forfeiture will be construed most favorably to the assured and most strongly against the insurer: Mutual Assur. Soc. v. Scottish Union etc., Co., 84 Va. 116; 10 Am. St. Rep. 819.

INSURANCE—JOINT ACTION BY HUSBAND AND WIFE.—A husband and wife are entitled to join as plaintiffs in an action upon a policy to recover their respective losses, where the policy has been issued to them jointly for a specified amount upon a building which is the separate property of the wife and for not exceeding an amount named upon a stock of merchandise in said building, which merchandise is the separate property of the husband, in consideration of a single sum paid by them as premium, both properties having been destroyed by fire: Graves v. Merchants' etc. Ins. Co., 82 Iowa, 637; 31 Am. St. Rep. 507.

ZANESVILLE v. FANNAN.

[58 OHIO STATE, 605.]

MUNICIPAL CORPORATIONS, OBSTRUCTION IN STREETS, RIGHT OF RAILWAYS TO MAINTAIN.—A statute providing that, if it be necessary in the location of a railway to occupy any street, the municipal officers and the company having charge of the railway may agree upon the terms, manner, and condition of such occupancy, but that every such company shall be answerable for injuries done to private and public property, does not authorize any obstruction of the public streets amounting to a nuisance, nor does it divest the municipal officers of their power, nor absolve them from their duty, to keep the streets free from such obstructions. The railway company must exercise its rights with proper regard for those of the public in the streets.

A RAILWAY CORPORATION CROSSING A HIGHWAY with its roadway must, with reasonable promptness, restore the highway to its former condition of usefulness.

MUNICIPAL CORPORATION, OBSTRUCTION IN STREETS, LIABILITY FOR, WHEN A RAILWAY IS ALSO LIABLE.—The fact that by law a railway corporation using a street is answerable for obstructions maintained by it therein does not relieve the municipality from liability. A citizen injured by such obstruction may maintain an action either against the railway or against the municipality, at his election.

A MUNICIPAL CORPORATION IS LIABLE at common law for permitting a nuisance in the streets under its control.

STATUTORY REMEDIES, WHEN CUMULATIVE.—A remedy given by a statute for a right existing independent of it without excluding remedies already known to the law is cumulative merely.

A MUNICIPAL CORPORATION IS NOT ANSWERABLE TO A PROPERTY HOLDER for damages arising from the use of the streets by a railway corporation, which are in the nature of compensation for additional burdens in the streets arising from the proper construction and operation of the railway therein, such as he would be entitled to recover in an appropriation proceeding commenced by the railway corporation. It is otherwise as to the improper use or obstruction of the street by a railway corporation, and which it is not authorized to make.

Action against the city of Zanesville. The complaint, among other things, alleged the existence of certain public streets and alleys in that city; that the plaintiff owned a lot fronting thereon, and had improved it by the erection of a dwelling, which he occupied as his home; that the city, by its council, consented to a certain railway corporation's taking possession of and using a part of the street; that such railway and its successors in interest took possession of the whole of the street and alley, laid tracks thereon, raised embankments, put down crossties, and fastened rails thereon, and entirely blocked and obstructed the street, completely destroying the approach to the alley, so that the streets were wholly rendered useless for the purposes for which they were laid out, and the plaintiff and his family had been deprived of access to their house by wagons and teams, and that the passage of water had been obstructed along the public gutters and drains in the streets, and cast upon plaintiff's lot and into his cellar. A general demurrer interposed to the complaint was overruled. The plaintiff recovered judgment in the trial court, and the defendant prosecuted a writ of error.

Isaac Humphrey, for the plaintiff in error.

Granger & Granger, for the defendant in error.

613 WILLIAMS, J. The question argued by counsel, and the only one presented by the record, is whether the facts stated in the petition entitle the plaintiff to any part of the relief demanded. It is contended they do not, because, by section 3283 of the Revised Statutes, a remedy is given against the railway companies that placed the obstruction in the streets of the defendant which caused the damages suffered by the plaintiff.

That section reads as follows: "If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporations, or public officers or authorities, owning or having charge thereof, and the company may agree

upon the manner, terms, and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way, or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals; but every company that lays a track upon any such street, alley, road, or ground shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two years from the completion of such track."

If the defendant had put its streets in the condition complained of, its liability could not be doubted: *Rhodes v. Cleveland*, 10 Ohio, 159; 36 Am. Dec. 82; *Dillon* ⁶¹⁴ on Municipal Corporations, 4th ed., secs. 1017, 1018; *Beach* on Public Corporations, sec. 1494. Any permanent obstruction or encumbrance in any street of a municipal corporation is made a nuisance by statute (Rev. Stats., sec. 6921), which the municipal authorities are invested with the power and charged with the duty of removing: Rev. Stats., secs. 1690, 1878, 1934, 2640. And those powers and duties continue when a railroad company has placed its tracks in a public street, whether they were so placed under permission granted by the municipality, or under an appropriation for that purpose. In neither event are the municipal authorities divested of their powers, nor absolved from the performance of their duties. Nor does section 3283 contemplate that a railroad company, in the use of a street for the purposes of its road, under a right acquired in either of the modes provided, may destroy the same, or create nuisances therein. On the contrary, it contemplates that the company shall exercise its rights with proper regard to those of the public in the street, and that the street and its uses by the public shall be preserved and protected, with such additional use as may be necessary in the proper operation of the railroad, which is itself a means of public use. If the permission to occupy the street be granted by the municipal authorities, they may and should prescribe such reasonable regulations and conditions as will prevent the creation of nuisances, and preserve and best protect the free and full use of the street by the public. And in the proceeding to acquire the right by appropriation, it cannot be assumed as a proper basis for the estimation of compensation or damage that the company will destroy the street, or create nuisances therein.

⁶¹⁵ The next section requires that such companies when a public highway is crossed or diverted by their roadway, shall, with reasonable promptness, restore the highway to its former condition of usefulness; and this requirement of the statute is but a declaration of the common-law rule. "The common-law rule is clear," says Tiedeman on Municipal Corporations, section 306, "that when a railroad company or other corporation lays out a railway or canal across a public street or highway, it must restore and afterward keep the highway in the same condition in which it was originally used by the public. This duty is imposed upon such a company by implication of law, where there is no express statutory requirement": And see *State v. St. Paul etc. Ry. Co.*, 35 Minn. 131; 59 Am. Rep. 313; *Railroad Co. v. Defiance*, 53 Ohio St. 262, 314. This obligation of the company is inseparably connected with the right to use the highway, and is a condition to the exercise of that right, which it may be compelled to perform so long as it continues to use the highway, either by appropriate proceedings by the state, or by the local authorities: *State v. Dayton etc. R. R. Co.*, 36 Ohio St. 434; *Little Miami R. R. Co. v. Commissioners*, 31 Ohio St. 338. The duty rests upon the principle that the public use is the dominant interest in the street, and that it continues to be so notwithstanding the construction of the railway in or across it. Thereafter, the rights of the public and the railway company are co-ordinate and equal, and the latter is bound to so construct and use its roadway as not to interfere with the use and enjoyment of the street by the public further than is essential in the proper operation of the road; and the principle applies as well when the railway is laid lengthwise in the street, as when it is laid across

⁶¹⁶ it. And hence, as said by the supreme court of Michigan, in *Detroit v. Fort Wayne etc. Ry. Co.*, 90 Mich. 646: "A city is not under obligation to conform its treatment of its streets to the construction of the railroad company's roadbed, but, on the contrary, the company must conform the construction of its roadbed to such reasonable regulations as are made by the municipality in the reasonable exercise of its powers respecting the use, control, and regulation and improvement of its streets." And that obligation, the authorities maintain, may be enforced by mandamus or other proceeding: *Elliott on Roads and Streets*, 600; *Cooke v. Boston etc. R. R. Corp.*, 133 Mass. 185; *Manley v. St. Helen etc. R. R. Co.*, 2 Hurl. & N. 840; *Indianapolis etc. R. R. Co. v. State*, 37 Ind. 489; *State v. Gorham*, 37 Me. 451; *Cambridge v. Charlestown etc. R. R. Co.*, 7 Met. 70; *Rex v. Railroad*, 9 Car. & P. 494; *State v. Dayton etc. R. R. Co.*, 36

Ohio St. 434; Little Miami R. R. Co. v. Commissioners, 31 Ohio St. 338; Detroit v. Ft. Wayne etc. Ry. Co., 90 Mich. 646.

The streets of a municipal corporation, then, remaining within its control and supervision, attended with the duty to keep them free from nuisance, notwithstanding the laying of a railway therein, can it be relieved from liability for its negligent omission of duty because the railway company is itself answerable for the damages occasioned by a nuisance caused by it? In section 1037 of Dillon on Municipal Corporations, it is said: "Towns and cities in the New England states are obliged, as we have seen, by statute, to keep their highways and streets in repair, and railroad companies in the same states have frequently been authorized by law to construct their roads over public highways and streets, the effect of which may be to cause the ⁶¹⁷ latter to be out of repair. Under these circumstances, the question arises, if a person suffer damage by reason of a defective highway or street thus occasioned, who is responsible, the railroad company which caused the defect, or the town or city which is charged with the general duty of maintaining and keeping in repair the public way? The course of decision is to hold the town or city primarily responsible to the person sustaining the injury, thus compelling it, when liable, to seek indemnity from the railroad company." The author cites many cases in support of his statement, and in a note to the section it is said the rule holds good in other states; and among the other cases cited to the note is Steubenville v. McGill, 41 Ohio St. 235. It is further said in the note that the person sustaining the injury "may, of course, elect to proceed at once against the railroad company if he chooses. The primary duty is on the city, although, as between it and the railway company, the latter is bound to repair."

These views are fully supported by the cases. In Sides v. Portsmouth, 59 N. H. 24, it is held: "If a railroad, having the right to cross a highway, does not leave it reasonably safe, and a person is injured thereby, the town may be held liable." Bingham, J., in that case says: "If a railroad company, acting under their charter, creates an obstruction in the highway by which a traveler sustains damage, the town is answerable as if the same acts had been done by an individual."

Scranton v. Catterson, 94 Pa. St. 202, was a case where a party received an injury by reason of a water plug, which was placed in a street of the city of Scranton by a water company, under authority ⁶¹⁸ from the state, before the city became incor-

porated. The city asked the court to charge the jury that if it (the plug) was so placed in the street under such authority, it was not liable, which the court refused to do. On error, the supreme court affirmed the judgment, holding: "That it mattered not who placed the obstruction in the street, provided the city had notice of its existence and failed to remove it." So, in *Eyler v. Commissioners*, 49 Md. 257, 33 Am. Rep. 249, where a person was injured by reason of a defective bridge which had been erected in a public highway by a canal company, which was charged with the duty of keeping the bridge in repair, the county commissioners, however, being required generally to keep all public bridges in repair, it was held the commissioners were liable. The court say: "The fact that the canal company is bound to repair the bridge does not absolve the county commissioners from their primary duty to the public, nor is their liability affected by the fact that the appellant could, if he had chosen, have brought his action against the canal company." But, says the court, "while we thus maintain the liability of the commissioners to the appellant in this action, the canal company is by no means discharged from its obligation to maintain and repair the bridge, nor are the commissioners left without remedy against the company. Upon the principles decided in many of the cases referred to, as also by the supreme court of the United States, in *Chicago v. Robbins*, 2 Black, 418, and *Robbins v. Chicago*, 4 Wall. 657, they may have their remedy over against the company for whatever damages may be recovered against them in this action." Among the authorities in the same line which we have examined are ⁶¹⁹ the following: *Phillips v. Veazie*, 40 Me. 96; *Currier v. Lowell*, 16 Pick. 170; *Elliot v. Concord*, 27 N. H. 204; *State v. Gorham*, 37 Me. 451; *Watson v. Tripp*, 11 R. I. 98; 23 Am. Rep. 420; *Krittredge v. Milwaukee*, 26 Wis. 46; *Swenson v. Lexington*, 69 Mo. 157, 166, 167.

In the case of *Steubenville v. McGill*, 41 Ohio St. 235, this court held a city liable for injuries caused by an excavation made by a railroad company between its tracks, which were laid in a street of the city under an ordinance granting the company the authority to place them there. The city pleaded the ordinance as relieving it for responsibility for so much of the street as was occupied by the railway, averring that the place where the plaintiff was injured had not been used, maintained, or kept up as a street or highway since the railroad was constructed, and was in the exclusive possession of the company. In affirming a judgment sustaining a demurrer to the answer, the court held:

"The city's supervision of, and responsibility for, the street, subject only to the use by the company as granted, continued."

And in *Cardington v. Fredericks*, 46 Ohio St. 442-447, it is declared that section 2640 of the Revised Statutes, which gives to municipal corporations the care, supervision, and control of their public streets, and enjoins upon them the duty to keep the same open and in repair and free from nuisance, is, "in effect, a requirement that the corporation shall prevent nuisances therein"; and, "by allowing a street to become so out of repair as to be dangerous, the corporation itself maintains a nuisance"; and, although the statute does not in terms declare a liability for the failure to perform the duty, "a right of action for damages caused by such neglect arises by the common law."

620 The municipal corporation being, then, liable at common law for permitting a nuisance in a street under its control, and railroad companies, like an individual, being also liable for creating such a nuisance, section 3283, in so far as it provides for an action against the railroad company for damages thus caused, creates no new right, nor does it purport to take away any of the remedies existing at the time of its enactment. The rule is well settled, that where a statute creates a new right, and prescribes the remedy for its violation, the remedy thus prescribed is exclusive; but when a new remedy is given by statute for rights of action existing independent of it, without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option: *Darling v. Peck*, 15 Ohio, 65-71; *Dunn v. Kanmacher*, 26 Ohio St. 497; *Portland v. Atlantic etc. R. R. Co.*, 66 Me. 485.

We conclude, therefore, that section 3283 of the Revised Statutes does not take away or affect the remedy against the municipal corporation in cases of this kind. But that section has a purpose and scope somewhat beyond that of giving a remedy against the railroad company for damages in this class of cases. It authorizes the recovery of damages which are in the nature of compensation for the additional burden in the street arising from the proper construction and operation of the railroad therein, such as the adjacent property owner would be entitled to, in an appropriation proceeding instituted by the company, or a proceeding to compel an appropriation. For damages of that character, we apprehend, the municipal corporation cannot be held; and in that, we think, consists the distinction 621 between the case of *Dellenbach v. Xenia*, 41 Ohio St. 207, and that of *Steubenville v. McGill*, 41 Ohio St. 235, and also this case. There being no showing in the record to the

contrary, we must assume the plaintiff was properly limited in his recovery by the trial court.

Judgment affirmed.

RAILROADS—OBSTRUCTION OF HIGHWAYS.—A grant of power to a railroad company to construct its road along, upon, or across and to use a highway is not, in the absence of express grant to the contrary, a power to so construct the road as to block the highway so that it cannot be used by the public while trains are passing over it, or the company is not otherwise properly using the tracks: *Palatka etc. R. R. Co. v. State*, 23 Fla. 546; 11 Am. St. Rep. 395, and note.

RAILROADS—DUTY TO RESTORE CROSSINGS.—It is the duty of a railroad building its track across a highway to restore it as nearly as possible to its former condition, and, for a failure to do so, it is liable for injuries received on that account by one using due care: *Louisville etc. R. R. Co. v. Pritchard*, 131 Ind. 564; 31 Am. St. Rep. 451, and note. A railroad company cannot escape liability for damages arising from its erecting and maintaining a fence across a highway, on the ground that such obstruction is incidental to raising its roadbed to conform to a grade authorized by municipal authority, if the work of raising the roadbed is not commenced for more than two years after the fence is erected: *Knowles v. Pennsylvania R. R. Co.*, 175 Pa. St. 623; 52 Am. St. Rep. 860.

MUNICIPAL CORPORATIONS—OBSTRUCTIONS IN STREETS. A municipal corporation has no power to authorize private persons or corporations to erect or maintain permanent obstructions to the public streets for private purposes; but it may authorize such obstructions for the purpose of serving the public for private gain: *Savage v. Salem*, 23 Or. 381; 37 Am. St. Rep. 688, and note. A city cannot create a nuisance in its streets, or devote them or any part of them to a purpose inconsistent with the rights of the public or abutting owners: *Lockwood v. Wabash R. R. Co.*, 122 Mo. 86; 43 Am. St. Rep. 547.

RAILROADS IN PUBLIC STREETS which injuriously affect adjacent owners by interfering with access to their property, or the excluding of air and light therefrom, imposes an additional servitude, for which such owners may recover damages: Note to *Lockwood v. Wabash R. R. Co.*, 43 Am. St. Rep. 558, where the cases are collected.

STATUTORY REMEDIES—WHEN CUMULATIVE.—The right to a writ of mandate to compel the furnishing of telephonic facilities is not taken away by a statute imposing a penalty for refusing such facilities. The statutory remedy is cumulative merely: *Central etc. Teleph. Co. v. Falley*, 118 Ind. 194; 10 Am. St. Rep. 114.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BARD v. PENNSYLVANIA TRACTION COMPANY.

[176 PENNSYLVANIA STATE, 97.]

NEGLIGENCE—STREET RAILWAYS—RIDING ON BUMPER.—One who, finding a street-car full of passengers with no standing room either in the car or upon the platform, takes passage on the bumper wholly outside the car, without the knowledge or assent of the conductor, is guilty of contributory negligence, and cannot recover for injury received while thus riding.

A. S. Johns and B. F. Eshleman, for the appellant.

W. U. Hensel, H. M. North, and J. H. Brown, for the appellee.

⁹⁸ Per CURIAM. The appellant attempted to take passage on one of the cars of the defendant company. It was full to overflowing at the time, and there was no standing room in the car or upon the platform. The appellant finally effected a lodgment of one foot upon the platform and supported the other on the outside of it. In this position he held himself by means of the post at the outside corner of the platform, being directly against the outer end of the dash, or enclosure of the platform. An employé of the defendant came to the car to adjust the trolley ⁹⁹ pole, and, to enable him to reach it, he required the appellant to leave the corner where he stood. He then moved to a position wholly outside the car, upon what is known as the bumper. The employé left the car on finishing his work at the trolley pole. It did not appear that any person having charge of the car had seen the appellant or had any knowledge of his position. After he had ridden a short distance upon the bumper, the car stopped to discharge some of its passengers, and, while

standing was struck by a car coming up in the rear, and appellant's foot was injured. Was it contributory negligence on the part of the appellant to take a position wholly outside of the car, and expose himself to the danger that overtook him?

It is argued that it was not, and reliance is put upon the *Thirteenth Street etc. Ry. Co. v. Boudrou*, 92 Pa. St. 475, 37 Am. Rep. 707, for the support of this position. But the plaintiff in that case was riding upon the platform of the car with the knowledge of the conductor.

This court declined to say that it was negligence per se on the part of a passenger to ride upon the platform of a street-car. So in *Germantown etc. Ry. Co. v. Walling*, 97 Pa. St. 55, 39 Am. Rep. 796, the passenger injured was upon the front platform with the knowledge and assent of the conductor. This fact was set up as conclusive proof of contributory negligence, but we held that it was not enough. Standing alone, it was not per se proof of negligence. But, in the case before us, the alleged passenger was on the outside of the car, in an obvious place of danger, without the assent or the knowledge of the conductor; and he was injured by an occurrence that was a known danger incident to his position on the bumper of the car. The bumper was not for use by passengers for any purpose, but to relieve against the shock of just such an accident as happened. We think the learned judge was right in directing a compulsory nonsuit on the facts of this case, and the judgment is affirmed.

STREET RAILWAY.—A passenger riding on the steps of the platform of a car is in a place of danger, and is prima facie negligent; and in an action for injuries by a collision, the burden is on him to rebut the presumption of negligence, which may be done by showing that the car and platform were full of passengers with room for no more, and that the conductor stopped the car and allowed him to get on and called for and received his fare: *Clark v. Eighth Avenue R. R. Co.*, 36 N. Y. 135; 93 Am. Dec. 495, and note. If the employés of a street railway company in charge of its cars undertake to carry a number of persons greatly in excess of the seating capacity of such cars, so that passengers are compelled to stand on the platform and steps, and the injury complained of is the direct result of such overcrowded condition, that fact is evidence of negligence on the part of the company: *Pray v. Omaha etc. Ry. Co.*, 44 Neb. 167; 48 Am. St. Rep. 717, and note. See, also, the case of *Muldoon v. Seattle etc. Ry. Co.*, 7 Wash. 528; 38 Am. St. Rep. 901, and note.

EVERS v. PHILADELPHIA TRACTION COMPANY.

[176 PENNSYLVANIA STATE, 376.]

STREET RAILWAYS — NEGLIGENCE — QUESTION FOR JURY.—If a young child attempts to cross a street in the middle of the block, about sixty feet from a rapidly moving electric-car, and in plain view of the motorman thereon, who is not looking in front of his car, but in another direction, and who pays no attention to calls from persons on the sidewalk, while his car strikes and kills such child, the question of negligence on the part of the motorman is purely a question of fact, to be determined by the jury.

STREET RAILWAYS — RIGHTS IN STREET.—Street-cars have a right to expeditiously transport passengers on the surface of the streets, but they have no exclusive rights either at crossings or between them.

STREET RAILWAYS—NEGLIGENCE.—The fact that more caution must be exercised in running street-cars over crossings than on the street between them warrants no inference that cars can be run without caution except on approaching crossings. Rapid running at crossings is itself evidence of negligence; rapid running between them is not.

CONTRIBUTORY NEGLIGENCE CANNOT BE IMPUTED to a child four and one-half years of age.

NEGLIGENCE—CONTRIBUTORY—ALLOWING INFANT ON STREET—QUESTION FOR JURY.—Whether the parents of a child, four and one-half years old, are guilty of contributory negligence preventing recovery for his death by being killed by an electric-car, is for the jury to determine, when it appears that such parents had eight children and were in reduced circumstances, and that the child killed was permitted to go to a coal-box on the street while his mother was attending to another child, and that the child was killed after another child, under direction of the mother, had attempted to take him home, and before she could return after the failure to so get him home had been reported to her.

J. H. Gendell and T. L. Vanderslice, for the appellant.

W. P. Bowman, for the appellees.

378 DEAN, J. On Sunday forenoon, the 17th of September, 1893, Michael Evers, four and one-half years old, the son of plaintiffs, was run over and killed by defendant's street-car on Front street, between Bainbridge and Catherine, in the city of Philadelphia. The plaintiffs lived at the corner of Meade and Swanson streets, the latter being parallel to Front street and near to it; Meade is a narrow street or alley, running from Front to the river. The family of plaintiffs was made up of the parents and eight children. The mother had washed and dressed Michael, the deceased child, and then had permitted him to go with his elder brother Thomas to a coal-box on the lower side of Meade street, while she proceeded to wash and dress another of her children; about the time she had finished this one, two other of her children, girls, returned from church; on inquiry of them, she was told the two boys were still by the coal-box; she then directed one of these to tell the boys to come home; one of the

sisters immediately did as directed by the mother; the elder boy obeyed, ³⁷⁹ but the younger refused; the sister, on reporting to the mother, was immediately sent to bring him home; in this interval, however, the boy had left the coal-box, and crossed over to the west side of Front street, a half square distant, and then started to run across again to the east side, when he was run over by defendant's car. The father peddled brooms with a horse and wagon, and at times manufactured them himself in the house where he lived; two of his daughters had employment and earned a living, but the family was in moderate circumstances. The parents brought suit against the defendant for damages, alleging the death was caused by its negligence in running the car at an unusual speed; further, that when the child started from the west side of Front street to run across the track to the east side, he was in plain view of the motorman for a distance of sixty feet; that although witnesses on the sidewalk saw the danger and screamed to him, the motorman made no effort to stop the car, and appeared to be looking westward in another direction. There was much negative evidence that no warning of the approaching car was given. The motorman himself admitted he was a new hand on city streets, having been in employ of defendant only four days, and that this was his first trip without an instructor.

At the trial, the court below submitted the evidence to the jury to find: 1. Whether defendant was negligent; 2. Whether the parents were guilty of contributory negligence in not exercising proper watchfulness over their child.

The verdict was for plaintiffs, and we have this appeal by defendant, in which there is the single assignment of error, that the court should have peremptorily directed a verdict for defendant on two grounds: 1. Because there was no evidence of negligence on part of defendant; and 2. Because the evidence necessarily warrants no other inference than that of negligence on part of the parents.

As to the first proposition, it is based on the incorrect assumption that there was no evidence tending to show the motorman failed to fully perform his duty.

Eight witnesses testified, this child, in broad day, started from the curb, which is about seven feet from the rail, to cross the street when the car was fifty or sixty feet distant. Eugene O'Neill, an intelligent witness, a foreman of stevedores, testified ³⁸⁰ he was sitting at a side window of a house looking toward the west side of Front street, and about thirty to forty feet distant; saw the child start from the curb to cross; then the car

came into view, running rapidly toward the child; the witness hallooed to the motorman, who had been looking to the west, and not in front of him, and who then turned his head to look in front, when he hallooed the second time, and just then the child was run over. This is in substance the testimony of several other witnesses who saw the child attempting to cross, and who saw the car when it approached him. Whether, under the circumstances, the motorman failed to exercise care, was a pure question of fact, to be determined by the jury. That the car moved rapidly between crossings was not of itself evidence of negligence, but, clearly, rapid movement of a car on the street of a city requires a vigilant lookout by those in charge of it. The cars have the right to expeditiously transport passengers on the surface of the streets, but that gives them no exclusive right to the surface occupied by their tracks. Neither at crossings nor between them is the public right relinquished; it is only subordinated to that of the railway company. The fact that more caution should be exercised in running over crossings than on the street between them warrants no inference that the car can be run without caution except on approaching crossings; in the one case, rapid running is of itself evidence of negligence; in the other, it is not. Assume, then, although running with comparative rapidity, the car was not running at a negligent, and therefore unlawful, speed, the question still recurs, Did the motorman exercise care according to the circumstances? If the witnesses be believed, he could, by merely looking in front of him, have seen the peril of the child, and could have saved its life by stopping the car. The case, on its facts, is almost the same as *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29, 34 Am. St. Rep. 680, where we held the question of negligence was for the jury. In that case, the boy run over was six years old, and it was alleged the gripman did not see him, but there was evidence by a number of witnesses that they saw him when the car was sixty to seventy feet off. There was no reason why the gripman, whose special duty it was to see the track in front of him, should not have seen what those on the street saw.

The cases cited by appellant are not applicable to the evidence, 381 as here offered. In *Chilton v. Central Traction Co.*, 152 Pa. St. 425, the child unexpectedly turned and ran into the car. In *Flanagan v. People's etc. Ry. Co.*, 163 Pa. St. 102, the driver of a horse-car was attending strictly to his duty when a little girl seven years of age ran in front of the car, when he was doing his best to stop it, and did stop it but an instant too late to avoid the accident. As we have already noticed, the simple ques-

tion here was, whether this motorman, by the exercise of care under the circumstances testified to, could have avoided this accident. That was fully and carefully submitted to the jury, and they have found defendant was negligent, and we must adopt that as the truth.

This being a child, contributory negligence cannot be imputed to him; if an adult had been injured in the attempt to cross a street railway track in front of a rapidly moving car, fifty to sixty feet distant, in charge of a negligent motorman, quite another question would have been raised.

As to the alleged negligence of the parents, we are of opinion the court committed no error in also submitting that question to the jury. Clearly, if the evidence were undisputed that these parents had habitually permitted a child of this age to play on the street on which ran the trolley-car, there could have been no recovery; or, if the evidence had shown they did not on that day, under the circumstances, exercise the care which a child of such tender years demanded, there could have been no recovery. But it will be noticed the family was a large one, and not in affluent circumstances; the mother had only such aid in caring for the younger children as those older could give; she washed and dressed this one, and permitted him with his brother eight years old to go to the coal-box on Meade street, where there was no railway track; when she had completed her motherly duty to the second child, and one of the daughters had returned from church she sent for both children; the eldest returned; the deceased one refused; she immediately sent again for him, but before he was reached the caprice and heedlessness of childhood had led him to Front street, where he was killed. It was not for the court to say, from this evidence, the parents were negligent. We think the following instruction of the learned judge of the court below on this evidence was all that defendant had the right to ask: ³⁸² "It is the duty of parents to look after their children of tender years, and not to turn them out amid the dangers from accidents which occur upon crowded streets, and where trolley-cars are running about, filled with the suggestions of danger to the lives and limbs of children. They ought to exercise reasonable and proper care, and one of the questions you are called upon to determine is, as to whether or not these parents did exercise such due care in looking after this child."

The assignment of error is overruled, and judgment affirmed.

IN THE CASE of Woeckner v. Erie Electric Motor Co., 176 Pa. St. 451, the supreme court decided that the question whether or not a

motorman on an electric-car was guilty of negligence in entirely releasing the brake of his car on a down grade, after bringing it almost to a stop, while a child about four years old, which he saw, was within ten feet of the car and five feet from the track, although such child had turned away from the track, is a question of fact, to be determined by the jury. In such case, contributory negligence cannot be imputed to the child.

STREET RAILWAYS—NEGLIGENCE TO CHILDREN CROSSING TRACK.—In an action against a street railway company for negligence in running an electric-car over a child of tender years, the proper inquiry is, whether the motorman failed to observe or do something which he ought to have seen or done, and which he would have done with ordinary vigilance: *Barnes v. Shreveport etc. R. R. Co.*, 47 La. Ann. 1218; 49 Am. St. Rep. 400, and extended note at pages 421, 422. When, in an action to recover for injuries to a child run over by a street-car, the evidence is conflicting as to the length of time the car was on the track, and whether the driver of the car could have seen it had he been looking at the track in time to stop before reaching the child, the question of negligence is for the jury to determine: *Johnson v. Reading etc. Ry.*, 160 Pa. St. 647; 40 Am. St. Rep. 752, and note.

STREET RAILWAYS—EXCLUSIVE RIGHTS OF IN STREETS. A franchise granted to a street railway corporation gives it no exclusive use of that portion of the street upon which its road is constructed, but only the right to construct such road in such place and manner as not to interfere with the use of the street by the public: *Pacific Ry. Co. v. Wade*, 91 Cal. 449; 25 Am. St. Rep. 201, and note.

NEGLIGENCE.—A CHILD ONLY THREE YEARS OLD is incapable per se of contributory negligence: *Barnes v. Shreveport etc. R. R. Co.*, 47 La. Ann. 1218; 49 Am. St. Rep. 400, and extended note; and the same thing was held true of a child of eight in *Lorence v. Ellensbury*, 13 Wash. 341; 52 Am. St. Rep. 42, and note.

NEGLIGENCE OF PARENT OR CUSTODIAN OF CHILDREN. If the custodian of a child permits it to stray away from her control, so that, in the exercise of ordinary care and prudence, she could not prevent it from going into a place of danger, which she might reasonably apprehend it would do, then she is, as a matter of law, guilty of contributory negligence: *Bamberger v. Citizens' etc. Ry. Co.*, 95 Tenn. 18; 49 Am. St. Rep. 909, and note. See the full discussion of this subject in the extended note to *Barnes v. Shreveport etc. R. R. Co.*, 49 Am. St. Rep. 408.

DU BOIS BOROUGH v. DU BOIS CITY WATER WORKS COMPANY.

[176 PENNSYLVANIA STATE, 480.]

CONTRACTS—RESCISSION.—The power of equity to compel the cancellation of a contract is never exercised to interfere with the freedom to contract or with proper legal liability for bad bargains, but only to supplement the powers of courts of law when there is exceptional equity, of a settled and recognized kind.

CONTRACTS—RESCISSION.—The grounds on which equity interferes for the rescission of contracts are distinctly marked, and every case proper for this branch of its jurisdiction is reducible to a particular head. They are principally fraud, mistake, turpitude of

consideration, and circumstances entitling to relief on the principle of *quia timet*, and do not include inadequacy of price, improvidence, surprise, and mere hardship.

CONTRACTS—RESCISSION.—A contract cannot be rescinded in equity simply because it calls for the performance of an impossibility, by reason of a mutual mistake of fact as to the capacity of the stipulated source of supply.

CONTRACTS—RESCISSION FOR MISTAKE.—If a contract between a borough and a water company provides that the water to be furnished by the latter to the former shall be drawn only from certain stipulated land, and it subsequently develops, owing to a mutual mistake of the parties, that there is not sufficient water on such lands to supply the borough, this is not alone sufficient to justify a cancellation and rescission of the contract.

STATUTES—CONSTRUCTION—WATER COMPANIES.—Under a statute authorizing a court, on bill filed by any citizen using water, and alleging impurity or deficiency in supply, to compel the water company to correct the evil complained of, a municipality has the same right as a citizen to file a bill to compel a water company, with whom it has contracted, to correct abuses complained of.

Bill in equity for the rescission of a contract entered into by the borough of Du Bois and the United States Water Company by which the latter agreed to furnish the former an adequate supply of pure, wholesome water, to be obtained from springs on land owned by one Du Bois. Before the waterworks were completed, the United States Water Company assigned its contract to the Du Bois City Water Works Company, and this latter company assumed and agreed to perform said contract, and undertook and entered upon the performance thereof. Upon the completion of the waterworks, said assignee was unable to perform its contract for the reason that the supply of water on the lands mentioned was inadequate to supply the borough as specified in the contract. The borough thereupon, claiming that the supply of water was inadequate, impure, and unwholesome, passed an ordinance electing to rescind said contract, and served notice thereof on the water company, and it refused to rescind. The borough thereupon brought a bill in equity for rescission, and obtained judgment in its favor in the lower court, and the water company appealed.

A. L. Cole, for the appellant.

G. A. Jenks and W. C. Pentz, for the appellee.

436 **MITCHELL, J.** The power of a court to compel the cancellation of a contract, though well established, is very exceptional in its character. Its purpose is never to interfere with the freedom of contract or with proper legal liability even for bad bargains, but only to supplement the powers of courts of law where there is exceptional equity of a settled and recognized kind. Hence, it is never to be exercised except in very clear cases and

for definite cause. The causes which will justify it were stated as long ago as *Delamater's Estate*, 1 Whart. 362, and experience and the amplification of equity powers in sixty years have not furnished any instance of their enlargement. In that case, Gibson, C. J., said: "The grounds on which equity interferes for rescission are distinctly marked, and every case proper for this branch of its jurisdiction is reducible to a particular head. They are principally fraud, mistake, turpitude of consideration, and circumstances entitling to relief on the principle of *quia timet*." In *Yard v. Patton*, 13 Pa. St. 278, this language was quoted as authoritative, and it was added that each of these causes should be established by positive and definite proof. In *Graham v. Pancoast*, 30 Pa. St. 89, it was said by Strong, J: "Inadequacy of price, improvidence, surprise, and mere hardship have each been held sufficient to stay the active interposition of a chancellor. Yet no one of these, nor all combined, furnishes an adequate reason for a judicial rescission of a contract. For such action something more is demanded—such as fraud, mistake, or illegality." In *Rockafellow v. Baker*, 41 Pa. St. 319, 80 Am. Dec. 624, it was said: "Our interposition is invoked, not to carry out and accomplish what the parties have begun, but to undo what the parties have accomplished. How narrow the grounds are upon which a court of equity will interpose for such a purpose, and how cautious and reluctant its steps will be in that direction, ⁴³⁷ were fully shown in *Graham v. Pancoast*, 30 Pa. St. 97, and *Nace v. Boyer*, 30 Pa. St. 109. Nothing but fraud or palpable mistake is ground for rescinding an executed contract." And in *Stephens' Appeal*, 87 Pa. St. 202, it was said: "No fraud or mistake, or turpitude of consideration and circumstances entitling her to relief on the principle of *quia timet* are proven. Nothing less than one of these, clearly established, would justify the court in ordering the rescission of an executed contract." No case has gone beyond these, and while we do not say that a willful and obstructive refusal to perform a contract, under circumstances which practically prevent the party aggrieved from entering into another, may not afford ground for equitable cancellation, yet some such special grounds must appear in order to take the case out of the general rule that remedy for mere breach must be sought at law.

Tested by these settled principles, there is no case here at all for the court's interference. Neither the bill nor the findings of fact under it charge any fault to the defendants. They show a want of strict performance, but they also show that strict performance was impossible, not from any lack of effort on the part

of the defendants, but because the contract limits the source of supply to springs on the Du Bois land, and those springs are inadequate to furnish the needed quantity of water. The utmost that is made out by the bill and the evidence is, that the contract calls for the performance of an impossibility by reason of a mistake of fact as to the capacity of the stipulated source of supply. But this mistake was no more the fault of defendants than of plaintiff, and the parties cannot be put back in statu quo. If the defendants have, to their misfortune, made a contract whose full performance is impossible, they may be unable to recover the stipulated rental, either in whole or in part. But this is a matter of defense in an action at law, and affords no ground for the cancellation of the contract. Certainly, there is no equity in putting the entire loss arising from a mutual mistake upon one party, with no consideration for the injury to its plant and franchise, and no allowance for the money already expended thereon without fault. The case is pre-eminently one for mutual concession and amicable adjustment on a fair basis, either by reduction of the rental, or by enlargement of the permitted source of supply. But failing this action by the parties ⁴³⁸ themselves, equity will not help one of them to put the whole loss on the other, but will leave them to such remedies as they may have in a court of law.

Reference was made in the court below and here to the act of April 29, 1874 (Pub. Laws, sec. 34, cl. 3, p. 94; Purdon's Digest, 12th ed., p. 955, pl. 4), relating to gas and water companies, by which the courts of common pleas are authorized, on bill filed by any citizen using the water alleging impurity or deficiency, to compel the water company to correct the evil complained of, and to make "such order in the premises as may seem just and equitable." The learned judge below was of opinion that this remedy did not apply to cases of contract, but only to water rights acquired by eminent domain under the act of 1874, and it has been argued here by appellees, citing Lehigh Water Co.'s Appeal, 102 Pa. St. 515, and Freeport Water Works Co. v. Prager, 129 Pa. St. 605, that this section applies only to private citizens, and does not include municipal corporations. Both these views, however, are erroneous. What was decided in those cases was, that the exclusive privilege of furnishing water, given by the act to the first company erecting works, does not prevail against a city or borough building waterworks in its municipal capacity and under its general powers. In the present case, the borough is not the builder or owner of waterworks, but a mere consumer under contract, and stands upon the same basis as any private

citizen in regard thereto. The remedy given by the act is intended to be adequate, and we see no reason why it may not be made so. The whole subject is put under the control of the court in the broadest terms, and, being one which concerns the public interest, may be treated with regard thereto, to the extent necessary, even to the reformation of the contract upon a basis just and equitable to both parties, where, as here, it was made in mutual mistake as to an essential fact, and a remedy for the difficulty may be found without violation of the main intent of both parties in the original instrument.

Decree reversed and bill dismissed with costs.

The borough of Du Bois passed an ordinance attempting to rescind its contract with the water company, as detailed in the principal case. The question of its right to thus rescind the contract having reached the supreme court, Mr. Justice Mitchell delivered the following opinion, the case being entitled *United States Water Works Co. v. Du Bois*, 176 Pa. St. 439:

"It was held in *Du Bois v. Du Bois Water Works Co.*, 176 Pa. St. 430 [ante, p. 672], that the circumstances would not sustain the cancellation of the contract between those parties by a court of equity, and, of course, they would not justify one of the parties themselves in attempting a rescission. The ordinance of the borough was beyond its authority and wholly ineffectual for that purpose.

"But, even if the ordinance had been effective, the direction of a verdict for defendant could not be sustained. It is admitted that a considerable amount of water was supplied by the plaintiff, although it fell short of the contract quantity, and it was shown, or offered to be shown, that the defendant's servants and employes had used it, notwithstanding the ordinance rescinding the contract. For such use the borough is responsible. Even if the borough was authorized to rescind, it could not escape liability for continued use by its agents; it was bound not only to notify them to stop but to see that they obeyed.

"This is not a case for the application of the rule as to entire contracts. Neither the thing to be furnished nor the consideration to be paid was single and indivisible. The plaintiff is entitled to go to the jury on the value of the service actually rendered, measured by the contract price for the service stipulated.

"Judgment reversed and venire de novo awarded."

CONTRACTS—RESCISSION IN EQUITY.—Courts of equity cancel contracts for false representations of material facts which constitute an inducement to the contract, and upon which the party had a right to rely: *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285, and note. See the discussion of this subject in the extended note to *Hough v. Hunt*, 15 Am. Dec. 572.

CONTRACTS—RESCISSION FOR INABILITY TO PERFORM.—Promises, honestly made, which the promisor cannot fulfill, do not furnish sufficient grounds for vacating a contract based thereon: *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712, and note.

CONTRACTS—RESCISSION FOR MUTUAL MISTAKE.—The party against whom a contract, made under a mutual mistake of material facts, cannot be specifically enforced is in general entitled to rescind: *Newton v. Tolles*, 66 N. H. 136; 49 Am. St. Rep. 593, and note. Where certain facts are assumed by both parties as the basis

of a contract, and it subsequently appears such facts did not exist, the contract is inoperative: *Fink v. Smith*, 170 Pa. St. 124; 50 Am. St. Rep. 750. See, also, the extended note to *Mills v. Stevens*, 45 Am. Dec. 631-634.

PRESCOTT v. BALL ENGINE COMPANY.

[176 PENNSYLVANIA STATE, 459.]

MASTER AND SERVANT—DUTY TO EMPLOYEES—NEGLIGENCE—FELLOW-SERVANTS.—The duty of an employer is to provide a safe place in which his employes may work, suitable materials, tools, and machinery to use while at work, reasonably competent fellow-servants with whom to work, and such instruction to the young and inexperienced as may be necessary to warn them against the peculiar dangers incident to the kind of work in which they are to be engaged. But he is not liable to them for injuries due to their incompetency, or carelessness, or to the negligence or malice of their coemployes.

MASTER AND SERVANT—DUTY AND NEGLIGENCE OF SERVANT.—An employe must use his senses in all that relates to his employment, and exercise attention and care in the selection of materials from the mass provided for general use, and in the manner of their general use, and to provide with reasonable diligence for the safety of himself and his coemployes in his management of his own share of the work to be done.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE. If a workman, whose duty it is to select material for his use from a stock furnished by his employer or a vice-principal, through haste, carelessness, or mistake in judgment, selects unsuitable and unsafe material, while suitable and safe material is in the stock furnished, or if, being suitable when selected, it is so attached to machinery by him as to render it unsafe, and either he or his fellow-servant is, from either of these causes, injured, the party injured is guilty of contributory negligence, and has no cause of action against his employer or the vice-principal.

MASTER AND SERVANT—VICE-PRINCIPALS.—A workman in a manufactory, whose duty is to maintain a good and suitable supply of material from which other workmen may select material for their own use, is a vice-principal, and not a fellow-servant of such workmen.

WITNESSES—COMPETENCY.—In an action to recover for personal injury, a fellow-servant is competent to testify as to the custom or usage of the manufactory in which he is employed, so far as such matters rest on his own knowledge.

Trespass to recover for personal injury. Plaintiff, while employed in defendant's manufactory, and engaged in hoisting a heavy piece of machinery, was injured by the breaking of a rope used on the work. Another employe, known as a rigger, ordered and kept, as was his duty, a supply of ropes for use in the manufactory. It was the duty of plaintiff and his fellow-workmen to select from such supply, ropes suitable for the work in hand. One Hill, a fellow-servant with the plaintiff, selected the rope

in use at the time of the accident and injury to plaintiff. Judgment in the court below in favor of plaintiff, and defendant appealed.

J. M. Sherwin and S. A. Davenport, for the appellant.

T. A. Lamb, E. P. Gould, and E. A. Walling, for the appellee.

463 WILLIAMS, J. Whose was the negligence from which the plaintiff in this case suffered? Was it that of the defendant company or that of a coemployé? This was the controlling question on which the plaintiff's right to recover depended. It was presented to the court by the defendant's points, numbers 1, 2, 3, 5, and 6, the answers to which are complained of by the assignments of error numbered from 13 to 17 inclusive. The duty of the employer is to provide a safe place in which his employés may work, suitable tools and machinery to use while at work, reasonably competent fellow-servants with whom to work, and such instruction to the young and inexperienced as may be necessary to warn them against the peculiar dangers incident to the kind of work in which they are to be engaged. He must also furnish them with suitable materials for use: *Ross v. Walker*, 139 Pa. St. 49; 23 Am. St. Rep. 160. But he is not liable to them for injuries due to their incompetency or carelessness, or to the negligence or malice of their coemployés. The duty of an employé is to use his senses in all that relates to his employment, to exercise attention and care in the selection of materials **464** from the mass provided for the general use, and in the manner of their general use, and to provide with reasonable diligence for the safety of himself and his coemployés in his management of his own share of the work to be done. In other words, he is bound to bring his mind, as well as his limbs, into the service of his employers, so far as it may be necessary to enable him to exercise a reasonable degree of care over the interests of his employer and the safety of his coemployés and himself. If, through carelessness or because of a mistake in judgment, the rope selected for use on this occasion was unsuitable for the purpose for which it was wanted, or if, being suitable, it was so negligently or carelessly put upon the shaft as to be cut and weakened unnecessarily, and the accident was due to either of these causes, it is clear that the plaintiff had no cause of action. The jury must find the existence of these two facts before they will be justified in rendering a verdict in favor of the plaintiff, viz: 1. That there was no better rope in the stock on hand from which the workmen had a right to select

than the one that was selected in this instance; and 2. That the failure of the rope selected was not due to the manner in which it was put upon the shaft, but to the insufficiency of the rope itself to answer the purposes for which it was offered to the workmen. We see no reason to doubt that the rigger was a vice-principal, and as such charged with the duty of keeping ropes on hand, some of which should be at all times suitable for use. But it was not his duty to select the rope to be used on each occasion when a rope was wanted. If good ropes were in stock, and a poor one was used because of haste, or carelessness, or mistake in judgment, it was not the fault of the rigger as vice-principal, but of the workmen themselves; and the injury suffered because of the use of the unsuitable rope could not give the injured person a cause of action against his employer. In the nature of things, the ropes will wear from using. In a few months they become worn so badly as to be unsafe for heavy work, while they might be entirely safe for that which is lighter. Such ropes are not to be at once removed from reach, but their use must be left to the experience and judgment of those by whom the work is to be done. Care must be exercised according to the circumstances by the employé, as well as the employer, up to a reasonable degree, and a failure to ⁴⁶⁵ exercise such reasonable care is a failure in duty. It is, therefore, negligence. The answers complained of did not furnish the jury with a clear and distinct statement of the rule; and the errors assigned to them are sustained. The fifth assignment should also be sustained. The witness Stahl had testified that he selected from the stock of ropes just such slings as he chose when he was employed with the pulley, and was asked, "Was it the same with the other workmen as to their right to get slings as you did"? He replied, "Yes, sir, they were"; and then added, "The foreman told me so." The whole answer was objected to, and the evidence was excluded. So far as the answer of the witness rested on his knowledge of the usage of the shop, it was competent. If he knew the practice among the men was to select such a sling as they supposed was needed for the work to be done at the time, he had a right to say so. It was clearly the duty of the workmen to make such selection, unless a particular sling was provided for each particular piece of work and they were required to use it. If this was required, it was the duty of the plaintiff to show it. It was important for the defendant to show no more than that a sufficient number of slings was provided for the use of the workmen, and that some of them, accessible at all times, were of sufficient strength

for the support of a weight, such as was handled at the time the accident occurred. If a poor one was used when a good one was within reach, this was negligence, and, whether chargeable to the plaintiff or to a coemployé, it relieves the defendant from all liability for the injury sustained.

The errors pointed out require us to reverse this judgment. A venire facias de novo is awarded.

MASTER AND SERVANT.—THE DUTY OF A MASTER TO HIS SERVANT requires the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business in which the servant is employed, and in keeping such machinery and appliances in repair, including the duty of making inspection and tests at proper intervals: *Nord Deutscher etc. S. S. Co. v. Ingebregsten*, 57 N. J. L. 400; 51 Am. St. Rep. 604, and note. The duties which the master cannot assign include the exercise of reasonable care to see that tools, appliances, and machinery, and the place where the servant works, are reasonably safe, and that the servant is informed of special dangers of his situation and of the machinery and appliances upon which he is employed: *Norton v. Volzke*, 158 Ill. 402; 49 Am. St. Rep. 167.

MASTER AND SERVANT—DUTY OF SERVANT TO USE CARE. The relation of master and servant requires each to exercise ordinary and reasonable care; the master to use such care in providing and maintaining suitable means and instrumentalities with which to conduct his business, that the servant, exercising due care, may be enabled to perform his duty without exposure to dangers not falling within the obvious scope of his employment: *Wormell v. Maine Cent. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321, and note.

FIRST NATIONAL BANK v. PELTZ.

[176 PENNSYLVANIA STATE, 513.]

BANKS AND BANKING—APPLICATION OF DEPOSIT TO PAYMENT OF NOTE.—While a bank which is the holder of a note, and has on deposit at the time of maturity a sum to the credit of any party liable to it on the note sufficient to pay it, and not previously appropriated by the depositor to be held for a different purpose, may apply the deposit to the payment of the note, yet it is not in general bound to do so. The cases where the right becomes a duty on the part of the bank rest on the special equity of the party, usually the indorser, to have the payment enforced against the depositor as the one primarily liable. In such cases, the deposit must be sufficient at the time of the maturity of the note, and must be to the credit of the party primarily liable.

BANKS AND BANKING—APPLICATION OF DEPOSIT TO PAYMENT OF NOTE.—If a note is made payable to the order of the payee, who indorses it, and, after procuring a third party to indorse it for his accommodation, discounts it at a bank, and it is not paid at maturity, such third party indorsing it cannot, in an action against him thereon by the bank, prove as a defense that shortly after the maturity of the note, and at other times thereafter, the bank had a

deposit to the credit of the payee sufficiently large to pay the note. Nor can he show that he was an accommodation indorser, and that the bank had knowledge of this fact.

NEGOTIABLE INSTRUMENTS—SECURITY AS DISCHARGE OF INDORSER.—The giving of a judgment or other security by the maker or a prior indorser of a note does not discharge a subsequent indorser.

NEGOTIABLE INSTRUMENTS—INDEMNITY—EVIDENCE—ESTOPPEL.—If a note is made payable to the order of the payee, who indorses it, and, after procuring a third person to indorse it for his accommodation, discounts it at a bank, and it is not paid at maturity, such third party indorsing may, in an action against him on the note by the bank, prove that he has been indemnified against liability on the note by a judgment against the payee, and that he has satisfied that judgment by the procurement of the bank whereby he has not only lost his security for indemnity, but the bank has advanced its own judgment against the payee to the position of a prior lien. These facts, if proved, would raise an estoppel against the bank.

EVIDENCE.—A GENERAL OFFER TO PROVE RELEVANT facts is competent, and should be admitted. Objection to the mode of proof or the sufficiency of the facts when proved must be made later.

Assumpsit against the second indorser on a note made in favor of Charles Kreamer or order, signed by John W. Buck, and indorsed by Charles Kreamer, E. Peltz, and G. W. Hipple. On the trial, defendant Peltz offered to prove that Kreamer, the payee and first indorser on the note, and who discounted it at the plaintiff bank, had to his credit six days after the note became due, and at other times thereafter, before the bringing of this suit, a balance on deposit in said bank sufficiently large to have paid said note. He also offered to prove that he, the defendant, was an accommodation indorser, and known to be such by said bank; that Kreamer was the principal debtor and known to be such by said bank. This offer of evidence, together with others noticed in the opinion, were ruled out by the trial court, and, after judgment for plaintiff, the defendant specified such rulings as error on appeal.

H. C. Dornan, for the appellant.

W. J. Lewis and Furst & Furst, for the appellee.

517 MITCHELL, J. The first assignment of error cannot be sustained. While a bank which is the holder of a note, and has on deposit at the time of maturity a sum to the credit of any party liable to it on the note sufficient to pay it, and not previously appropriated **518** by the depositor to be held for a different purpose, may apply the deposit to the payment of the note, yet it is not in general bound to do so. The cases where the right becomes a duty on the part of the bank rest on the special equity

of the party, usually the indorser, to have the payment enforced against the depositor as the one primarily liable: *Commercial Nat. Bank v. Henninger*, 105 Pa. St. 496. And even in these cases all the circumstances enumerated must exist. Thus the deposit must be sufficient at the time of maturity of the note. Subsequent deposits will not raise the duty: *People's Bank v. Legrand*, 103 Pa. St. 309; 49 Am. Rep. 126; *First Nat. Bank v. Shreiner*, 110 Pa. St. 188. And the deposit must not have been previously appropriated to any other use: Cases cited *supra*, and *German Nat. Bank v. Foreman*, 138 Pa. St. 474, 21 Am. St. Rep. 908, where the principle was conceded though an exception of doubtful correctness was made against a mere notice from the depositor not to pay, unaccompanied by a specific appropriation to a different purpose. And, lastly, the deposit must be to the credit of the party primarily liable. The rule is thus stated by our brother Williams in the latest case on the subject: *Mechanics' etc. Bank v. Seitz*, 150 Pa. St. 632; 30 Am. St. Rep. 853: "The general rule is well settled that, while the bank may appropriate funds in its hands belonging to any previous party to the note to the payment of it, . . . yet it is not bound to do so. The note may be treated as, in effect, an order or check authorizing the bank to apply the deposit to the payment, but the deposit is not payment in law. . . . But where the bank holds funds of the maker when the note matures, it is bound to consider the interests of the indorsers or sureties, and if it allows the maker to withdraw his funds after protest, and the indorsers are losers thereby, the bank is liable to them. The reason of this rule is, that the maker is the principal debtor, and liable to all the indorsers, whose undertaking is to pay if he does not."

The appellant's offer was defective in two respects, it was not to show the state of Kreamer's account at the maturity of the note, but some days after, and Kreamer was not the maker of the note but an indorser. It is true that it is claimed by appellant that this was an accommodation note and known by the bank to be so, and that Kreamer was in fact the principal debtor, even as regards the maker. But, if this was so, it was by the arrangement among the parties. On the face of the note, ⁵¹⁹ the maker was primarily liable, and although the bank may have supposed, as the cashier testified, from the presentation of the note for discount by the first indorser, that the second and third indorsements were for his accommodation, it was under no obligation to draw that inference as to the maker. But if it had been, the duty of the bank to appropriate has not been

carried by any case beyond the deposit of the maker. Nor is it desirable that it should be. On the face of the paper the maker is the party to pay, and while the bank may, upon dishonor, secure payment from the deposit of any party liable to it, yet there is great force in the reasons for limiting its duty to do so to the party legally answerable in the first instance on the face of the paper. The rule thus rests on a liability fixed by law and capable of immediate and conclusive determination by the evidence of the note itself. Otherwise, it is thrown open to contest on the private arrangements of parties, to questions of notice and proof, and to all the uncertainties of the final ascertainment of the facts. While money deposited becomes the property of the bank, yet that result flows from the nature of money, which is to be measured by amount and not by physical identity. Hence a deposit of one hundred dollars is returned by another one hundred dollars without regard to the identity of the notes, or the coin, because legally they are the same. Except for this characteristic, a deposit of money to be returned on demand would be like the deposit of any other article, a mere bailment. But though for this reason the title to money deposited passes to the bank, yet the whole business of banking is founded on the faith of the immediate availability of the deposit, as money, for the use of the depositor, and any rule that interfered with the freedom of action of either bank or customer, by compelling a stop of their dealings with each other to examine the relations of other parties to the deposit, would go far toward destroying that instant convertibility which is the essence of the business. We do not think it desirable to go beyond the line already clearly marked by the authorities.

The second assignment of error cannot be sustained. The giving of a judgment or other security by the maker or a prior indorser does not discharge a subsequent indorser: *Guarantee Trust etc. Co. v. Craig*, 155 Pa. St. 343.

The third assignment, however, is well founded. The offer ⁵²⁰ of defendant, was, in substance, to show that he had been indemnified against the present liability on the note in suit by a judgment against the prior indorser, Kreamer, and that he had satisfied that judgment on the procurement of the plaintiff bank, whereby he not only lost his security for indemnity in regard to the present claim, but the plaintiff advanced its own judgment against Kreamer to the position of a prior lien. This offer was entirely competent. It was to prove facts which tended to raise an estoppel against the plaintiff in favor of the defendant. It is argued by the appellee that the certificate of

liens presented was not such as was admissible in evidence, but the objection made and sustained was to the offer as a whole, which was of the certificate, etc., to be followed by proof, etc., How the facts were to be proved, and whether, when proved, they were sufficient to raise an estoppel, were questions not yet reached in the case. It is sufficient that the offer was a general one to prove relevant facts. As such it was competent and should have been admitted. Further objections to the mode of proof, or the sufficiency of the facts when proved, could be raised later.

Judgment reversed and venire de novo awarded.

BANKS—APPLYING DEPOSIT TO PAYMENT NOTE.—A bank holding a depositor's note past due is entitled to set it off against the amount due him upon his deposit account: *Bank v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St. 151; 40 Am. St. Rep. 660, and note. See, also, the extended note to *National Bank v. Smith*, 23 Am. Rep. 50.

NEGOTIABLE INSTRUMENTS—INDORSERS—COLLATERAL SECURITY.—An indorser does not exempt himself from liability as such from the fact that he has taken collateral security sufficient to indemnify him against the consequences of his indorsement: *Stephenson v. Primrose*, 8 Port. 155; 33 Am. Dec. 281, and note.

MOYER v. SUN INSURANCE OFFICE.

[176 PENNSYLVANIA STATE, 579.]

INSURANCE—PROOF OF LOSS—WAIVER.—If an assured, in good faith and within the time stipulated, does what he plainly intends as a compliance with the requirements of his policy in respect to proofs of loss, the failure of the insurance company to notify him of any objections to the proofs furnished constitutes a waiver of objections to such proofs, and of any other or further proof.

INSURANCE—CONDITIONS IN POLICY—WAIVER.—If the insured, in good faith and within the stipulated time, does what he plainly intends as a full compliance with the requirements of the policy, good faith equally requires that the insurer shall promptly notify him of his objections, so as to give him the opportunity to obviate them, and mere silence, or failure to notify him, as to what further information is desired, or mere notice that "strict compliance with the requirements of the policy will be required," misleading the insured, to his disadvantage, constitutes a waiver by estoppel to object to the proofs furnished or to require other or further proofs.

INSURANCE—CONDITIONS—DUTY TO FURNISH CERTIFICATE OF LOSS.—If a policy of insurance provides that the insured must furnish a certificate of a magistrate or notary as to his loss if required to do so by the insurer, the insured is under no obligation to furnish such certificate unless required to do so, and notice to him to comply with the conditions of the policy is not notice to furnish the certificate.

INSURANCE—ARBITRATION—SUCCESSIVE REMEDIES. If one clause in a fire insurance policy provides that, in case of loss,

an estimate shall be made by the insured and the company, and another clause provides that in case they differ the subject shall be referred to appraisers selected as therein provided, the remedies are successive, and neither party can insist upon the second who has not shown himself willing and ready to enter upon the first.

Assumpsit upon a policy of fire insurance. After trial and binding directions by the court below to the jury to find for the plaintiff, and verdict and judgment for him, the defendant appealed.

A. A. Leiser, and F. H. Ely, for the appellant.

H. A. Hall and K. J. Tener, for the appellee.

585 FELL, J. The policy of insurance upon which this action was brought contained the usual stipulations with regard to furnishing proofs of loss, and the defense was based mainly upon the failure of the insured to comply with the requirements of the policy in that particular.

The plaintiff, who lived in Camden, New Jersey, had insured with the defendant company a dwelling-house and stable situated in Elk county, Pennsylvania. On August 25, 1894, both buildings were entirely destroyed by fire. He at once notified the agent, and was informed by him that he had notified the proper officers of the company. On September 21st, he received a letter from the adjuster, Mr. Clinger, requesting him to go to Williamsport and "go over the loss." In order to do this, he would be obliged to travel some two hundred miles from his home, and on the 29th he wrote to the adjuster, objecting because of the expense and loss of time it would entail, and asking whether it was "unavoidably necessary." On October 10th, the adjuster replied by letter: "If you think it a hardship to meet me at Williamsport, do not comply with the request, but comply strictly with the policies you hold." On October 11th, the 586 plaintiff wrote to the insurance company stating: 1. That he had a policy issued by it, giving its number, date, and amount, and describing the property insured; 2. That the property had been totally destroyed on August 25th by a fire which originated on the property of a neighbor and had been carried by the wind to his buildings; 3. The amount of insurance in another company; 4. The amount it would cost to replace the buildings. He further stated that he had notified the company's agent, and that their adjuster had examined the property and found the buildings entirely consumed. He then recited the substance of his letter to Mr. Clinger, and continued: "I inclose herewith copies of both his letters. The last one dated Oct. 10, '94, is

written in a mysterious manner alluding to a strict compliance of the policy, but does not explain in what way I omitted to strictly comply with the policy. I have read both policies, and cannot find anything where I have failed in strictly complying with the conditions of these policies, but if there is anything further to be done, I wish you would please inform me, and also inform me whether it was unavoidably necessary to answer the summons of Mr. Clinger or not, and by so doing you will greatly oblige," etc. To this letter the defendant replied: "The matter is in the hands of our representatives in Pennsylvania, and strict compliance with the conditions of the policy will be required."

The plaintiff had distinct notice that the requirements of the policy would be insisted upon. Although intended for the protection of the company, these requirements were conditions precedent to the right of action, and he was bound to comply with them in order to recover on the policy. On the other hand, if in good faith he had attempted to comply, it was the duty of the company to notify him of any objections to the proofs furnished. This has been repeatedly decided. In *Gould v. Dwell-inghouse Ins. Co.*, 134 Pa. St. 588, 19 Am. St. Rep. 717, after a careful review of the cases, it was said by Mitchell, J: "If the insured, in good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of the policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel."

⁵⁸⁷ The plaintiff's letter of October 11th was intended to furnish the information required. No other conclusion is possible. He stated what he knew about the insurance on the building, the circumstances of the fire, and the extent of the loss. This he afterward testified was all the information it was possible for him to give. He did not have such a knowledge of the buildings as to enable him to state their dimensions or the details of their construction. Referring to Mr. Clinger's letter he said: "The last one is written in a mysterious manner, . . . but does not state in what way I omitted to comply with the policy. I have read both policies, and can't find anything where I have failed in strictly complying with the conditions, but, if there is anything further to be done, I wish you would please inform me." If, in the opinion of the officers of the company,

this was not a substantial compliance, or if they wished further information, it was clearly their duty so to inform him.

The insured, if required, was to furnish a certificate of a magistrate or notary. He was not required to furnish one. It cannot be said that the notice to comply with the conditions of the policy was notice to furnish the certificate. The company could insist upon the certificate, but the insured was under no duty to furnish it unless required to do so. The arbitration clause was similar to, if not identical with, that considered in *Boyle v. Hamburg-Bremen F. Ins. Co.*, 169 Pa. St. 349, in the opinion in which case it was said by Williams, J.: "When one clause in a fire insurance policy provides that in case of loss an estimate shall be made by the insured and the company, and another clause provides that in case they differ the subject is to be referred to appraisers selected as therein provided, the remedies are successive, and neither party can insist upon the second who has not shown himself willing and ready to enter upon the first."

The defendant company, by letter of November 3d, distinctly denies its liability on the policy, basing its refusal to pay upon the failure of the plaintiff to furnish proofs of loss within the time specified. As the testimony was undisputed, and nearly all of it, in fact all that was material in making out the plaintiff's case, was in writing, we see no error in the peremptory direction given by the learned judge.

The judgment is affirmed.

INSURANCE—PROOFS OF LOSS—WAIVER.—When an insurance company receives and returns proofs of loss without making any objections thereto, it will be deemed to have waived any defects therein: *Vangindertaelen v. Phoenix Ins. Co.*, 82 Wis. 112; 33 Am. St. Rep. 29, and note; *Welsh v. London Assur. Corp.*, 151 Pa. St. 607; 31 Am. St. Rep. 786, and note with the cases collected.

INSURANCE—CERTIFICATE OF LOSS—DUTY TO FURNISH.—Where a policy of insurance provides that a loss shall not be payable until the assured produces the certificate of a magistrate to certain required facts, the production of such certificate, unless the company have themselves prevented the obtaining it or waived its want, is a condition precedent to the right to sue: *Johnson v. Phoenix Ins. Co.*, 112 Mass. 49; 17 Am. Rep. 65. To the same effect see *Leadbetter v. Etna Ins. Co.*, 13 Me. 265; 29 Am. Dec. 505.

INSURANCE—ARBITRATION.—A condition in an insurance policy, providing that any difference of opinion between the insurer and the insured as to the amount of loss may be submitted to arbitration, is not a condition precedent to commencing suit on the policy, but leaves arbitration optional with the parties, and either may decline to arbitrate: *Continental Ins. Co. v. Wilson*, 45 Kan. 250; 23 Am. St. Rep. 720, and note. To the same effect *Randall v. American etc. Ins. Co.*, 10 Mont. 340; 24 Am. St. Rep. 50, and note.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

DICKSON v. STATE.

[34 TEXAS CRIMINAL REPORTS, 1.]

SLANDER—INDICTMENT—SUFFICIENCY.—An indictment for slander, alleging that the accused did falsely and maliciously impute a want of chastity to a certain female by saying that a certain man was monkeying with her and doing what he pleased with her, meaning that the said man was having carnal knowledge of her, is good.

IDEM SONANS.—The christian names "July" and "Julia" are idem sonans.

SLANDER—EVIDENCE TO PROVE INNUENDO.—On the trial of an indictment for slander, it is not competent to prove by a witness, who heard the slanderous words, what he understood them to mean. In such cases, the innuendo as alleged in the indictment does not admit of being sustained by proof.

SLANDER—INNUENDO—PROOF OF.—An innuendo in criminal slander is an explanatory averment of the meaning, which charges no fact and neither adds to, nor qualifies, any previous allegation, and does not admit of being sustained by evidence.

SLANDER—INNUENDO—PROOF OF—HARMLESS ERROR. In a trial for criminal slander, an error of the court in admitting evidence of the meaning of the innuendo as alleged in the indictment is harmless, if the words alleged themselves clearly and unequivocally indicated the meaning intended to be conveyed.

Bounds & Bounds, for the appellant.

R. L. Henry, assistant attorney general, for the state.

2 SIMKINS, J. Appellant was convicted of slander, and his punishment assessed at one hundred and fifty dollars. There are various grounds of error assigned, but we will only consider the most material.

1. The court did not err in overruling the motion to quash the information. It certainly charged the offense of slander,

and the meaning of the language used is sufficiently stated by innuendo.

2. There is no error in the general charge of the court. It is sufficiently comprehensive, and, with the special charges requested and given, presented the case to the jury as favorably to appellant as he could ask.

3. The appellant complains that the court erred in permitting the county attorney to ask the witness what appellant meant by saying that "Ed Henry was monkeying with July Chambliss," and in permitting the witness to answer that "said Henry was having carnal knowledge of her," because the question called for the opinion of the witness, who should state only what was said, and not what was meant, that being a question for the jury. The complaint alleges that appellant used the language, and, by innuendo, stated it meant "Henry was having carnal knowledge of her, the said July Chambliss." Can the matter alleged by innuendo be proven? It is held in this state, that the truth of an innuendo may be proven. In *Riddle v. State*, 30 Tex. Crim. App. 426, Judge White says, that having alleged³ the slanderous words with an innuendo which would go to established an offense, if proved, it was necessary to prove the innuendo as substantially as the slanderous words themselves: See, also, *Berry v. State*, 27 Tex. Crim. App. 484; 2 Wharton's Criminal Law, 8th ed., sec. 1661. It is true, Mr. Bishop says an innuendo does not admit of being sustained by proof: Bishop's Criminal Procedure, 793; Townshend on Slander and Libel, secs. 335, 342. This is where, under the rules of criminal pleading, the circumstances necessary to explain the meaning of slanderous words are stated in the indictment by way of inducement, and the only office of the innuendo is to refer the libelous words to the facts so set forth: 13 Am. & Eng. Ency. of Law, sec. 4, p. 501; Townshend on Slander and Libel, secs. 129, 308, and notes 1, 2, secs. 335-337. With us, the office of the innuendo is enlarged to explain the meaning of the language spoken, and we dispense with the inducement or colloquium, and the innuendo may be proven. Now, where the words are obviously defamatory, or are clear and unambiguous, whether defamatory or not, the court and jury, and not the witnesses, construe the words; and a witness cannot be asked how he understood the words, nor what impression was produced on his mind on hearing them, and the words are to be construed in their ordinary and usual sense. When, on the other hand, the language is ambiguous as to its import or signification, and the words used are not ordinary, but are local, technical, or slang terms, evidence is ad-

missible to explain their meaning, and the testimony of hearers is admissible as to how they understood the words. The question is in what sense the hearer understood the words, for slander and damage consist, not in the intent of the speaker, but in the apprehension of the hearers: Townshend on Slander and Libel, secs. 127, 384; Dorland v. Patterson, 23 Wend. 424; Demarest v. Haring, 6 Cow. 76; Smart v. Blanchard, 42 N. H. 137; Barton v. Holmes, 16 Iowa, 252; Smith v. Miles, 15 Vt. 245; 13 Am. & Eng. Ency. of Law, 385. But such testimony, which is admitted to show what meaning hearers of common understanding would and did ascribe to the words, is not conclusive on the jury: Nelson v. Borchenius, 52 Ill. 236; Vanderlip v. Roe, 23 Pa. St. 82; Wimer v. Allbaugh, 78 Iowa, 79; 16 Am. St. Rep. 422. Hence, we do not think the court erred in permitting the questions complained of to be asked.

The other errors assigned are not regarded as material, and the judgment is affirmed.

Judges all present and concurring.

ON MOTION FOR REHEARING.

DAVIDSON, J. This case was tried in the court below, and appealed to the Tyler term, 1894, of this court, the judgment affirmed, and now comes before us on a motion for rehearing of the case. The appellant, in his motion, contends, that the indictment is defective as to ⁴ the charge "that appellant did falsely and maliciously impute a want of chastity to July Chambliss, by saying that one Ed Henry was monkeying with said July Chambliss, and doing what he pleased with her, meaning that the said Henry was having carnal knowledge of her, the said July Chambliss." We think the indictment is unquestionably good. Nor, in our opinion, is there any variance between the names "July Chambliss," as alleged in the indictment, and "Julia Chambliss," as proven, "July" and "Julia" being idem sonans. In the opinion heretofore rendered in this case, this court held that it was competent to prove by a witness who heard the slanderous words what he understood them to mean. We have re-examined the question, and, in our opinion, this is not the correct doctrine in criminal cases. In civil cases, where the words spoken are ambiguous, some of the authorities allow this; but they are by no means uniform: See Barton v. Holmes, 16 Iowa, 252. In that case it was said: "Such testimony is received, not to ascertain the words, for they are directly proved, nor to learn the sense in which the speaker intended to be understood, for his intentions are immaterial, since they cannot

limit the injury or atone for the wrong, nor is it to ascertain the correct definition of the words used, but simply to determine how the hearers understood them." It will be noticed that one of the grounds assigned is with reference to the intentions of the party uttering the words, and it is stated that these are immaterial. This may be true in a civil case, as to proof of an element of damage, but in a criminal case the intention of a party uttering the words is the very gist of the offense. Mr. Bishop, than whom there is no higher authority in all questions of criminal law (2 Bishop's Criminal Procedure, sec. 793), says: "An innuendo is an explanatory averment of the meaning. It charges no fact, and it does not admit of being sustained by evidence; the pleader, having in the colloquium and elsewhere stated all the extrinsic and other facts desired, introduces into his recitation of the libelous words, when necessary, the expression 'meaning so and so,' and this is called an 'innuendo.' Alleging nothing, it neither adds to nor qualifies any previous allegation; but if, for example, a word has two significations, and the preceding averments have laid the foundation for the one claimed, the innuendo may say that this is the one meant." "Still the jury, to convict, must be satisfied that the meaning of the libelous words is what they allege it to be. This is a question for them, not for the court": 2 Bishop's Criminal Procedure, sec. 799.

It will be observed in this case that the words charged in the indictment were not only the words "monkeying with her," but in the same connection, and a part of the same sentence, "and doing with her as he pleased"; and the evidence of the witness not only shows the use of such words in that connection, but witness also stated that, as a part of the expression of the defendant, and in connection with said words, the defendant said that the party spoken of was "ramming it to her." In our opinion, the words spoken were not ambiguous, and could, to the ordinary understanding, have but one signification, and required ⁵ no explanation. They were actionable per se in a civil suit: *Elam v. Badger*, 23 Ill. 498; *Townshend on Slander and Libel*, sec. 172. According to Mr. Bishop (2 Bishop's Criminal Procedure, sec. 799): "It is the duty of the jury to construe plain words and clear allusions to matters of universal notoriety according to their obvious meaning, and as everybody else who reads them must understand them." In order to enable the jury to arrive at the meaning of a local phrase not well defined and in general use, an innuendo may become necessary; and, in such case, witnesses may testify as to the signification or meaning of

such words in the locality: *Commonwealth v. Morgan*, 107 Mass. 202. And, moreover, the courts all agree that it is competent to prove facts and circumstances attending the speaking of the words, the situation of the parties, and their relations to the subject matter or occasion of the slander, and any other portions or all of the same conversations. This testimony is admitted in order to enable the jury to correctly determine the ultimate fact, to wit, in what sense the words were uttered. In this case, while we hold that it was not proper for the court to have admitted the testimony of the witness as to what he understood the defendant to mean by the words used, yet we fail to see how the defendant suffered any prejudice thereby, as the words themselves clearly and unequivocally indicated the meaning appellant intended to convey; and the jury trying the case could have arrived at no other conclusion in regard to the defendant's meaning in using such language: *Barton v. Holmes*, 16 Iowa, 252.

The motion for rehearing in this case is overruled.

Judges all present and concurring.

Slander—Evidence to Support Innuendo.

A majority of the cases sustain the doctrine that an innuendo in libel or slander is an explanatory averment of the meaning, which charges no fact and does not admit of being sustained by evidence. "The office of an innuendo is entirely indicatory—intended to point out and refer to what has been before stated—and, for that reason, no evidence can be introduced to support or explain an innuendo, it being used as a mere convenience, in composition, to relieve the mind from confusion as to names and other matters that have been frequently repeated, and sometimes have the same sound. The difference between an averment and an innuendo will appear from this illustration: When a paper has been ironically written of another, the complaint should set out the paper as it is, with an averment, that it contains a latent and different meaning from its literal purport, and then the alleged different meaning should be precisely set forth. An innuendo, afterward, may refer, in a running commentary, to the previously explained meaning, as often as it occurs in recital. As where one is called a white man when the meaning was that he had colored blood in him. Here the averment should explain the meaning, and the innuendo would call the attention to the true meaning, when there was an occasion to mention it": *State v. Henderson*, 1 Rich. 179-186. In *Van Vechten v. Hopkins*, 5 Johns. 211, 4 Am. Dec. 339, Mr. Justice Van Ness said: "There is another point in the case upon which, in the view I have taken of the subject, it would not be necessary for me to express an opinion. As it may, however, embarrass the parties on a future trial, if there should be any, it may as well be disposed of. I allude to the exclusion by the judge of the testimony of the witness who was called to say, that from reading the libel, he applied it to the plaintiff. This evidence

was properly overruled. The intention of the defendant is not the subject of proof, by witnesses in the way here attempted. It is the mere opinion of the witness, which cannot, and ought not, to have any influence upon the verdict. I consider the evidence as inadmissible, because it goes to prove the correctness of an innuendo. This kind of evidence, I know, has frequently, though erroneously, been admitted at nisi prius. From what has been said before of the nature of an innuendo, technically so-called, it is clear that it cannot be the subject of proof by witnesses. Not so of an averment and colloquium, which introduce into the pleading extrinsic matter, which is the proper subject of proof": *Van Vechten v. Hopkins*, 5 Johns. 211; 4 Am. Dec. 344-352, containing an extended note on the subject in hand. This doctrine was approved and reaffirmed in *Gibson v. Williams*, 4 Wend. 320. This was a case for slander instead of libel. In *Rangler v. Hummel*, 37 Pa. St. 130-133, the court used the following expressions: "It was not competent to prove the special averment that the words were 'spoken of and concerning' the plaintiff, and thus aid the innuendo by the opinion of the witness that the defendant meant the plaintiff in the words used. If this could be done, there would be no use for the innuendo. Its office would be supplied by the oath of witnesses, who would draw the inference from the precedent facts instead of the jury. This is not permissible." This last case was followed in *McCue v. Ferguson*, 73 Pa. St. 333, where it was held that it was not competent, in an action for slander, to prove, by the opinion of witnesses, the special averment that words spoken in the third person were spoken of the plaintiff. In *Pittsburgh etc. Ry. Co. v. McCurdy*, 114 Pa. St. 554; 60 Am. Rep. 363, it was again held that it was not competent to aid the innuendo of embezzlement by the mere opinion of witnesses.

In *Briggs v. Byrd*, 11 Ired. 353, the court said: "When a charge is made by using a cant phrase, or words having a local meaning, or a nickname, or when advantage is taken of a fact, known to persons spoken to, in order to convey a meaning, which they understand by connecting the words, of themselves unmeaning, with such fact, the plaintiff is obliged to make an averment of the meaning of such cant phrases or nickname, or of the existence of such collateral fact, for the purpose of giving point to the words and of showing that the defendant meant to make the charge complained of, and, in such cases, there must also be an averment that the words were so understood by the persons to whom they were addressed, for, otherwise, they are without point and harmless. These averments are traversable, and must be proven, and differ entirely from what are called innuendoes, which need no proof, and, in fact, prove themselves, their office being merely to point out the meaning, and give a greater degree of certainty than is usual in conversation or ordinary writing": *White v. Sayward*, 33 Me. 322, *Snell v. Snow*, 13 Met. 278, 46 Am. Dec. 730, *Gribble v. Pioneer Press Co.*, 37 Minn. 277, *Sternau v. Marx*, 58 Ala. 608, and *Callahan v. Ingram*, 122 Mo. 355, 43 Am. St. Rep. 583, support the doctrine that in libel and slander the innuendo alleged cannot be aided, supported, or explained by the opinion of witnesses. This doctrine has, however, met with severe criticism in some cases, and they absolutely refuse to follow it. Thus

in *McLaughlin v. Russell*, 17 Ohio, 475, the court expressly refers to *Van Vechten v. Hopkins*, 5 Johns, 211, 4 Am. Dec. 339, and *Gibson v. Williams*, 4 Wend. 320, as being bad law, which it refuses to follow, and lays down the rule that in libel or slander, where the words used are ambiguous, witnesses who know the parties and circumstances may be called to state their opinion and judgment as to the person intended, and thus aid the innuendo. To the same effect is *Russell v. Kelly*, 44 Cal. 641; 13 Am. Rep. 169; *Howe Machine Co. v. Souder*, 58 Ga. 64; *Goodrich v. Davis*, 11 Met. 473. The cases which maintain this rule generally hold that in actions for libel or slander, the testimony of the hearers or readers as to the meaning and the sense in which they understood the words is admissible: *Nelson v. Borchenius*, 52 Ill. 236; *Miller v. Butler*, 6 Cush. 71; 52 Am. Dec. 768; distinguishing *Goodrich v. Davis*, 11 Met. 473, and *Snell v. Snow*, 13 Met. 278; 46 Am. Dec. 730. If the slanderous or libelous words were uttered by indirection, without naming the plaintiff, the opinion of witnesses, well acquainted with the parties and circumstances, are admissible in evidence to show that the plaintiff was the person referred to: *Smawley v. Stark*, 9 Ind. 386; *Mix v. Woodward*, 12 Conn. 262. If the slander is not made in direct terms, but by expressions, gestures and intonations of voice, it is competent for witnesses, who heard the expressions, to state what they understood the defendant to mean by them, and to whom he intended to apply them: *Leonard v. Allen*, 11 Cush. 241.

In slander, if the complaint, by proper averments, states the existence of extrinsic matter to explain the meaning and application of the words spoken, and show their defamatory character, it is competent, when the words are proven, to admit evidence of the understanding of witnesses familiar with such facts, in whose presence the words were uttered, as to their application. The mere general opinion of a witness, derived from reading a libel, or hearing the words spoken, unaided by circumstances within his knowledge, is not competent evidence. But his understanding as to the meaning of the words, and their application to plaintiff, when founded on facts previously known to him, and detailed by him as the foundation for such understanding, is not subject to exception, and is competent to go to the jury, who may adopt or reject it in their discretion: *Tompkins v. Wisener*, 1 Sneed, 458. The mere opinions of witnesses as to the meaning of a libel or slander, or that it was of or concerning the plaintiff, are not admissible, but if the words are ambiguous and the application doubtful, it must be shown that they were used in the actionable sense, and were applied to the plaintiff, and that the hearers so understood them, and therefore the evidence of the hearers as to how they understood them, is admissible: *Smart v. Blanchard*, 42 N. H. 137. "The correctness of this rule is not only established by the weight of authority, but is supported by every consideration of justice and sound policy: *Russell v. Kelly*, 44 Cal. 641; 13 Am. Rep. 171.

IDEM SONANS.—NAMES are to be considered identical which sound alike: *State v. Patterson*, 2 Ired. 346; 38 Am. Dec. 699, and note. The doctrine of idem sonans applies to names undistinguishable in ordinary enunciation: *Barnes v. People*, 18 Ill. 52; 65 Am.

Dec. 699, and note. If two names may be sounded alike without doing violence to the power of the letters found in the variant orthography, the variance is immaterial: *Pitsnogle v. Commonwealth*, 91 Va. 808; 50 Am. St. Rep. 867, and note.

ROBINSON v. STATE.

[34 TEXAS CRIMINAL REPORTS, 71.]

BURGLARY—ATTEMPT TO COMMIT—CONSENT OF PROPERTY OWNER.—It is not consent to the taking of his property for the owner to obtain the aid of a confederate of the accused, who, for the purpose of detection, joins the accused in the criminal act designed by the accused, and attempted to be carried into execution by him.

L. Wood and Mathews & Browning, for the appellant.

74 DAVIDSON, J. This conviction was for an attempt to commit the crime of burglary with intent to steal. Appellant proposed to one Cox, who informed McDowell, the owner of the premises to be burglarized and the money therein situated, of the intended burglary. **75** McDowell replied to Cox by saying, "Just let him [defendant] come along and we will try and catch him, and not insist on his coming, and not encourage him to come; if he comes, let it be of his own free will and accord, and voluntarily." I just said, "Let him come ahead; not to stop him."

There is no conflict in the testimony of McDowell and Cox upon this issue.

Appellant was not induced by McDowell or Cox to commit the crime, but was the instigator and prime mover in the whole affair.

Under this state of case, appellant did not have the consent of the owner to enter his house or to take his money therefrom.

This is a different case from that of *Speiden v. State*, 3 Tex. Crim. App. 156, and authorities cited. In *Speiden v. State*, 3 Tex. Crim. App. 156, the defendant entered a bank at the solicitation of a detective rightfully in possession, and with the consent of the owner. There are no such facts in this case.

In *Pigg's case*, 43 Tex. 108, it was held, that "it is not consent to the taking for the owner to obtain the aid of a detective, who, for the purpose of detection, joins the defendant in a criminal act designed by the defendant, and carried into execution by actual theft": See, also, *Johnson v. State*, 3 Tex. Crim. App. 590; *Allison v. State*, 14 Tex. Crim. App. 123; *Conner v. State*, 24 Tex. Crim. App. 245.

The charge complained of is correct. It sets forth very clearly the rule contained in the cited cases. It follows, therefore, the court did not err in refusing special instructions requested by appellant, because they were not applicable to the facts of this case. Cox did not, either of his own motion or at the suggestion of McDowell, the owner, propose the burglary to the appellant, but simply agreed with him to commit the burglary, not intending or contemplating, at the time, its accomplishment.

The evidence is amply sufficient to support the verdict; the case was carried beyond mere preparation to enter the house, and shows an actual attempt to make an entry.

The judgment is affirmed.

Judges all present and concurring.

CONSENT TO CRIME OF LARCENY OR BURGLARY BY OWNER OF PROPERTY.—The crime of larceny is not committed, when, with the owner's consent, his property is taken, however guilty may be the taker's purpose and intent: *Connor v. People*, 18 Colo. 373; 36 Am. St. Rep. 295, and note. A breaking cannot be regarded as burglarious, where the entrance to the building is made by the procurement and with the consent of the owner, or by a person acting in his employment: *State v. Stickney*, 53 Kan. 308; 42 Am. St. Rep. 284. This subject is fully discussed in the extended notes to *Spelden v. State*, 30 Am. Rep. 129, 130; *Allen v. State*, 91 Am. Dec. 482, 483, and *People v. Richards*, 2 Am. St. Rep. 387.

SOUTHERN v. STATE.

[34 TEXAS CRIMINAL REPORTS, 144.]

INDICTMENT—APPLYING VERDICT TO COUNTS IN.—If there are several counts in an indictment, on the bringing in by the jury of a general verdict the court may apply the verdict to any one of the several counts of the indictment, and order judgment and sentence accordingly.

INDICTMENT—COUNTS FOR DISTINCT OFFENSES—APPLYING VERDICT TO.—If the jury returns a general verdict of guilty upon an indictment containing counts for distinct offenses, the proper practice is to retire the jury, and require it to indicate by the verdict the count upon which the defendant is found guilty.

INDICTMENT—COUNTS IN FOR DISTINCT OFFENSES.—If an indictment contains two or more counts for two or more distinct offenses, a general verdict of guilty operates as a conviction upon all, but the defendant is, upon request, entitled to have separate findings, or at least to have the jury in some way pass upon each count by itself.

INDICTMENT—APPLYING VERDICT TO COUNTS IN.—If the jury returns a general verdict of guilty upon an indictment containing different counts for distinct offenses, and the court, without objection, after interrogating the jury and with its consent, changes the verdict so as to make it apply to one of the counts in the indict-

ment upon which the evidence justifies a conviction, the defendant is not prejudiced by the action of the court, nor entitled to a reversal of the judgment on the ground of such action.

M. Trice, assistant attorney general, for the state.

144 HURT, P. J. The appellant in the above case was tried in the district court of Grayson county on an indictment in two counts, the first of which charged him with the theft of a watch of the value of twenty dollars, and the second charged him with the theft of the same watch from the person of the owner. The jury trying the case found him guilty, and assessed his punishment at confinement in the penitentiary for a term of five years. There are no assignments of error in the record, and the only question in the bills of exception that requires an answer is the action of the court in receiving and correcting the verdict of the jury.

As stated, the indictment contained two counts, the first charging a general theft of the watch, and the second charged a theft of the watch from the person of the owner. No motion was made requiring an election as to which count the prosecution would proceed upon, and the court charged the jury upon both counts. The jury subsequently returned into court with the following verdict, to wit: "We, the jury, find the defendant guilty as charged in the indictment, and assess his ¹⁴⁵ punishment at confinement in the penitentiary for the term of five years." The judge thereupon asked the jury of what offense or on which count they found defendant guilty. They replied, "Of both." The judge then suggested it would be best to indicate which offense or count they found defendant guilty upon, and he then interlined or inserted in the verdict, after the word "guilty," the following words, "theft of property of the value of twenty dollars." And judgment and sentence were accordingly entered up on the first count of the indictment. And on account of this action of the court the defendant complains, and now seeks to reverse the judgment of the lower court. On the bringing in of the verdict by the jury, if the court was not satisfied with it, unquestionably it would have been the proper practice to have had the jury retire with a suggestion to indicate by their verdict upon which count they found defendant guilty. That was not done, but does it therefore follow that what was done should cause a reversal of the case? Of course, if the statement of facts did not show a proper conviction of defendant on the first count, a different question would be presented; but the statement of facts in this case justifies a conviction of defendant on the first count of the indictment, and so we look at the

case as one of possible injury to defendant, or in which his rights were in any measure prejudiced by the action of the court. It is the general doctrine of the authorities, that where there are several counts in an indictment, on the bringing in by the jury of the general verdict the court will apply the verdict to any one of the several counts of the indictment, and order judgment and sentence accordingly.

Mr. Bishop, in his *Criminal Procedure*, volume 1, section 1014, says: "Since in the criminal law a count whereon the finding is silent may, by the better opinion, be disregarded, so likewise it would seem may be a count where a general verdict by the court applied to other counts. Consequently, if the evidence at the trial did not tend to support a particular count, or such count is bad, yet the jury have returned a general verdict of guilty on the whole, the court, not always through the formality of an amendment, but sometimes simply at the sentence, applies the verdict to—in other words, treats it as rendered on—the other and good counts, to which alone the judgment by its terms is made to attach." And again, the same author says (1 Bishop's *Criminal Procedure*, sec. 1015 a): "Where the indictment is for an offense only, charged in separate counts, the jury cannot be required to pass on each count by itself, but they may bring in a general verdict of guilty or not guilty on the whole. Yet where the counts are for distinct offenses, though a general verdict of guilty will operate as a conviction of all, still it has been held, and in reason just, that the defendant is entitled, on request, to have separate findings returned upon them, or at least to have the jury in some way pass upon each count by itself." While the counts in this case were distinct offenses, no request was made, either before the jury retired or after they returned with their verdict, ¹⁴⁶ to have them pass upon each count by itself; nor was any objection made at the time to the action of the court in interrogating the jury as to which count they found upon, and in changing their verdict so as to make it apply to the first count. As stated before, the charge of the court properly instructed the jury with reference to the law on the two counts, and the purpose and effect of the charge was to indicate to the jury to state in their verdict, in case they found the defendant guilty, upon which count they returned their verdict. They did not seem to so understand the charge, and returned into court a general verdict. It was entirely competent for the court to have received this verdict, and from his recollection or notes of the evidence, to have applied the verdict to the count proven, and to have directed judgment and

sentence accordingly; and, if the court had this authority, we fail to see why the judge did not have the authority to inquire of the jury, as he did, upon which count they had found, and, on their general or indefinite answer, to make the suggestion to them to return their verdict upon the first count, in which suggestion they acquiesced. Or if the court and jury did not have this authority at the time to so treat the verdict, then the action of the court may be treated as if it had not been done, and rejected as null and void, and the verdict in such case considered in the form in which it was originally brought in—as a general verdict; and the court then had the right (as exercised) to apply the verdict to the first count, and enter judgment and sentence accordingly.

We have before remarked that the statement of facts in this case sustains the verdict of the jury as applied to the first count, and there appearing no error in the case, the judgment is affirmed.

Judges all present and concurring.

TRIAL—VERDICT—APPLYING COUNTS TO.—Upon a general verdict of guilty, judgment may be given upon any one or all of several felonies of the same degree, included in the indictment, as they may have been supported by proof: *State v. Crank*, 2 *Ball.* 66; 23 *Am. Dec.* 117, and note. A verdict finding defendant guilty as charged is, in effect, a finding that he is guilty of every matter alleged against him in the indictment: *In re Black*, 52 *Kan.* 64; 39 *Am. St. Rep.* 331. The joinder of distinct misdemeanors in the same indictment is not a cause for the reversal of the judgment, where there is a general verdict, and the sentence is single, and is appropriate to either of the counts upon which the conviction was had: *People v. Budd*, 117 *N. Y.* 1; 15 *Am. St. Rep.* 460.

MIERS v. STATE.

[34 TEXAS CRIMINAL REPORTS, 161.]

ARREST—ILLEGAL—RIGHT TO RESIST.—One person has a right to resist an illegal arrest by another, whether an officer or a private individual, with as much and no more force, than is necessary for the purpose of resistance.

ARREST—ILLEGAL—RIGHT TO USE FORCE IN REGAINING LIBERTY.—A person wrongfully and illegally deprived of his liberty by arrest has a right to regain it, and to use all force necessary for that purpose, taking care to use no more force than is required. What degree of violence is necessary always depends upon that used or attempted by his adversary.

ARREST—RESISTING ILLEGAL—RIGHT TO RESORT TO DEADLY WEAPONS.—If a person illegally arrested attempts to regain his liberty, and the party arresting tries to prevent this by the

use of deadly weapons, the person arrested may resort to such weapons, and, if the party arresting presents his gun in shooting position, commanding the party arrested and fleeing to halt, the latter may shoot, if it reasonably appears to him that the arresting party is about to shoot, and, if he kills the arresting party, the killing is justifiable and excusable.

ARREST—ILLEGAL—RIGHT TO DETAIN PRISONER.—An officer who attempts to arrest without authority is a trespasser, and stands on no better ground than a private individual. He has no right to detain the prisoner, and no authority to prevent an escape, and in attempting to prevent such escape he is a trespasser, standing toward the prisoner on the same ground as a private citizen.

INSTRUCTIONS IN FELONY CASES.—Upon a trial in felony cases, the court must give in its charge to the jury the law applicable to the case, whether requested to do so or not. What law is applicable to the case is determined by the charge contained in the indictment and the evidence adduced at the trial.

MURDER—EVIDENCE.—On a trial for murder, arising from an illegal arrest, evidence of the issuance of a capias from another county for the arrest of the defendant is not admissible, provided it was not in the hands of the deceased at the time he attempted to make the arrest.

MURDER—EVIDENCE OF GOOD CHARACTER OF DECEASED is not admissible on a trial for murder, if his character has not been attacked.

MURDER—EVIDENCE OF CHARACTER OF DEFENDANT. On a trial for murder arising from an illegal arrest, evidence that deceased was informed a short time before the homicide that "you have a pretty bad man to arrest, and that they would all shoot," is irrelevant and inadmissible.

Miller & Williams and S. H. Russell, for the appellant.

M. Trice, assistant attorney general, for the state.

184 HURT, P. J. This is a conviction for murder of the second degree, with punishment in the penitentiary for the term of twenty-five years. The name of the deceased was Riley Burnett. The statement of facts covers seventy printed pages, when all of the material facts could have been placed in twenty pages. Alf Miers was, at the time of homicide, living with Mr. Metker, in Dallas county, about fourteen miles northwest of the city of Dallas. Miers was a brother in law of Metker. In Shackelford county an indictment was pending against him for burglary. A capias had been sent to, and was in the hands of, the sheriff of Dallas county (Cabell). On the evening before the homicide, Webb and Bolick (deputy sheriffs of Dallas county), Webb in possession of the capias, saw deceased, Burnett, who was a constable of said Dallas county, and requested him to take the capias and arrest the defendant. Deceased took the capias, but returned it to Webb, stating, that "You might as well have it as I." On the next morning, early, Burnett went to Metker's, and arrested the defendant. When the arrest was made, defendant asked him for what he was arrested. Deceased re-

plied, for burglary in Shackelford county. Defendant asked him if he had any papers. Deceased answered that he had not, and did not need papers. Defendant asked permission to go to the house and get his breakfast, and, after some parleying, deceased consented to this. The parties went to the house, defendant in the lead, with deceased a few feet behind him. Upon the gallery of the house was lying a Winchester rifle. Defendant stepped over or passed near by the gun, and, when deceased reached it, he picked it up and threw a cartridge into the barrel. One witness says that he threw a cartridge ¹⁸⁵ out, but this is immaterial. When the deceased picked up the gun and threw a cartridge into the barrel, the defendant, hearing this, ran. The defendant did not run until this was done. But we will let the dying man give the facts attending the homicide. Riley Burnett, the deceased, a very short time after he was shot, gave the following version of the transaction to A. B. Wright. Wright was his friend. They had known each other for twenty years, and had been partners in the cattle business.

The following is the testimony of A. B. Wright: "My name is A. B. Wright, and I knew Riley Burnett in his lifetime. I think I knew him twenty years, and I had business relations with him, as we were in the cattle business together, and we were associated as partners. We had been partners three years. I remember the day he was killed. I have known the defendant ever since he was a baby. I have not seen him [the defendant] for over ten years prior to the homicide till I saw him then. I went over to Metker's house, where Riley Burnett was after the shooting, and saw Mr. Riley Burnett. Riley Burnett made a statement to me as to how this shooting occurred. When I walked up there, I said, 'Riley, are you badly wounded?' and he replied that he was badly wounded. I asked him, 'What made you let Miers go to the house?' and he said that he out-talked him. He said Miers wanted to go to the house, and he said that he was a little too careless with him. He said that when he got to the house, and Miers run in the house, 'I run around the corner of the house, and when I got around to the corner of the house Miers had got to the door. I had my gun to my shoulder, and had it on Miers, when Miers jumped out. I did not think he would shoot me. Miers came out of the house with the gun in his hand.' Riley said he [the defendant] threw the guard down, and threw a cartridge into the gun, and he just threw his gun over and shot; and he [Riley] said, 'I held a little too long.' He stated that the defendant just threw the gun over and shot. He stated he ran out of the door, and threw the cartridge in. I do

not believe Burnett stated how the defendant shot at him. He said he just run out of the door, and threw a cartridge in it, and just threw the gun over, 'and we both fired at once; I held a little too long.' He said that he had the gun on the defendant as the defendant got out of the door. He said the defendant had just jumped out of the door, and run, and that he hallooed 'Halt!' at him, and that when the defendant jumped out of the door to run he hallooed 'Halt!' Yes, sir; he said something about liberty. He said that Miers said he just wanted his liberty. He said that he did not blame anybody but himself. He said that he could not blame Miers; that if they had a writ for him, that he would try to get away, too. He said he would have done the same thing that Miers had done if he had been in his place."

Now, there is not a line of testimony in conflict with this, the statement of the man who was shot, and soon after died from the wounds inflicted, by appellant. That this story is colored in behalf of appellant ¹⁸⁶ is absolutely preposterous. Such an hypothesis is in conflict with our experience, and is against our frail, depraved natures. For Burnett, suffering, yes, dying, from the wounds inflicted by appellant, to tell the plain unvarnished truth, would be to approach that degree of perfection rarely to be found in a man. This homicide was not in prevention of the arrest, which had taken place at the horse lot. That arrest, though illegal, had been submitted to by the appellant. The case before us is one in which a citizen, who has been illegally deprived of his liberty, attempts to regain it, and the trespasser—aggressor—who has, in violation of law, deprived him of his liberty, attempts, by means of a deadly weapon, used in a deadly manner, to prevent him. In this case, the man falsely imprisoned did not use, or attempt to use, a deadly or any kind of weapon to regain his freedom. He had his gun unloaded, down, not presented, and was fleeing, and did not charge his gun until deceased had not only presented but had covered him with his gun, when they shot at each other simultaneously, both receiving, as was then supposed, mortal wounds.

That the arrest was illegal is not questionel. The court so instructed the jury. Being an illegal arrest, what were the rights of the accused under the circumstances? Being without capias in this case, the deceased, a constable, had no right to arrest the appellant, and in making the arrest was a trespasser, and the appellant had the right to resist by force, using no more than was necessary to resist the unlawful acts of the officer. An officer who acts without proper authority, and the person doing

the same act who is not an officer, stand on the same footing; and any third person may lawfully interfere to prevent an illegal arrest, doing no more than is necessary for that purpose: *West v. Cabell*, 153 U. S. 78; *Commonwealth v. Crotty*, 10 Allen, 404, 405; 87 Am. Dec. 669. If deceased, Burnett, had no right to arrest appellant, and if, in so doing, he was a trespasser, had he the right to retain him in his custody? Does the fact that appellant yielded, without resistance, or without protesting against the trespass, make the arrest legal? Does this fact deprive the man falsely imprisoned of the right to assert his rights and regain his liberty, or convert in some mysterious manner the trespass into a lawful act? The affirmative of these questions has no support in principle or reason. Being wrongfully and illegally deprived of his liberty, appellant had the same right to regain it, and right to use the same means, force, or resistance, as he had in preventing an illegal arrest. Being falsely imprisoned, he had the right to his liberty, and, for the purpose of obtaining it, could use all force necessary for that purpose, taking care to use no more than was required. What degree of violence is necessary always depends upon that used or attempted by his adversary. To illustrate: A is illegally arrested, and attempts to regain his liberty. His adversary proposes to prevent this by the use of deadly weapons. A may resort to such weapons. A flees from such arrest. The officer presents, in a shooting position, his gun, demanding of him to halt. A can shoot, if it reasonably appears ¹⁸⁷ to him that the officer will shoot. But if A is unlawfully arrested, and, being in no danger of violence from the officer, resorts immediately to deadly weapons or great violence (that which is unnecessary to secure his liberty), he would not be justified or excused. He would be guilty (if he should slay the officer) of murder in the first degree if he, anticipating the arrest, should prepare himself with a deadly weapon, and deliberately and calmly form the intention to kill the officer: *Rex v. Patience*, 7 Car. & P. 775; *Regina v. Allen*, 17 L. T., N. S., 222. But, express malice apart, if A should at once, without first resorting to milder means, greater force or violence than was necessary to obtain his liberty, and should kill the officer, he would be guilty of manslaughter. The illegal arrest being a great provocation, the killing would be attributed to the passion arising therefrom: *West v. Cabell*, 153 U. S. 78, and authorities there cited. In every case in which the defendant is held guilty of manslaughter, he used more or greater violence or force than was necessary to prevent the arrest or regain his liberty. If the accused used no more force than was necessary, he would

be guilty of no offense. Let us suppose that the party slain (be he officer or not) was authorized to make the arrest and detain the accused. If he exercises his authority in a wanton and unnecessary manner, he becomes a trespasser, and if, by his acts, he creates in the mind of the accused a reasonable apprehension or fear of death or great bodily harm, the homicide would be excusable: *State v. Oliver*, 2 Houst. 605, 606. If the officer has no authority to arrest, in attempting or making the arrest, he becomes a trespasser, and stands on no better ground than a third party—than if he were not an officer. The arrest being illegal, he has no right to detain the prisoner, and hence no authority to prevent an escape, and in preventing an escape he would still be a trespasser, and stand to the prisoner on the same ground as a private citizen.

All of the above propositions of law are not applicable to this case. Upon the trial in felony cases, the court must give in charge to the jury the law applicable to the case, whether requested to do so or not. What law is applicable to the case is determined by the charge contained in the indictment and the evidence adduced on the trial. To be applicable, it must have support in the evidence; and in determining the law which is applicable, the case must be clearly understood by the judge whose duty it is to apply the law. Law which is applicable to one case of homicide in preventing an illegal arrest, or to effect an escape from such an arrest, may not have any application whatever to the case on trial. Now, then, what is this case? Appellant was illegally arrested, and attempted to regain his liberty. The deceased, who was a trespasser, threw his Winchester upon him, covering him with it. Appellant charged his gun while deceased was covering him, and, he still retreating, deceased, with his gun still in a shooting position, demanded of appellant to halt, when they both shot, shooting at the same time, each receiving wounds, that of the deceased's proving mortal. And ¹⁸⁹ what is the law applicable to this case? The court should have instructed the jury that the arrest was illegal, and that deceased was a trespasser in making the arrest and detaining the prisoner; that the appellant had the right to regain his liberty, and that deceased had no right to prevent him; and that if deceased, to prevent an escape, threw his gun upon him, commanding him to halt, and that appellant, believing that his life was in danger, or that he was in danger of serious bodily injury, shot and killed the deceased, to acquit him. Was manslaughter in this case? It was not. Why? The arrest and detention were unlawful. Did appellant use more force than was necessary? He did not;

for nothing less than the most effectual means could have sufficed, and in this case appellant's life was not saved by his prompt action with a deadly weapon—that is, by the shot—but because the ball from deceased's gun struck appellant's gun, and was, no doubt, somewhat deflected. Did he shoot too quick? He did not shoot soon enough. Before the deceased threw his gun to his shoulder, and pointed it at appellant, had he done or said anything which was calculated to induce deceased to believe that he intended to shoot him, or inflict upon him the slightest degree of violence? He had not. He said, "I just want my liberty," running at the time. He was entitled to his freedom, and had the right to say so. He had the right to run, and was doing so. Was murder of the first degree in this case? It was not. There is not the slightest testimony in this record tending to prove that appellant had prepared arms in anticipation of arrest, and had deliberately and calmly determined to kill the officer. When arrested, appellant was unarmed. The Winchester on the gallery did not belong to him. He, when he could have done so, did not touch the gun. Deceased picked it up, and threw a load into the barrel, and with this gun shot appellant.

But concede, for the argument, that appellant had been breathing out threats of the most deadly character against any and all officers who might attempt to arrest him legally or without authority, such proof could not have had the slightest bearing upon this case, when considered in the light of the facts attending this homicide. Neither was murder in the second degree in this case. Why? 1. Because the killing was without malice; 2. Because the killing was permitted by law in the necessary defense of the life of the appellant. We have given the statement of facts a most careful examination, and, if there is any testimony in the record which places the appellant in the wrong in any respect, we have not perceived it. He may have been guilty of burglary in Shackelford county, but, until tried and convicted, the law presumes him innocent of that charge.

Over the objections of counsel for appellant, the court permitted the state to introduce in evidence the capias from Shackelford county for burglary in that county. The state, over the objection of the appellant, proved that Riley Burnett was a good man. The state, over the objections of the appellant, proved by Wright, that a short time ¹⁸⁰ before the homicide he had told deceased, "You have a pretty bad man to arrest; that they would all shoot." 1. Riley Burnett was not on trial; 2. The arrest was unlawful. The capias was not admissible, and served no legitimate purpose in this case, but would present the appel-

lant to the jury as a felon—a burglar. What Wright stated to the deceased was not competent. Deceased had no right to attempt the arrest. That the deceased was a good man had nothing to do with this.

The court instructed the jury upon self-defense properly, but added the following: "And in this connection you are further told that if you find that Burnett first assaulted defendant by drawing his gun to fire, and not to halt defendant, then the law presumes that he intended to inflict serious bodily injury or to kill the defendant." But suppose he drew his gun (which he never did), pointed it at the defendant, and called for him to halt, intending, evidently, to kill him if he did not halt, what would the law presume then? The law would make no presumption, because none would be needed, especially when deceased unlawfully shot the defendant. The charge was wrong. It was calculated, when considered in connection with the statement made by deceased to Wright, to induce the jury to believe, that if deceased's intention was to rearrest the appellant, he had the right to do so. That it was the intention of the court to convey this idea is evident from the following charge: "You are further instructed that if you believe from the evidence that the defendant, Alf Miers, had submitted to his arrest by Riley Burnett, and, after such submission, broke away from the custody of said officer with the intent to escape from the arrest to which he had submitted, that the officer, Riley Burnett, had the right to prevent said escape." A is arrested by a private person without authority. A did not resist the arrest. A has no right to escape from such an arrest, and hence the person making the illegal arrest is vested with the authority of a full-fledged officer, armed with all proper authority, and A must go with the trespasser wheresoever he desires, and can obtain relief by habeas corpus, we suppose, if his consent has not deprived him of this right. We defy the production of a single authority in support of this proposition. Such a doctrine would be sweet to the highway robber. He would select his time, arrest his man, take him to one side for the purpose of fleecing him, and the prisoner would have no right to regain his liberty, because he had yielded to the arrest without resistance; nor could any other persons intervene, for they would have no greater or other rights than the prisoner. This charge vamps paragraph C of the main charge, which reads: "But if a person submit to arrest, and acquiesce in the authority of the officer to make the arrest, he waives every objection or right he may have made to any irregularity or illegality in the same or the arrest; and if thereafter he breaks away from the

officer he acts unlawfully, and in a conflict between him and the officer consequent thereon, he, in law, would be the aggressor; and if, by his conduct ¹⁹⁰ [what conduct? running, we suppose], or with deadly weapons, he leads the officer to reasonably apprehend danger to life or serious bodily harm, he cannot invoke the law of self-defense in any subsequent conflict."

When we read this instruction to the jury, we can account for the verdict of guilty in this case. Now, in regard to this charge, we have this to say, that it is not law, but an outrage upon law. A citizen is illegally arrested without resistance. He attempts to regain his liberty by flight. He is the aggressor if he should shoot the trespasser to save his own life—shoot and kill the man who was and had been in the very act of killing him, because he was attempting to release himself from the, in law, real aggressor.

The appellant was convicted of murder of the second degree; his punishment was fixed at confinement in the penitentiary for the term of twenty-five years. This conviction has no support in the evidence. It is evidently against not only the great weight of testimony, but against all of the evidence. We close our observations in regard to this case with the language of Messrs. Horrigan and Thompson in their note to the case of Myers v. State, 33 Tex. 525: "This seems to be one of those unfortunate cases where not only the plain rules of law, but the very right and justice of the case, have been violated, and, what is worse, violated against the overwhelming preponderance of the testimony, and that presumption which the law humanely indulges in favor of the innocence of every man who is put upon trial for crime."

The judgment is reversed and the cause remanded.

Henderson, J., concurs.

Davidson, J., absent.

ARREST—ILLEGAL—RIGHT TO RESIST.—A person is not required to submit to illegal arrest, but may demand the warrant or proper authority, and in its absence repel force by force, provided the force does not exceed prevention and defense: Miller v. State, 31 Tex. Crim. Rep. 609; 37 Am. St. Rep. 836, and note. One unlawfully sought to be arrested, who, without malice and to prevent such arrest, kills the party seeking to arrest him, is not guilty of murder but of manslaughter only: Cryer v. State, 71 Miss. 467; 42 Am. St. Rep. 473, and note. See, also, the notes to Croom v. State, 21 Am. St. Rep. 187, and State v. Scheele, 14 Am. St. Rep. 120.

TRIAL—INSTRUCTIONS.—Where a trial court throws aside all instructions asked for by one or both of the parties, and gives instructions of its own, the latter must fairly instruct the jury on all legal questions involved in the case: Wacaser v. People, 134 Ill.

438; 23 Am. St. Rep. 683. It is the duty of the court to charge the jury on the law applicable to every phase of the testimony adduced on the trial: Jones v. State, 33 Tex. Crim. Rep. 492; 47 Am. St. Rep. 46, and note.

DUNN v. STATE.

[64 TEXAS CRIMINAL REPORTS, 257.]

CORPUS DELICTI—PROOF OF.—The corpus delicti cannot be established by the confession of defendant alone, but, taken in connection with evidence of his flight and other facts connecting him with the crime, the proof may be sufficient.

LARCENY—INTENT—APPROPRIATION.—If the property of another is taken with intent, on the part of the taker, to retain it until he is paid a reward for its restoration to its owner and in the event of not receiving such reward, not to return it at all, the taking is larceny.

LARCENY — INTENT — APPROPRIATION.—If one person takes the property of another with intent to hold it for the purpose of obtaining a reward for its return, but without any intention of depriving the owner of the property permanently, and with intent to return it in case no reward is offered, the taking is not larceny.

M. Trice, assistant attorney general, for the state.

258 HENDERSON, J. The appellant in this case was tried in the district court of Tarrant county on an indictment charging him with theft of a horse, and was convicted, and his punishment assessed at confinement in the penitentiary for a term of five years.

The appellant contends in this case that the "corpus delicti" is dependent alone on the confessions of defendant, and that the conviction cannot be sustained in such case without other proof. From an inspection of the record, we find from the testimony of the owner that this horse in question was kept in an inclosure with another horse, his mate, and to which he was very much attached, and they were never known to separate from each other of their own accord; that the two **259** horses were placed by the owner in the inclosure on the night in question; that the next morning the gate of the inclosure was found open, and the horse charged to have been stolen was missing, and has never been seen by the owner since. On the same night, about 1 o'clock, two witnesses testify to seeing the defendant riding along the railroad track near them, and leading a bay or brown horse, which answered to the description of the horse of the prosecutor. The defendant is shown by other testimony, before the alleged theft, to have suggested to one or two parties that they take horses and hide them out, and hold them for any reward that might be offered by the owners. After the horse in

question was missed, the defendant is also shown to have suggested to the prosecutor that he should offer a reward for his missing horse. While it is true that the corpus delicti cannot be proven by the confessions of a defendant, yet, to our minds, the testimony, outside of the defendant's confessions in this case, is amply sufficient to establish the fact that the prosecutor's horse was taken by someone on the night in question. And the confessions of the defendant to the taking and his flight, together with the other circumstances proven, not only connected defendant with the taking, but relieved the court from the necessity of giving to the jury a charge on circumstantial evidence: *Wampler v. State*, 28 Tex. Crim. App. 352.

It is also insisted by the appellant that there was no fraudulent intent in this case to permanently appropriate the horse to the use or benefit of the appellant; that the taking of the horse with the intent to procure a reward for the return of same is not the intent to permanently appropriate the property, necessary to constitute theft. Under our statutes, the taking must be with the intent to deprive the owner of the value of the property, and to appropriate the same to the use or benefit of the person taking, and it has been held that the taking for a mere temporary use—as where a party takes a horse for the purpose of taking a ride, and turning the horse loose or restoring him to his owner—is not theft. But it appears that the purpose here was not for a temporary use, but to hold the property itself until he should be paid for its restoration to the owner, and to that extent he must have intended to have deprived the owner of its value, and to appropriate it, pro tanto, to his own use and benefit; that is, he proposed to appropriate to his own use some interest or value in the horse itself: *Musquez v. State*, 41 Tex. 226; *McPhail v. State*, 9 Tex. Crim. App. 165. On this phase of the case, the court charged the jury, if they believed the defendant took the horse with the intent to deprive the owner of the value of the same until such time as the owner might offer a reward for the return of the horse, and then to return same and get the reward, and that it was his intent not to return same, but to appropriate it to his own use, except in case a reward should be offered, that in such case defendant would be guilty, the same as if he had taken the horse without any intention to return it in any event, or in any contingency. On the other hand, they were ²⁶⁰ instructed, if they believed defendant took the horse, but that he did so for the purpose of holding the horse and getting the reward, should one be offered, and without any intention of depriving the owner permanently of the

value of same, but with the intention of returning same and getting a reward, or of returning him without a reward should none be offered, then to find defendant not guilty. These charges presented the issue on this branch of the case certainly as favorably to appellant as he could claim, and left the question of his intent at the time of the taking to be determined by the jury, and we think the evidence is amply sufficient to sustain their finding as to such intent.

The appellant raised the question as to the sufficiency of the indictment, and claims that the word "at" is used, instead of the word "of," in the allegation of possession and in the allegation of value, and he has brought the original indictment before us for our inspection. On a careful reading of the same, we are of the opinion that the word "of," was the word written by the pleader, and not "at," as claimed.

There being no error in the record, the judgment is affirmed.

Hurt, P. J., absent.

CORPUS DELICTI—PROOF OF.—Confessions alone will not sustain conviction of crime in the absence of corroborative proof of the corpus delicti: Willard v. State, 27 Tex. App. 386; 11 Am. St. Rep. 197, and note; Harris v. State, 28 Tex. App. 308; 19 Am. St. Rep. 837, and note. See, also, the extended notes to State v. Williams, 78 Am. Dec. 254, and Daniels v. State, 6 Am. St. Rep. 251.

LARCENY—TAKING AND CONCEALING FOR REWARD.—The wrongful taking and carrying away of the property of another without his consent, with intent to conceal it, until the owner offers a reward for its return, and for the purpose of obtaining the reward, is larceny: Berry v. State, 31 Ohio St. 219; 27 Am. Rep. 508.

HOCKER v. STATE.

[34 TEXAS CRIMINAL REPORTS, 359.]

INDICTMENT—VARIANCE.—An indictment for forgery alleging that the instrument uttered by the accused purported to be the act of another, "a fictitious person," which instrument was to the tenor of the following, then setting out the instrument signed by such other, does not contain a variance. The purport clause of the indictment simply describes such other party as a fictitious person, and does not allege that the act was that of a fictitious person.

FORGERY—FICTITIOUS PERSON.—The signing of a fictitious name to a written instrument with fraudulent intent constitutes forgery.

EVIDENCE, CIRCUMSTANTIAL—INSTRUCTIONS.—In order to warrant a conviction on circumstantial evidence, all the necessary facts must be consistent with one another and with the main fact sought to be established, and they must be of so conclusive a nature that, when considered in connection, they lead reasonably and with moral certainty to the conclusion that the defendant did

commit the offense of which he is accused, and exclude any reasonable hypothesis except the guilt of the defendant.

FORGERY—VENIRE.—Under a statute providing that "the offense of forgery may be prosecuted in any county where the written instrument was forged, or where the same was used or passed, or attempted to be used or passed," the forger may be prosecuted in the county where the forged instrument was passed, although it purported to be executed in another county. In such case, although the indictment alleges that the instrument was made in the county where it was passed, it is not necessary for the prosecution to prove such allegation as a prerequisite to conviction.

W. G. Barber, for the appellant.

M. Trice, assistant attorney general, for the state.

361 DAVIDSON, J. Appellant was convicted of forgery. Omitting prior averments, the indictment, in its purport clause, charges that appellant "did then and there, without lawful authority, and with intent to injure and defraud, willfully and fraudulently make a false instrument, in writing, purporting to be the act of another, to wit, the act of Clay Rollins, a fictitious person, which said false instrument is to the tenor of the following." Then follows the tenor clause, and the instrument does not purport to be the act of a fictitious person, but the act of Clay Rollins. This, it is insisted, constitutes a variance. We do not understand the purport clause as alleging that the tenor clause discloses that Clay Rollins was a fictitious person. The purport clause does not allege the act purported to be that of a fictitious person, but simply that Clay Rollins was such a person. It was but descriptive of the person whose name was forged, and not an averment that the instrument purported to be that of a fictitious or unreal person. *Westbrook v. State*, 23 Tex. Crim. App. 401, and *Roberts v. State*, 2 Tex. Crim. App. 4, cited by appellant, are not in point. Nor can we agree to the proposition that the use of a name of a fictitious person cannot be made to constitute forgery. It is thoroughly settled that forgery can thus be committed: *Brewer v. State*, 32 Tex. Crim. Rep. 74; 40 Am. St. Rep. 760; *Davis v. State*, 34 Tex. Crim. Rep. 117; 8 Am. & Eng. Ency. of Law, 457, and note; *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183; *State v. Hahn*, 38 La. Ann. 169; *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760; 2 Wharton's Criminal Law, sec. 1424; 2 Russell on Crimes, 733; *Commonwealth v. Costello*, 120 Mass. 370.

In the case last cited it was said: "The essential element of forgery consists in the intent, when making the signature, of procuring it to be made to pass it off fraudulently as the signature of another party than the one who actually makes it. If this intent thus to personate another ³⁶² exists, the instrument

is still a forgery, even if the name affixed is actually the same name with that borne by the party who signs it. So there may be forgery by the use of a fictitious name, as well as by the use of a person's own name, if the intent exists to commit a fraud by deception as to the identity of the person who uses the name." Again it is said: "The law is settled, that the signing of a fictitious name to an instrument with a fraudulent intent constitutes forgery": State v. Wheeler, 20 Or. 192; 23 Am. St. Rep. 119, and cited authorities. The court charged the jury, that "in order to warrant a conviction alone on circumstantial evidence, all the necessary facts must be consistent with each other, and with the main fact sought to be established; and they must be of so conclusive a nature that, when considered in connection, they lead reasonably and with moral certainty to the conclusion that the defendant did commit the offense of which he is accused, and exclude any reasonable hypothesis except the guilt of the defendant." This charge was objected to, because it "failed to charge the jury that each fact or circumstance relied on by the state as constituting a link in the chain of circumstances must itself be proven by competent evidence beyond a reasonable doubt, and did not lay down the rule by which the jury should be governed in weighing each fact or circumstance, and then grouping them together as a whole." This exception states the rule applicable to circumstantial evidence rather too broadly, and may not, in many cases, be correct. The circumstances and facts do not always arrange themselves, or are not arranged by the evidence in the form of a chain, and do not always so depend the one upon the other as to constitute such chain. But they may, and frequently do, array themselves in a group or number of isolated and independent facts, "in such a manner that each isolated fact, though insufficient of itself to raise the conclusion of guilt, points to it with more or less force, so that the whole group of facts, according to the strength or number of isolated facts, will, when considered together, create a satisfactory conclusion of guilt. In by far the greater number of cases it is believed the facts thus arrange themselves, and not in the form of a chain. When they so arrange themselves, they have been more properly likened to the strand of a cable. One or more of the strands may break, but the cable itself will not part": Thompson on Trials, par. 2512, note 3. These ultimate or necessary facts essential to the conclusion of guilt should be proven as satisfactorily as the main fact. If all the facts are so proved that are necessary or essential to justify the conviction, it would hardly be correct to hold that others, relied on by the state, not necessary to the convic-

tion, should also be proved as cogently as the main fact, for the conviction could be supported without such facts; and besides, they may tend only remotely to prove guilt, though relied on, and the case may be completely proved independently of them.

The court charged fully upon reasonable doubt, as well as upon the issue that Clay Rollins was a fictitious person, and the jury were further ³⁶³ instructed this fact must be proved, or the defendant was entitled to an acquittal. They were further told that they must believe defendant signed the name of "Clay Rollins" to the instrument, and that he used such name as the name of a fictitious person; otherwise they should acquit. The charge on circumstantial evidence, as given, is believed to be sufficient, when applied to the evidence in this case. Not only so, but the court went further, and gave a pertinent charge directly applicable to the inculpatory facts proved on the trial. There was no possible chance that we can conceive, in this case, for the jury to have been misled as to the law applicable to the facts, or for them to have misunderstood their duty in passing upon the testimony. The charge was a direct, pertinent application of the law to the evidence, independent of the charge on circumstantial evidence.

Appellant requested the court to charge the jury that, the state having alleged the instrument was made in Hays county, it was necessary to prove it as a prerequisite to conviction. It was refused, and exception reserved. The court's action was correct, for the statute provides: "The offense of forgery may be prosecuted in any county where the written instrument was forged, or where the same was used or passed, or attempted to be used or passed": Code Crim. Proc., art. 206. The instrument purports to have been executed in San Antonio, Bexar county, but was passed in Hays county. This was sufficient on question of venue. The instrument, if genuine, would have authorized defendant to have disposed of the interest "Clay Rollins" may have had in the property described in it. He consummated a sale of a portion of said property under and by virtue of its terms, and used it as authority for such disposition.

We are of opinion the record is free from reversible errors, and the judgment should be affirmed, and it is so ordered.

Judges all present and concurring.

FORGERY—SIGNING NAME OF FICTITIOUS PERSON.—Signing the name of a fictitious person, with intent to defraud, is a forgery: *State v. Warren*, 109 Mo. 430; 32 Am. St. Rep. 681, and note; *State v. Wheeler*, 20 Or. 192; 23 Am. St. Rep. 119, and note.

FORGERY.—WHERE DEEMED TO HAVE BEEN COMMITTED is discussed in the extended note to *Simpson v. State*, 44 Am. St. Rep. 83.

CIRCUMSTANTIAL EVIDENCE SUFFICIENT to support a verdict of conviction must be consistent with guilt and inconsistent with any other reasonable hypothesis: *State v. Atkinson*, 40 S. C. 363; 42 Am. St. Rep. 877, and note. Absolute certainty is not essential to proof by circumstances, and, if they produce moral certainty to the exclusion of every reasonable doubt, it is sufficient: *Carlton v. People*, 150 Ill. 181; 41 Am. St. Rep. 346, and note with the cases collected. See, also, the extended note to *Rippey v. Miller*, 62 Am. Dec. 179.

BAXTER v. STATE.

[84 TEXAS CRIMINAL REPORTS, 516.]

SLANDER OF WIFE BY HUSBAND.—A husband who previously to his marriage, had carnal knowledge of his wife is not guilty of slander in imputing to her a want of chastity, and stating that he was not the father of her child, born after marriage, and that she had also had carnal intercourse with another man besides himself.

SLANDER BY IMPUTING WANT OF CHASTITY to a female is only predicable upon the fact that such female is a chaste woman.

HUSBAND AND WIFE—WITNESSES AGAINST EACH OTHER.—A statute providing that husband and wife cannot testify against each other, except in a criminal prosecution for an offense committed by one against the other, must be construed to mean an act of personal violence committed by one against the other.

HUSBAND AND WIFE—WITNESSES AGAINST EACH OTHER.—In an action for slander uttered by a husband against his wife, she is incompetent as a witness against him.

Turner & Turner, Jones & Jones, and W. C. Buford, for the appellant.

R. L. Henry, assistant attorney general, for the state.

518 HENDERSON, J. The appellant in this case was tried in the court below on an indictment charging him with slander, was convicted, and his punishment assessed at a fine of one hundred and fifty dollars and six months' imprisonment in the county jail; and from the judgment and sentence of the lower court he prosecutes this appeal.

The slander, as alleged in the indictment, is as follows: "That the said J. R. Baxter did then and there falsely, willfully, maliciously, and wantonly say of and concerning one Mittie Baxter, in the presence and hearing of Ross Norvell and divers other persons, in substance, that he, the said J. R. Baxter, had been deceived, and that the child of Mittie Baxter was not the child of said J. R. Baxter, but was the child of one Houston, meaning thereby that the said Mittie Baxter had given birth to the child,

and that the said Houston, a person other than the husband of said Mittie Baxter, had had carnal intercourse with her, the said Mittie Baxter, and was the father of said child, the said Mittie Baxter being then and there the lawful wife of said J. R. Baxter." The record in this case shows that the defendant married Mittie Baxter on the 8th of January, 1892, and that about a week thereafter he took her to Louisville, Kentucky, where, on February 3d, following, she was delivered of a child. He returned to Texas, leaving her in Louisville, and the words set out in the indictment as constituting the slander were spoken by him of and concerning his wife after his return from Kentucky. The evidence on the part of the state shows various acts of carnal intercourse on the part of the defendant with the said Mittie Baxter, nee Tips, prior to their intermarriage; and the question here presented for our consideration is, whether a husband, who has, previous to his intermarriage, had carnal knowledge of his wife, can slander her by imputing to her a want of chastity under the circumstances of this case. The gravamen of this offense is the imputation of a want of chastity to a female alleged to be slandered. If the prosecutrix in this case, as is conceded by the state, had repeated acts of carnal intercourse with the defendant prior to their marriage, could she, under such circumstances, be regarded as a chaste woman? Suppose he had never married her, and had spoken the words alleged against him in this case concerning her, would proofs of the facts of this case be a good defense against the accusation of slander? Most assuredly they would. Then, does it follow that, because he subsequently married the prosecutrix, he by these means wiped out the stigma of unchastity which by her own voluntary act she had brought about? And, if this sexual intercourse rendered her unchaste, was she the subject of slander, which can only be predicated of a chaste woman? If this be true, can it be urged that what the defendant said of and concerning her—that she had also had intercourse with another person besides himself—made him guilty of slander? If, by her previous ill-conduct in this regard, she had destroyed her virtue and rendered herself unchaste, we fail to see how an accusation of a want of chastity with any number of persons could affect the question. However ⁵¹⁹ the moral sentiment may be shocked at the man who could be brute enough, after marrying a woman whom he knew to be unchaste at the time of his marriage, to upbraid her for her past conduct, and much more falsely accuse her of carnal intercourse with other men besides himself, yet our statute on the subject fails to reach

such a case, as it is intended only for the protection of the chaste woman, whether married or unmarried.

Another question presented by the assignments in this case is the right of the wife to testify against the husband. Our statute provides (Code Crim. Proc., art. 735), that "the husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other." This has been construed to mean some act of personal violence by the one against the other: *Overton v. State*, 43 Tex. 616; *Wharton on Evidence*, sec. 392. In *Compton v. State*, 13 Tex. Crim. App. 271, 44 Am. Rep. 703, which was a case of incest, the wife was introduced against the husband, and for this error the case was reversed and remanded, and the reasoning of the court presented in said case is applicable to the present case. Following said decision, we hold that the testimony of the wife in this case was not admissible.

For the errors discussed, the judgment is reversed and the case remanded.

Judges all present and concurring.

WITNESSES—HUSBAND AND WIFE.—A wife is competent to testify against her husband in a criminal action whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted: *Dill v. People*, 19 Col. 469; 41 Am. St. Rep. 254, and note. To the same effect see *State v. Chambers*, 87 Iowa, 1; 43 Am. St. Rep. 349, and note. A wife is competent to testify for or against her husband in a criminal case: *Walker v. State*, 34 Fla. 167; 43 Am. St. Rep. 186, and note. See, also, the extended note to *State v. Boyd*, 27 Am. Dec. 377, and the note to *Roland v. State*, 35 Am. Rep. 744.

ANDERSON v. STATE.

[34 TEXAS CRIMINAL REPORTS, 546.]

MURDER—CORPUS DELICTI—PROOF OF.—If in a murder case it is shown that the body of the deceased, or portions thereof, have been found or seen, and identified, and that the death was caused by the culpable act or agency of another, the corpus delicti may be established by the confession of the accused, corroborated by the testimony of his accomplice.

WITNESSES—ACCOMPLICE—PROOF OF REPUTATION FOR VERACITY.—An accomplice, whose testimony has been attacked, may be sustained by evidence of his good character for truth and veracity, the same as any other witness.

WITNESSES CANNOT BE IMPEACHED or contradicted, except as to such matters as they have testified.

MURDER—ALIBI—INSTRUCTIONS.—It is reversible error for the court to fail to charge the jury with reference to an alibi, if the accused has testified that he was not at the place of the homicide when the deceased was killed, and had nothing to do with the killing. In such case the error is intensified if the jury is instructed upon the law of self-defense, when there is not the slightest circumstance presenting this defense.

Miller & Williams, for the appellant.

M. Trice, assistant attorney general, for the state.

549 HURT, P. J. Appellant was tried and convicted for the murder of Henry Kirk, the conviction being for murder of the second degree, with punishment fixed at five years in the penitentiary.

Was the corpus delicti proven? This must be done beyond a reasonable doubt. We proceed to answer the question upon the hypothesis that James Bagley was an accomplice to the crime. The corpus delicti cannot be proven by the uncorroborated testimony of an accomplice. Nor can the corpus delicti be proven alone by the confession of the accused. Must it be proven independently of the confession? This is not necessary. Can the confession aid, corroborate the testimony of the accomplice, and, when both are taken together, be sufficient to prove the corpus delicti beyond a reasonable doubt? We answer, yes, if certain facts are proved—namely, the body of the deceased, or portions thereof, must be found or seen and identified, so as to establish the fact that the person charged to have been killed was dead; that the person charged to have been killed came to his death by the culpable act or agency of another person. Now, Bagley swears that he was present when appellant shot and killed Kirk; that on the next morning he assisted (by keeping watch) appellant in concealing the corpse. In this testimony we have all the facts which make up the corpus delicti—Kirk's dead body, and that death was caused by the guilty agency of the accused. But was Bagley an accomplice? Concede this; will not the law permit the prosecution to corroborate him as to this fact, as well as to any other corroborative facts? If not, why not? No reason can be given in support of the negative. We are not left in the dark upon this question: *People v. Jaehne*, 103 N. Y. 182; *Carroll v. People*, 136 Ill. 456; 3 *Greenleaf on Evidence*; 1 *Bishop's Criminal Procedure*, sec. 1071. Bagley testified to facts which, if true, establish the corpus delicti beyond any sort of doubt. Was he corroborated? He was. How? By the confession of the appellant "that he had killed Henry Kirk." Now, then, this evidence most clearly proves the corpus delicti in the manner required by statute, and there was no issue on this

question except the credibility of Bagley and the witnesses who swore to the confession. Some bones, parts of old boots, a piece of lead (which was found in the skull), some wood and bark, were presented to the inspection of the jury. To this appellant excepted, because the bones had not been identified as a part of the remains of Kirk. They were found where Bagley stated the corpse ⁵⁵⁰ had been placed on the next day after the homicide, and there was no error in permitting the jury to inspect them. This question is settled in this state.

By a number of witnesses, the state found that Bagley bore a good reputation for truth, etc. This evidence was opposed by appellant, because Bagley was an accomplice to the crime; appellant contending that an accomplice cannot be sustained, when attacked, by evidence of good character for truth and veracity. We are not aware of an authority making this exception to the general rule. An accomplice can be sustained by such proof just as any other witness.

Appellant proposed to prove by Roll Kirk that Joseph Bagley stated to him, in 1883, that deceased had made a trip with him and his brother James from Mesquite to their mother's place, about five miles southeast of Mesquite, in the spring of the year, and that, on the day subsequent to their arrival there, deceased complained of being sick, and said, if he felt well enough, he was going home; that they left the deceased lying under a tree, asleep, when they went about their work, and when they returned he was gone, and they never saw the deceased again, etc. Joseph Bagley had not testified in regard to this matter, nor to any other fact that had the slightest bearing on the case. There was no error in rejecting this evidence.

Objection is made to the charge of the court defining an accomplice. We have carefully read and examined the charge on this subject, and, when viewed as a whole, it is as favorable as the appellant should require. It is law, though some part thereof is not applicable to this case, but that which is without application is absolutely harmless.

Appellant swore that he was not at the place of the homicide when deceased was killed, and had nothing whatever to do with the killing, etc., but was at another place. The court failed to charge the jury with reference to an alibi. For this omission in the charge appellant excepted at the time: *Ayres v. State*, 21 Tex. Crim. App. 399. The charge should have been given. Such a charge was a part of the law of the case: *Hunnicut v. State*, 18 Tex. Crim. App. 498; 51 Am. Rep. 330; *Rider v. State*, 26 Tex. Crim. App. 334. Furthermore, the error of the court in

failing to instruct the jury with reference thereto was intensified by the court instructing the jury upon the law of self-defense: *Quintana v. State*, 29 Tex. Crim. App. 401; 25 Am. St. Rep. 730. There was not the slightest circumstance presenting this defense. Appellant relied upon no such defense, and for the court to instruct thereon was calculated (evidently) to impress the jury with the belief that the judge believed appellant present at the homicide.

This is a remarkable case, but we have not time to discuss the facts. But while the case is unparalleled in a great many particulars, it is not so mysterious as the verdict of the jury. Attending this homicide, if there was a homicide, there is not one circumstance of mitigation or extenuation. It was a deliberate, fiendish assassination, for which the perpetrator should have been ⁵⁵¹ hanged. Now, what was the verdict? Murder in the second degree, with the terrible penalty of five years' confinement in the penitentiary! What a mockery on justice, if appellant be guilty! The verdict can be explained only upon the hypothesis that the jury entertained a serious doubt of the guilt of the accused, for no sane and honest jury could have believed appellant guilty beyond a reasonable doubt of this most dastardly assassination, and assess such a penalty. Our views of the facts of this case may not accord with that of the jury, but we can afford no relief, because, if Bagley and the witnesses who swear to the confession told the truth, appellant was evidently guilty. The jury, and not this court, are the judges of the credibility of the witnesses.

For failing to instruct the jury on alibi, the judgment is reversed and cause remanded.

Judges all present and concurring.

ACCOMPLICES—WITNESSES.—The testimony of an accomplice, though uncorroborated, may be sufficient to sustain a conviction for murder, but in such cases the trial court should proceed with the greatest caution: *Campbell v. People*, 159 Ill. 9; 50 Am. St. Rep. 134, and note. This subject is fully discussed in the extended note to *Commonwealth v. Price*, 71 Am. Dec. 671-678.

CORPUS DELICTI—PROOF.—Extrajudicial confessions, without proof of the corpus delicti, are insufficient to justify a conviction: Extended note to *Daniels v. State*, 6 Am. St. Rep. 251.

WITNESSES—CONTRADICTING.—A witness may not be asked on cross-examination a question which does not tend to rebut, impeach, modify, or explain any of his testimony: *Atchison etc. R. R. Co. v. Gantz*, 38 Kan. 608; 5 Am. St. Rep. 780. If a witness, upon cross-examination, testifies to collateral matter, not responsive to any fact brought out on his examination in chief, his answer is not open to contradiction: *Redington v. Pacific etc. Cable Co.*, 107 Cal. 317; 48 Am. St. Rep. 132, and note.

TABOR v. STATE.

(24 TEXAS CRIMINAL REPORTS, 631.)

CONSTITUTIONAL LAW—TITLE OF STATUTE.—A statute which, in its title, amends the penal code of the state simply by reference to the code sections, is valid, and not obnoxious to a constitutional provision requiring that the caption or title of statutes shall embrace the subject matter therein.

CONSTITUTIONAL LAW—AMENDMENT OF CODE.—A statute amending the penal code of a state by taking the word "hog" out of one section thereof and inserting it in another, together with "cattle," and making the theft of a hog a felony, regardless of value, is valid and constitutional.

CONSTITUTIONAL LAW—TITLE OF STATUTE—HOW CONSTRUED.—The legislature having acted in the selection of a title for a statute, its power to do so and to embrace legislation within such caption is construed liberally in favor of the constitutionality of the enactment.

LARCENY—CONFESSION AS EVIDENCE.—A statement or confession made by an accused at his preliminary examination, after he has been duly cautioned, is admissible against him, although the examining magistrate is the owner of the property which the defendant is accused of stealing.

LARCENY—EVIDENCE.—Family quarrels between the prosecutor and the accused antedating, and not in any manner connected with, the larceny are not admissible in evidence.

LARCENY.—EVIDENCE that, on the night before a trial for larceny the parties having the accused in charge were drinking wine and playing cards, is irrelevant and inadmissible.

LARCENY—EVIDENCE—ELECTION.—If, on a trial for theft of a hog, the evidence tends to show that another hog was lost by the owner of both, but it does not certainly connect the accused with the theft of more than one hog, and he admits the killing of only one, while the meat of but one was found in his possession, the prosecution cannot be compelled to elect as to which hog a conviction will be claimed.

J. Dowell, for the appellant.

M. Trice, assistant attorney general, for the state.

638 **HENDERSON, J.** The appellant was tried and convicted for theft of a hog, and his punishment assessed at two years' confinement in the penitentiary, and from the judgment and sentence of the lower court he prosecutes this appeal.

The appellant contends, that the court erred in refusing to quash the indictment in this case, the grounds of his contention being that the caption of the Act of March 15, 1893, amending articles 747 and 748 of the Criminal Code, is obnoxious to section 35, article 3, of the Constitution, because said caption does not embrace the subject matter contained in the amendments of said acts. It has been held by the supreme court and by this court, that our Penal Code can be amended by reference to the articles thereof: *State v. McCracken*, 42 Tex. 383; *Nichols v. State*, 32

Tex. Crim. Rep. 391. The caption of the act in question embraces and refers to these two articles of the Penal Code, and the two articles set out in full, as amended. But it is contended that the word "hog" could not be transposed and legislated on in article 747. No tangible reason is afforded us why this could not be done. The object of the amendment, as declared in the title of the act, was to amend said two articles of the Penal Code, and in our opinion it was entirely competent for the legislature to insert the word "hog" in article 747, taking it out of 748, and making it a felony; and we fail to discern how this could be construed as violative of the provision of the constitution alluded to under the caption in question. There is no incongruity in uniting the animals "cattle" and "hogs" in the same article of the statute, and making both felonies, and the making, by this legislation, theft of hogs a felony, regardless of their value, could not operate a surprise and fraud upon the public and the legislature which enacted the bill, and, as we understand, the purpose of the constitutional provision was merely to prescribe a rule which would put the legislature on notice of the essential elements of the law to be enacted; and, ordinarily, when the legislature has acted in the selection of a title, their power to do so and to embrace legislation within such caption is construed liberally in favor of the constitutionality of the enactment.

Appellant assigns as error the admitting as evidence of the written statement of the defendant, made before A. B. Short, justice of the peace of precinct number 3, of Kendall County, on the ground that A. B. Short, the justice of the peace, was the owner of the hogs, and that he was not authorized to preside at the examining trial of defendant, and that the statement made by defendant before him as an examining magistrate was invalid, and could not be taken as a judicial confession; and moreover, that the said appellant, before making his statement, was not cautioned as the law requires. The bill of exceptions, as explained by the court, shows that said statement was not admitted as a statement made in judicial proceedings, but was merely made as ⁶³⁹ the statement of appellant to any person, after having been duly warned, according to the statute; and besides, the court, at the instance of the defendant, fully charged the jury that same was not admitted as the statement of defendant, made in a judicial proceeding, and authorized the jury to wholly disregard the said confession, unless they believed from all the evidence that same was established beyond a reasonable doubt; and the defendant himself, having testified that the same was not freely made, the court submitted that issue to the jury. In our opin-

ion, it would have been entirely proper for the court to have treated said confession as made by the defendant in the course of a judicial proceeding, inasmuch as the justice of the peace was qualified to try the case against appellant, although the charge against him was for theft of the hog of the justice of the peace who tried him: Code Crim. Proc., art. 569; Davis v. State, 44 Tex. 523. As before stated, the appellant, according to the evidence offered by the state, was legally cautioned before he made the statement, and while this was controverted by the defendant, the issue as to this matter was submitted to the jury in the charge of the court.

The court did not err in refusing to permit the defendant's counsel, on the cross-examination of the witness A. B. Short, to go into the details of family quarrels between his family and the defendant's, nor between himself and defendant. He gave him full latitude to prove the state of feeling between himself and the defendant, which it seems the defendant did not take advantage of, but insisted on proving certain quarrels and altercations between the parties, not connected in anywise with this transaction, but antedating same a year or more. The defendant says he expected to prove these altercations by said Short, or have him deny them, and then, after having laid the predicate, introduce evidence to impeach and contradict him. If this were permissible, the trial of a criminal case, if such a course should be pursued, would be interminable, and would raise issues which were not material to the case, and, if denied, would not afford the basis for impeaching testimony. Nor, in our opinion, was the refusal of the court to permit testimony that the witness Short and others, who had the defendant in charge the night before the trial, were drinking wine or playing cards, error. The same does not appear to us to be relevant or material. Said evidence does not purport to be connected with any fact having the remotest bearing upon any issue in this case.

The appellant also assigns as error that on the trial of this cause, there being evidence tending to show on the part of defendant a theft of two hogs, at the conclusion of the testimony the appellant asked the court to have the district attorney elect as to which of said hogs he would insist on a conviction of the defendant. The court declined to do this, assigning as a reason that there was no sufficient testimony showing the taking of two hogs, such as would require an election by the district attorney. There is testimony in the record showing that the prosecutor Short lost two shoats out of his bunch of hogs within a ⁶⁴⁰ short time of each other, and some testimony with reference to the

finding of the hide taken from a hog. The meat of the hog found in the possession of defendant appeared to be too fresh for the hog to have belonged to the hide in question. All of this testimony was admitted without objection, and no charge was asked in relation thereto. At most, the testimony was exceedingly meager connecting defendant with the taking of more than one hog, and he was only found in possession of the meat of one hog, and he only admitted the killing of one hog. If the testimony regarding the other hog had been objected to at the proper time, it might have been the duty of the court to have sustained the objection; or if there appeared from the record in this case a danger of conviction for another hog, not charged in the indictment, then it would have been the duty of the court to have controlled the testimony as to such other hog by a proper charge, even though not requested; but the record fails to disclose any such danger, and in our opinion the court did not err in refusing to require the district attorney to elect as to which hog he would insist on convicting the defendant for the theft of.

The evidence in this case, though of a circumstantial character, is ample to sustain the conviction. The court gave a charge on circumstantial evidence, and gave the defendant the full benefit of all his defenses in the case. The jury found against him, and we are not inclined to disturb their verdict.

The judgment of the lower court is accordingly affirmed.

Judges all present and concurring.

STATUTES—TITLE—SUBJECT MATTER OF ACT.—The subject of an act is sufficiently expressed in its title, when it is to amend a pre-existing act, the title of which is recited verbatim in the title of such amendatory act, but without mentioning the year of its enactment: *Willis v. Mabon*, 48 Minn. 140; 31 Am. St. Rep. 626. The title of an act entitled, "An act amending section 2 of chapter 8 of the charter of the city of Minneapolis," creating liability for damages caused by a change of street grade, and providing for a special tax or assessment on property benefited to pay the same, is sufficient, and the law is not unconstitutional because the subject thereof is not expressed in its title: *Kelly v. Minneapolis*, 57 Minn. 294; 47 Am. St. Rep. 605, and note.

EVIDENCE—CONFESSIONS AT PRELIMINARY EXAMINATION.—It is the duty of a justice of the peace, presiding at the preliminary examination of a person charged with crime, to caution the latter that statements or confessions there made may be used against him, and to inform him of his legal rights in the premises. Unless he is so cautioned and informed, a confession made by him at that time is not admissible in evidence on his subsequent trial: *Coffee v. State*, 25 Fla. 501; 23 Am. St. Rep. 525, and note with the cases collected. See, also, the extended note to *Daniels v. State*, 6 Am. St. Rep. 242, and especially the extended note to *State v. Clifford*, 41 Am. St. Rep. at page 524.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

**SAN ANTONIO RAPID TRANSIT STREET RAILWAY
COMPANY v. LIMBURGER.**

[83 TEXAS, 79.]

RAILROADS—STREET RAILWAYS AS AN ADDITIONAL SERVITUDE.—The operation of street railways does not impose an additional servitude upon a public street.

RAILROADS—STREET RAILWAYS—DAMNUM ABSQUE INJURIA.—The original purposes for which a street was dedicated embrace the operation of a street railway, and if the owner of adjacent property suffers a loss by reason of such operation, it is damnum absque injuria.

RAILROADS—INTERFERENCE OF STREET RAILWAYS WITH ACCESS TO BUSINESS HOUSES.—The right of a street-car company to run its cars over its track is not superior to the right of another person in the use of the street. Hence, if there is a multiplicity of tracks in a narrow street, an abutting lotowner has the right, though it interferes with the passage of the cars, to load and unload invoices of goods in front of his storerooms facing the street occupied by such railways, but he must not make the cars wait longer than such reasonable time as is necessary for his purpose.

RAILROADS — STREET RAILWAYS — DANGEROUS TRACKS—DAMAGES.—A street railway company is answerable in damages to an abutting property owner for allowing its rails to project above the surface of the street, or to become dangerous in other respects.

Ogden & Harwood, for the appellant.

C. A. Keller, for the appellee.

§1 **GAINES, C. J.** The defendant in error brought this suit to recover of plaintiff in error damages for the depreciation in value of certain business lots in the city of San Antonio, alleged to have been caused by the construction and operation of the company's railway along the street upon which the lots fronted. The cause of action is stated in the petition as follows:

"4. That heretofore, to wit, on or about the months of October, November, and December, 1891, said defendant corporation, in violation of plaintiff's rights and against his wishes, did unlawfully build, construct, and put down a line of electric street railway from the United States postoffice, on Alamo plaza and Avenue E, in said city ⁸² of San Antonio, along Avenue E to Austin street; thence along said Austin street to Grand avenue; thence along Grand avenue to River avenue; thence along said River avenue outside of the corporate limits of the said city of San Antonio to the suburban town known as Alamo Heights, at the headwaters of the San Antonio river; and that said line of street railway was built from Alamo Heights along River avenue to Grand avenue, along Grand avenue to Austin street, then down Austin street to Avenue E, and to the postoffice; that said line of street railway runs along and upon Grand avenue on the north side of block 38, and turns into Austin street and runs along and upon Austin street on the east side of said block 38; and that on said line of street railway said defendant operates, controls, manages, and runs electric cars and motors for the purpose of transporting passengers and freight for hire and profit from the said city of San Antonio to said town of Alamo Heights; that said cars are run along and upon said Austin street, and in front of said block 38, at regular intervals of about ten to twenty minutes.

"5. That plaintiff was, at the time said line of street railway was built and constructed as aforesaid, and still is, the owner in fee simple of lots 14 and 15, in block 38, on said Austin street; that he also owned a large rock storehouse and a small frame store building located upon said lots 14 and 15, in said block 38, and fronting east on the west side of said Austin street, which have been used and rented for storerooms for the retailing of merchandise. That said premises and improvements, at the time the said defendant built, constructed, and laid down said railway track in front of said block 38, were of the value of twenty thousand dollars.

"6. That said Austin street is only about forty feet wide, and before said defendant built said line of street railway, another corporation, to wit, the San Antonio Street Railway Company, already had a double track electric street railway upon said Austin street, operating a line of electric street railway, motors, and cars from that portion of the city of San Antonio known as Government Hill to the corner of Soledad and Houston streets, and another line of electric motors and cars using the same track and running from the Southern Pacific, or 'Sunset,' depot to a suburban town outside of the city limits of the city of San Antonio, known as

Lakeview; both of said lines, so belonging to said San Antonio Street Railway Company, using said double line of railway track, running along and upon and occupying the greater portion of the center of said Austin street on the east side of said block 38, to Tenth street, on the south side of block 38, thence down said Tenth street to Avenue C, and on through the city to the respective ends of said lines. That said San Antonio Street Railway Company runs its said cars upon the said Government Hill line at regular intervals of about five minutes; that defendant corporation built its said line of railway between the curbstone immediately in front of plaintiff's property and the western track of the railway belonging to said San ⁸³ Antonio Street Railway Company; and when said cars are running upon said defendant's line of railway and passing in front of plaintiff's said storerooms, there are only about six feet between the side of the car and said curbstone.

"7. That from said Austin street is the only way of ingress and egress to said storerooms of plaintiff; and that in receiving invoices of goods for said storerooms, or in putting up orders for delivery to customers, it is necessary to load and unload the same from the front of the said storerooms on said Austin street; that the constructing and building of said line of street railway by defendant corporation has so completely obstructed the said street as to prevent plaintiff and his tenants from having the proper use and enjoyment of said storerooms and premises.

"8. That defendant's said railway track in front of said block 38, and in front of plaintiff's said premises, are kept in a bad and dangerous condition; that the roadbed is allowed to get so badly out of repair that the steel 'T' rails used upon said track are frequently several inches higher than the street for almost the entire length of said block 38, making it difficult and dangerous for vehicles of any kind to attempt to cross the same.

"9. That said Austin street is a good business street, daily thronged with people, and one upon which the traffic and travel is very large; and that from Tenth street north to and beyond said 'Sunset' depot has been for years a splendid location for retail business; that there has always been a strong demand and good prices paid for storerooms in that vicinity, and plaintiff has always been enabled, until defendant built said line of railway, to let his said storerooms and premises without trouble, for a profitable rental; but by reason of the fact that there are now three railway tracks on Austin street in front of said block 38 (and nowhere else), upon which cars are constantly run by electric motors, and the consequent danger occasioned thereby to all

classes of users of said street, and the bad and dangerous condition of repair in which defendant's said track is kept, a large portion of the travel and traffic upon that part of said street has been discontinued, driven away, and gone elsewhere; and plaintiff's said storerooms being no longer desirable as a business location, on account of the construction and use of defendant's said line of railway, the rental and market value of plaintiff's said property has greatly depreciated, to plaintiff's damage ten thousand dollars."

The trial court sustained a general demurrer to the petition, and, the plaintiff having declined to amend, gave judgment for the defendant. The plaintiff below having sued out a writ of error to the court of civil appeals, the judgment was reversed and the cause remanded.

In the case of Texas etc. Ry. Co. v. Rosedale Street Ry. Co., 64 Tex. 80, 53 Am. Rep. 739, this court adopted the elaborate and able opinion of Judge Watts, of the commission of appeals, in which it is held that the operation of a horse railway ⁸⁴ upon a public street was not an additional servitude, and that the owners of property abutting upon the street could not recover damages for such use when the railway is properly constructed and operated. That ruling was in accord with all the decisions up to that time, with one or two exceptions; and though there seems latterly to be some disposition to question the correctness of the doctrine, it is still supported by the great weight of authority. Since the decision of that case, much capital has been invested in street railways in this state, the value of which might be seriously impaired by a contrary ruling at this time. However much, therefore, we might be inclined to rule differently, were it an open question, we should not now feel at liberty to overrule that decision, unless convinced that it was palpably wrong. With the exception of New York, the same doctrine seems to have been announced in the courts of every state of the Union in which the question has been presented for decision: See Booth on Street Railways, sec. 82, and note, in which the cases are cited.

The construction and operation of an ordinary steam railway upon a street is generally regarded by the courts as an appropriation of such street to a different purpose from that for which it was originally dedicated. Such railways are maintained for the purpose of transporting passengers and freight between distant points; and, from the nature of their construction and their mode of operation, they monopolize in part the use of the streets as a highway, and obstruct their enjoyment for the purposes for which they were originally established. It is not so, as the courts

hold, with a street railway. If properly constructed, their tracks constitute no serious impediment to the legitimate use of the thoroughfare. Its cars interfere with travel, but so do omnibuses, carriages, and other vehicles used for the transport of passengers. Street railways facilitate the passage of persons from one part of the city to another, and this is one of the objects for which streets are opened and maintained. It is therefore argued that although street railways may have been unknown at the time a street was dedicated, it does not follow that a use of the streets by such a railway is not a use in pursuance of the original purpose contemplated in laying out the highway. A street may be older than the omnibus or the hansom cab, and yet who would deny the right of the drivers of such conveyances to use it? We conclude that, for the reasons given, the doctrine announced in the case of *Texas etc. Ry. Co. v. Rosedale Street Ry. Co.*, 64 Tex. 80, 53 Am. Rep. 739, ought to be held the settled law of this state.

So far we have been speaking of street railways upon which the cars are drawn by horse power; and so far, as we have said, the authorities are in substantial accord.

Here, however, we have the case of a street railway upon which the cars are propelled by electricity. We have here, also, the additional circumstances that two tracks of street railroad had already been constructed upon the street in front of the plaintiff's property, and that ⁸⁵ the track in question was laid upon that part of the street next to plaintiff's lot, and left a space of six feet only between that track and the sidewalk.

The first question, then, is, Are street railways upon which the cars are moved by electricity distinguishable from those upon which horsepower is used? Upon this question there is some conflict of authority, but it is held by the great majority of the courts in which the point has been decided, that they are not: *Koch v. North Avenue Ry. Co.*, 75 Md. 222; *Taggart v. Newport Street Ry. Co.*, 16 R. I. 668; *Railway Co. v. Telegraph Assn.*, 48 Ohio St. 390; 29 Am. St. Rep. 559; *Halsey v. Rapid Transit Street Ry. Co.*, 47 N. J. Eq. 380; *Williams v. City etc. Street Ry. Co.*, 41 Fed. Rep. 556. See *contra*, *Dooley Block v. Salt Lake etc. Co.*, 9 Utah, 31. The case of *Detroit City Ry. Co. v. Mills*, 85 Mich. 634, is cited in support of the doctrine that an electric railway is not an additional burden upon a street; but it would seem from the concurring opinion of the chief justice and the two dissenting opinions that, if the naked point had been presented, the court would have decided the question in the affirmative.

We concur, however, with the majority of the courts, in holding

that street railways which are operated by mechanical power do not impose an additional servitude upon the street, and therefore do not damage the owner of the abutting property, whether he owned the fee in the street or not. Why an electric road should be a burden and a horse railroad should not, we are unable to see. The electric-car, as was pointed out in the opinion of the court in the Michigan case cited above, "does not occupy as much space upon the street as does the car with the horses attached." We may assume that they are capable of being run at a much greater rate of speed than a horse-car, and the greater rapidity of motion may render them more dangerous. But the increased rate of speed is not necessarily inherent in the system, and, so far as we can see, they may be operated as slowly and as safely as other cars. The right to construct and operate a line of electric railway does not confer a right unnecessarily to endanger persons or property; and if the cars of a company operating such a road are propelled at a dangerous rate of speed, it would be responsible to all persons who may be injuriously affected, either in person or property, by such improper operation.

We come, then, to the question of the obstruction of the access to the plaintiff's storehouses. Does the defendant company occupy a different position with reference to the rights of the plaintiff, by reason of the fact that its line, in connection with the two which were previously constructed, practically occupies the entire space covered by the street, and that its track is in close proximity to the edge of the sidewalk in front of plaintiff's lots? We find it difficult to answer this question in the affirmative. As was argued by Mr. Justice McGrath, in his able dissenting opinion in *Detroit City Ry. Co. v. Mills*, 85 Mich. 634, to which we have already referred, if the construction of a street railway in a ⁸⁶ street, however narrow, or the construction of a third line in a street, be a burden, it would seem to follow that the construction of one line in a broad street is also a burden. The difference is merely in degree, and not in kind. If, when the tracks of the railway occupy a very large proportionate part of the street between the curbstones, the owner of abutting property is entitled to recover substantial damages, how can we deny the right of the owner to recover some damage, even if merely nominal, when the space is comparatively small? The converse of the proposition must be true. If in the latter case there can be no recovery, so in the former. We have seen that for a single track in a broad street the owner of the adjacent property is not entitled to any compensation from the railroad company; and we think it follows that he is not entitled to be compensated when

there is more than one track. The principle is, that the original purposes for which the street was dedicated embrace the operation of a street railway, and that if the owner of adjacent property suffer a loss by reason of such operation, it is *damnum absque injuria*.

In regard to the matter of access to the property, the question is not whether the construction and maintenance of the railway interferes with the ingress and egress to and from the store-houses, but it is whether such construction and maintenance infringe upon the right of access. It is possible that the operation of a line of omnibuses or drays, or the frequent passage of all kinds of vehicles for the conveyance of persons or property, may seriously interfere with and obstruct the occupants of the buildings in the receipt and delivery of goods; and yet it could not be held that such interference was unlawful. Everyone has the right to the use of the street for the purpose for which it was dedicated, and still in every crowded thoroughfare the driver of any one vehicle almost necessarily interferes with the passage of some other. One cannot, however, unreasonably delay to the obstruction of another. So with the case of a street railway. Its passage may be lawfully interfered with by persons lawfully using the thoroughfare for pleasure or for business. It may obstruct the passage of other vehicles; but it cannot legally do so, except upon reasonable necessity. The right of the company to run its cars over its track is not superior to the right of another person in the use of the street. In a similar case, the supreme court of Pennsylvania, in treating of this question of access, use this language: "But the right of the property owner in this respect is not at all changed. He has the same right after the tracks are laid and the cars are running that he had before. It is a right which must be exercised in reason, whether there are cars on the street or not. In no circumstances does it confer the privilege of obstruction by unreasonable exercise. But the reasonable exercise of the right gives no right to the street-car companies to arrest it. If, at any time, the owner has occasion for the presence of vehicles in the front of his property on the streets to take away or deliver persons or goods, he may exercise that right for such reasonable ⁸⁷ time as is necessary for his purpose; and if, in such exercise of the right, the passage of street-cars is impeded, the street-cars must wait. Such stoppage of cars is a matter of hourly occurrence in all large towns and cities where street-car tracks are laid upon narrow streets. . . . But the important question is as to the existence of the right of the owner, and not as to its abuse by either the street-car company or the owner.

For such abuse by the company on the one hand, or by the owner on the other, each is responsible, and each has adequate remedy": *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; 30 Am. St. Rep. 763.

There is no complaint in the petition with reference to the erection of poles or the stretching of wires along the street, and therefore the question whether they constitute an additional servitude is not before us for decision.

The facts alleged in the eighth paragraph of the petition, if supplemented by a proper averment of damages, would have shown a cause of action. The rails of a street-car track should be laid and maintained on a level with the grade of the street, so as not to constitute a substantial interference with the passage of vehicles. We hold that, if properly constructed, they are not a new burden upon the owners of adjacent property in law; and they should be so constructed as not to be a burden in fact. But if the rails in front of the plaintiff's premises are permitted to project above the surface of the street, or to become dangerous in other respects, as alleged in the petition, the road becomes a nuisance which may be abated, and for which the company is answerable in damages. But such a nuisance is temporary. The measure of damages in a case of that character is not the depreciation in the value of the abutting property: *Baugh v. Texas etc. Ry. Co.*, 80 Tex. 56. The only damages alleged in the petition are the decline in the value of the lots and storehouses. For the damages resulting to the defendant in error from the dangerous manner in which the street has been maintained, he is entitled to recover, upon proper averment and proof, and it seems, that the adjudication in this case will constitute no impediment to such recovery.

We are of the opinion that the judgment of the court of civil appeals should be reversed and that of the district court should be affirmed, and it is so ordered.

STREET RAILWAYS — ADDITIONAL SERVITUDE — DAMAGES.—The authorized use of a public street for street railroad purposes, no matter what the motor power may be, is not the imposition of an additional servitude, and does not entitle the abutting landowners along the street to compensation for such use: *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; 30 Am. St. Rep. 763, and note; *Montgomery v. Santa Ana etc. Ry. Co.*, 104 Cal. 186; 43 Am. St. Rep. 89; *Chicago etc. Ry. Co. v. Whiting, etc. Ry. Co.*, 139 Ind. 297; 47 Am. St. Rep. 264; monographic note to *Western Paving etc. Co. v. Citizens' Street R. R. Co.*, 25 Am. St. Rep. 479, on the rights, duties, and obligations of street railway corporations with respect to the streets. A street railway company, however, has no exclusive right to the use of a public street in which its tracks are laid: Note to *Western Paving etc. Co. v. Citizens' Street R. R. Co.*, 25 Am. St. Rep. 475. Other vehicles have a right to use any part of the street, the only limita-

tion of the right being that they must not unnecessarily interfere with the passage of the cars: Note to Western Paving etc. Co. v. Citizens' Street R. R. Co., 25 Am. St. Rep. 475. Street railway companies are subject to an action for damages by an abutting owner whose right of ingress and egress will be interfered with, whether or not he may be vested with the fee to the center of the street: *Montgomery v. Santa Ana etc. Ry. Co.*, 104 Cal. 186; 43 Am. St. Rep. 89, and note. So, if they fail to keep their tracks in proper repair after they are laid, and injury results from such failure, they are liable in damages to the person injured: Note to Western Paving etc. Co. v. Citizens' Street R. R. Co., 25 Am. St. Rep. 480.

POWERS v. MORRISON.

[88 TEXAS, 133.]

DESCENT.—When one dies intestate in the state of Texas, the statute casts the title of all his property, both real and personal, directly upon his heirs.

DISTRIBUTION—LIABILITY OF HEIRS FOR DEBTS OF ANCESTOR.—If an intestate leaves, as heirs, children and a grandson, whose father, the son of the intestate, is dead, the grandson is not chargeable with a debt due from his father to his grandfather, in proceedings for the partition and distribution of the estate under a statute providing that "when the intestate's children, or brothers and sisters, uncles and aunts, or other relations of the deceased, standing in the same degree alone, come into the partition, they shall take per capita, that is to say, by persons; and when a part of them being dead and a part living, the descendants of those dead have a right to partition, and such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive"; and this is true, although the deceased son, at the time of his death, was indebted to his father in a sum which was found to exceed the interest he would have inherited in the estate, had he survived his father.

Richardson & Watkins, for the appellant.

J. J. Faulk and W. L. Faulk, Faulk & Faulk, and Leake, Henry & Reeves, for the appellee.

136 GAINES, C. J. This controversy arose in the county court of Henderson county during the course of a proceeding for the partition and distribution of the estate of N. P. Coleman, deceased. Coleman died intestate, and defendant in error, Morrison, became the administrator of his estate. He left surviving him a widow and five children. One of the intestate's children died before his father, leaving a minor son, who is the plaintiff in error in this court. The deceased son, at the time of his death, was indebted to his father in a sum which was found to exceed the interest he would have inherited ¹³⁷ in the estate, had he survived his father. The case was appealed from the county court to the district court, where it was adjudged that the

share of the grandchild in the estate of his grandfather was subject to be offset by his father's debt to the estate, and that, therefore, he should take nothing in partition. The judgment of the district court was affirmed by the court of civil appeals.

Was the grandchild chargeable in partition with the debt of his father to his grandfather? This is the sole question presented for our determination. The right of succession in this state is the creature of statutory law, and therefore the decision of the question depends upon the construction of our statutes of descent and distribution. When one dies intestate in this state, the statute casts the title of all his property, both real and personal, directly upon his heirs. The provision which applies immediately to the question before us is as follows: "When the intestate's children, or brothers and sisters, uncles and aunts, or other relations of the deceased, standing in the same degree alone, come into the partition, they shall take per capita, that is to say, by persons; and when a part of them being dead and a part living, the descendants of those dead have a right to partition, and such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive": 1 Sayles' Ann. Stats., art. 1652. We are of the opinion that the sole purpose of the article was to declare under what circumstances those entitled to the inheritance should take per capita, and under what contingencies they should take per stirpes. Such is the intention plainly manifested upon the face of the provision, and we find nothing in the language employed to indicate a further purpose that when they take per stirpes those standing in the remoter degree should be subject to the liabilities of their ancestors. The plaintiff in error in this case is entitled under the statute to the share which his father would have taken, if alive, at the death of the intestate. This share would have been one-sixth of the property which descended to the children of the deceased. If the son of the intestate had survived his father and had not paid his debt to the estate, in the adjustment of the equities between him and his coheirs, his share would have been set off by the debt. His portion of the estate would simply have been credited upon his obligation. If he had survived and had paid his debt to the administrator, he would have been entitled to an equal distribution with his brothers and sisters. If his estate had been solvent, it would have been the duty of the administrator to collect the debt, and it would have been the right of plaintiff in error to receive the share of the estate which he would have inherited, if alive. If, on the other hand, his estate had been solvent, and his debt had not been

paid, and the plaintiff in error had received from his estate property subject to the payment of his debts, equal in value to the amount of the debt, then the latter would have become liable for the discharge of his obligation, and that liability could have been set off against the share of the ¹³⁸ estate he would otherwise have been entitled to receive. But the estate of his deceased father being insolvent, the plaintiff in error received no property from it which rendered him liable to the payment of the debts against it; and therefore he owes his grandfather's estate nothing, and there is no liability of his own to be set off against his share in the estate.

It does not follow that because the father of plaintiff in error, if he had been alive at the death of his intestate, would have had to account in settlement for his debt, that he would not have recovered his due share of the estate. He would not have been permitted to assert that his debt to the estate was of no value, though under other circumstances it may have been worthless. If alive he would have received his full share in his debt. Being dead, since his child did not owe the debt, the latter was entitled to receive his share without accounting for the liability of his father.

It is clear that if the intestate had left only grandchildren, the plaintiff in error would have received his full share, although the immediate ancestors of the other grandchildren had owed nothing to the grandfather's estate; and why a different rule should prevail when he takes per stirpes and not per capita we do not see.

In *Kendall v. Mondell*, 67 Md. 444, a similar question came up for determination. It appears from the opinion of the court in that case that the code of Maryland provides "that, if a father or mother be dead, the children of such father or mother shall receive the same share of the estate as the father or mother if living would have been entitled to, and no more." The contest was between a sister of the intestate and the children of another sister. The mother of the children was indebted to the intestate, and died first. The attempt was to set off the indebtedness against the children's share in the estate, and it was held that it could not be done.

Under a statute substantially the same as our own, the supreme court of Massachusetts held that an heir who takes per stirpes takes directly from the intestate and in his own right, and not through and in right of his immediate ancestor: *Sedgwick v. Minot*, 6 Allen, 171; *Howland v. Howland*, 11 Gray, 469; *Valentine v. Borden*, 100 Mass. 273.

On the other hand, the supreme court of Pennsylvania, construing the statute of that state, hold that the heir in such a case represents his immediate ancestor and inherits his rights, and that, accordingly, a debt due by such ancestor to the intestate may be set off against the heir's interest in the estate: *Ernest v. Ernest*, 5 Rawle, 213; *McConkey v. McConkey*, 9 Watts, 352; *Hughes' Appeal*, 57 Pa. St. 179. The statute of Pennsylvania reads as follows: "The issue of such deceased child shall take by representation of their parents, respectively, such share only as would have descended to such parents had they been living at the death of the intestate." It may be doubted whether this demands a construction different from that which should be placed ¹³⁹ upon the statute of our own state. But the Pennsylvania court lay stress upon the fact that their statute declares that the heir shall take by representation. In *Ernest v. Ernest*, 5 Rawle, 213, they say: "As the plaintiffs entitle themselves as representing their parents only, they must take the share which descended to them, with all the burden, had their parent been living." In the subsequent case of *Ilgenfritz's Appeal*, 5 Watts, 25, a contrary ruling was made; but in *McConkey v. McConkey*, 9 Watts, 352, this case was expressly overruled, the court saying: "*Ilgenfritz's Appeal*, 5 Watts, 25, was decided without adverting to the statute of 1833, which declares that issue of such deceased child, grandchild, or other descendant shall take by representation of their parents, respectively, such share as would have descended to such parents, had they been living, at the death of the intestate. On this principle of representation, and not of substitution, had been decided *Ernest v. Ernest*, 5 Rawle, 213, and the oversight in *Ilgenfritz's Appeal*, 5 Watts, 25, is one for which it is difficult to account." In *Hughes' Appeal*, 57 Pa. St. 179, the doctrine of *Ernest v. Ernest*, 5 Rawle, 213, and of *McConkey v. McConkey*, 9 Watts, 353, was reaffirmed—rather upon the ground, as it seems to us, that the law had been settled, than that the question had been correctly determined. We are not prepared to say what weight ought to have been given to the words in the statute of Pennsylvania upon which the determination of these cases seem to have turned; but leaving those words out of view, it seems to us the opinion in the overruled case cannot be successfully answered. The court there say: "The grandchildren of an intestate take by substitution, not through, but paramount to, their parent. The law designates them as a person to take a title, derived not from the parent, but immediately from the intestate. The property never was in the parent, and consequently they did not inherit from him what he had not. If the administrator could

come upon the funds in their hands as the representative of the parent's creditor, it is obvious that all other creditors might do the same—a consequence not to be pretended." At least as applied to our statute, we think this an accurate statement of the law. The argument is as forcible as it is terse.

Our conclusion is, that the plaintiff in error is entitled to receive his full share of the estate, without accounting for his father's debt.

The judgments of the district and the court of civil appeals are reversed, and the cause remanded to the district court for further proceedings in accordance with our opinion.

DESCENT—RIGHTS OF HEIRS.—The interest of an heir in the estate of an intestate vests immediately upon the death of the ancestor, and may be conveyed by deed: *Hyde v. Barney*, 17 Vt. 280; 44 Am. Dec. 335.

DISTRIBUTION—LIABILITY OF HEIR FOR DEBTS OF ANCESTOR.—If there are surviving children and the issue of deceased children, the share which would have descended to the parents of such children's children will descend to them. In other words, the surviving children take per capita, while the issue of the deceased children takes per stirpes: See monographic note to *In re Ingram*, 12 Am. St. Rep. 96, on succession to estates of intestates. In *Wilson v. Miller*, 30 Md. 82, 96 Am. Dec. 568, it is held that the heirs of an intestate are not responsible for his debts. Perhaps a more accurate statement of the rule is that heirs take land descended to them subject to all debts of their ancestors, but that beyond this they are not personally liable: See monographic note to *Shannon v. Dillon*, 48 Am. Dec. 396, on the liability of heirs for the debts of the ancestor.

CHASE v. SWAYNE.

[88 TEXAS, 218.]

HOMESTEAD—IMPROVEMENTS—INSOLVENT DEBTORS. A debtor, though insolvent, may apply his funds to improvements upon his homestead, and, if the constitution places no limit in value upon the improvements which he may make thereon, his investment, though large, does not constitute a fraud upon creditors for which they may get relief, as the object of the constitutional provision exempting homesteads is to protect the homes of insolvent debtors from forced sale.

GARNISHMENT — INSURANCE MONEY — HOMESTEAD.—Money due from an insurance company upon a policy of insurance issued upon the homestead is not subject to garnishment at the suit of a creditor.

DEFINITIONS.—"TO REPRESENT" means "to stand in the place of."

INSURANCE, FIRE—MONEY REPRESENTS HOUSE DESTROYED.—The money due upon an insurance policy upon a house represents to the owner of the property the house lost, and the destruction of the house by fire is an involuntary conversion of the house into money, as fully as if it had been sold under an execution or deed of trust.

CONSTITUTIONS — STATUTES — CONSTRUCTION — JUDICIAL LEGISLATION.—It is a legitimate and recognized rule of construction for a court, in interpreting constitutions and statutes, to find out their true meaning, from the language used, the subject matter, and purposes of those framing them; but to ingraft upon a constitution or law something that has been omitted, and which the court believes ought to have been embraced, is judicial legislation, which is forbidden by the constitution.

STATUTES—CONSTRUCTION.—If a court ascertains that the meaning and intent of a law embraces that which is not expressed in the language, this becomes a part of the law, the same as if it had been so written.

HOMESTEAD—EXEMPTION—INSURANCE MONEY.—Insurance money derived from a policy on the homestead improvements is all exempt, as the courts have no power to say that only a reasonable portion of such a fund shall be exempt.

John W. Wray, for the appellants.

Samuels & Hendricks and Harry G. Hendricks, for the appellee.

220 BROWN, A. J. Plaintiffs in error were husband and wife, and occupied and owned a homestead in the city of Fort Worth, upon which was their residence, and which they insured in various insurance companies to the amount of sixty thousand dollars. The property was destroyed by fire. One of the policies on Chase's house was issued by the Phoenix Insurance Company. Chase was indebted to John F. **221 Swayne** in the sum of twenty-two thousand dollars, upon which judgment had been rendered. Swayne sued out a writ of garnishment against the Phoenix Insurance Company, which answered, setting up the facts, admitting the indebtedness to Chase upon the policy, and stating that it was for insurance upon his homestead. Chase and wife intervened, claiming that the money due upon the policy was exempt, because it was the proceeds of a policy of insurance upon their homestead. Swayne replied to the plea of intervention, that Chase, being indebted in the sum of three hundred thousand dollars, and being insolvent, and in contemplation of his insolvency, with the intent to defraud his creditors, and especially the plaintiff, invested in the improvements upon his homestead, that which was insured, and for which the money was claimed from the insurance company, the sum of one hundred and twenty-five thousand dollars, with the purpose of withdrawing and abstracting from his assets an unnecessary and unreasonable amount, thereby placing the same beyond the reach of his creditors, especially the plaintiff. That Chase had procured policies of insurance upon his residence from various insurance companies to the aggregate amount of sixty thousand dollars, and that after paying plaintiff's debt there would remain thirty-five thousand or forty thousand dollars, a sum more than

sufficient to erect a dwelling in the place of the one destroyed, the sum of five thousand dollars being alleged to be a reasonable amount for that purpose.

To this supplemental petition the district court sustained a demurrer, and upon trial gave judgment for the intervenors.

The court of civil appeals reversed the judgment of the district court, holding that all of the insurance money over and above a reasonable sum for rebuilding the residence should be subjected to the payment of the debts of the intervenors.

The following questions arise upon the presentation of this case: 1. Was the investment made in the house for which the insurance is claimed deprived of the exemption under the constitution by the alleged fraud of the plaintiff in error *E. E. Chase*? 2. If the property itself was exempt from forced sale under the constitution, is the insurance money derived from the policy thereon likewise exempt under the constitution? 3. Can the court limit the amount of the insurance money to which the plaintiffs in error are entitled as being exempt, to what may be considered a reasonable sum to be invested in another residence?

The first question is definitely settled against the contention of the defendant in error by the case of *North v. Shearn*, 15 Tex. 175, wherein the plaintiff sought to subject the homestead of the defendant, upon the ground that when he contracted the debt he was a single man, and set about erecting the homestead improvement with the material for which he contracted the debt, with a knowledge of his inability to pay the debt, and that he married and acquired his homestead in fraud of his creditors. The court held in that case that the evidence was not admissible. That case was stronger in favor of the creditor than the present case, in this, that the debt was contracted for the material ²²² with which the improvements were made, and when sold to defendant he was a single man. In this case, it is not claimed that the money invested by Chase was acquired from plaintiff, or that it was acquired from anyone in such manner as to show that it was the intent at the time to put it beyond the reach of creditors. Chase was at the time a married man, and all parties who dealt with him must take notice of the law upon the subject of exemptions: *Meigs v. Dibble*, 73 Mich. 101.

The allegations of the supplemental petition amount in substance to a charge that Chase, being largely indebted, insolvent, and the head of a family, invested in his homestead improvements a large amount of his funds, with the intent to defraud his creditors by placing the same beyond the reach of the law. The proposition, in effect, is, that an insolvent debtor cannot invest

his money or property in a homestead by which it will be protected from the payment of his debts. The object of the constitutional provision is to protect the homes of insolvent debtors from forced sale, and, if the contention of plaintiff be correct, only such as become insolvent after the investment is made can be protected. While it is true that the amount alleged to have been invested in the homestead by Chase is large, the constitution places no limit on the value of such improvements which are permitted to be made. The amount invested does not change the principle involved, for if it be a fraud to invest a large amount for such purposes and under such circumstances, it is equally a fraud to so invest for like purposes a smaller amount.

There might be a state of facts under which such investment would not be protected, as in the case of *Shepherd v. White*, 11 Tex. 346, where the property purchased as a homestead was paid for by another, so that a resulting trust existed, or if the property invested had been acquired by fraud, so that the title thereto did not pass by the sale. But the allegations in the supplemental petition present no such case. The demurrer was properly sustained to the supplemental petition.

The second question has likewise been decided in favor of the plaintiffs in error, in the case of *Cameron v. Fay*, 55 Tex. 58, in which it was held that the money due from an insurance company upon a policy of insurance issued upon the homestead is not subject to garnishment at the suit of a creditor. That decision is vigorously attacked and severely criticised, but whatever may be said of it, an examination of the authorities will show that it is abundantly supported by the decisions of the ablest courts in the Union, and opposed by but few. The following cases support the doctrine of this court upon the question at issue: *Berheim v. Davitt* (Ky. June 11, 1887), 5 S. W. Rep. 193; *Mullikin v. Winter*, 2 Duvall, 257; 87 Am. Dec. 495; *Reynolds v. Haines*, 83 Iowa, 342; 32 Am. St. Rep. 311; *Houghton v. Lee*, 50 Cal. 101; *Cooney v. Cooney*, 65 Barb. 524; *Tillotson v. Wolcott*; 48 N. Y. 188; *Wyman v. Wyman*, 26 N. Y. 253; *Leavitt v. Metcalf*, 2 Vt. 342; 19 Am. Dec. 718; *Stebbins v. Peeler*, 29 Vt. 289; *Culbertson* ²²³ v. *Cox*, 29 Minn. 309; 43 Am. Rep. 204; *Probst v. Scott*, 31 Ark. 652; *Mudge v. Lanning*, 68 Iowa, 641; *Kaiser v. Seaton*, 62 Iowa, 463.

We have been able to find no case holding the contrary doctrine except those cited by the court of civil appeals and counsel for the defendants in error, which are, *Monniea v. German Ins. Co.*, 12 Bradw. 240, decided by the appellate court of Illinois, upon a statute which in terms excluded from exemption debts

due from corporations: *Wooster v. Page*, 54 N. H. 125; 20 Am. Rep. 128; *Smith v. Ratcliff*, 66 Miss. 683; 14 Am. St. Rep. 606. The last two are in point, and directly opposed to the majority of the courts upon the question.

There is in the case of *Cameron v. Fay*, 55 Tex. 58, an apparent inconsistency in holding that Cameron, who had a materialman's lien upon the buildings insured and the lots upon which they stood, had no right to have the proceeds of the insurance policy upon those buildings applied to the discharge of his lien, and at the same time holding that the proceeds of the policy were so far impressed with the character of the property insured as to exempt the money due thereon from the payment of the debts of the policy holder, because the property insured was exempt. This inconsistency upon the same questions exists in the decisions of many other states, but it is the more obvious in that case, because both questions were decided in the same case.

In disposing of the rights of the lienholder in *Cameron v. Fay*, 55 Tex. 58, the court said: "The policy is strictly a personal contract. It does not attach to the mortgage or the realty." This is a quotation from *Jones on Mortgages*, and is a succinct statement of the reasoning of the cases upon that question. We do not intend to enter upon a discussion of that proposition, for it is not involved in this case. It does not necessarily follow, however, that because a court adopts a rule established by a line of decisions upon a given question that it must therefore carry that rule to its logical results by applying it to all cases upon the same character of contracts, where the parties occupy different relations to the subject and to each other. An instance of this occurs in the adjudications of the courts upon insurance policies, where the question involved is whether the heir or administrator is entitled to the proceeds of a policy upon a house. In those states in which the administrator takes the personal property and the heir takes the land of the intestate, the courts hold that upon the death of the holder of a policy of insurance on a house situate on land belonging to him, if by the policy the right to the money passes to the heir or administrator upon such death, the person to whom the land descends or is devised takes the policy of insurance. In other words, the policy passes with the land to whomsoever the title to the land passes: *Culbertson v. Cox*, 29 Minn. 309; 43 Am. Rep. 204; *Wyman v. Wyman*, 26 N. Y. 253.

If the policy were considered strictly a personal contract, and did not attach to the realty, then the proceeds must in such case be assets in the hands of the administrator.

224 In this state it is held that when a sale of land is made and a vendor's lien is reserved in the deed or note, or a mortgage given, the paramount title remains with the vendor; the deed is but an executory contract, which, in case of nonpayment by the vendee, the vendor may rescind and recover the land. However, when under the same character of deed the vendor sues to recover the purchase money, and the vendee seeks to set up as a defense a failure of title, the deed is held to be an executed contract, and the rules applicable to such instrument are applied to the defense: *Lanier v. Foust*, 81 Tex. 189; *Ogburn v. Whitlow*, 80 Tex. 239. We cite these instances merely to show that *Cameron v. Fay*, 55 Tex. 58, is not singular in the application of different rules to the policies of insurance in determining the rights of the same parties to the same money, when occupying different relations to each other and to the subject of litigation.

In *Smith v. Ratcliff*, 66 Miss. 683, 14 Am. St. Rep. 606, the supreme court of Mississippi ridiculed the idea that the proceeds of a policy represents the house upon which the insurance was placed, but that learned court failed to give any reasons why it did not so represent the house, nor did it state what it did represent.

"To represent" means "to stand in the place of." What does the insurance money represent to the payee of the policy? No one is permitted to insure property in which he has no interest, and in case the title is terminated the policy becomes void, because there is no interest to support it. The validity of a policy of insurance is made to depend upon the correctness of answers as to the value, title, locality, and other conditions, and the amount to be paid is regulated by and based upon the value of the property insured. The purpose of taking out the insurance is to enable the owner to restore the thing insured, in case of loss, or to reimburse him for the loss of it. The house in this case was the subject of the insurance, the agreed proportion of its value was the measure of damages to be paid upon its loss, the policy was dependent upon its existence, and payable upon its destruction. The proceeds stand to the owner in the place of the property lost; it is the value of the house paid by the insurance company, not because it acquires the property, but because it agreed to pay so much for the house if destroyed by fire.

If the house of Chase had been set on fire by sparks from a locomotive operated upon a railroad, under such circumstances as would make the railroad company liable, the value of the house would be the measure of damages—it would be compen-

sation for the loss; in other words, indemnity for the injury, and such damages would be exempt from garnishment for the debts of the owner: *Mudge v. Lanning*, 68 Iowa, 641. If there had been a railroad in course of construction through that city, and the house of plaintiff in error had stood in the line of that road it might have been condemned and torn down or removed. In that case, the value of the house would be the measure of damages, and would be exempt from the power of courts to apply it to the payment ²²⁵ of debts of the owner: *Kaiser v. Seaton*, 62 Iowa, 463. In each of these cases, the damages takes the place of the house, represents it to the owner, and it is not apparent to us that there is any material difference between money paid in these cases and that paid upon an insurance policy.

We think that the money due upon an insurance policy upon a house represents to the owner of the property the house lost, and that the destruction of the house by fire is an involuntary conversion of the house into money, as fully as if it had been sold under execution or deed of trust.

Can the courts limit the amount of the money derived from an insurance policy upon the homestead improvements that may be protected from the debts of the owner to a sum reasonably sufficient to build a house for the family to live in, and subject the remainder to the payment of debts? This is the main question in this case.

It is claimed by counsel for defendant in error that the exemption of the money involved does not arise out of the constitution, but rests upon the decision of *Cameron v. Fay*, 55 Tex. 58, in which an equitable construction, as it is called, was placed upon the constitution, thereby creating an exemption which did not arise out of its language. If this were correct, that case should be overruled. The decision of a court contrary to the constitution of the state can have no validity; it is the exercise of unauthorized power on the part of the court.

There is a marked distinction between liberal construction of constitutions and statutes, by which courts, from the language used, the subject matter and purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law or constitution something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by article 2, section 1, of the constitution of the state, by which the powers of the government are distributed to three departments, the legislative, executive, and judicial, forbidding anyone to exercise the pow-

ers conferred upon another. The protection claimed for insurance money upon a homestead does not depend upon the case of *Cameron v. Fay*, 55 Tex. 58, but upon the constitution, the meaning and intent of which the court, in *Cameron v. Fay*, 55 Tex. 58, by fair construction ascertained to include the proceeds of such policies.

The court of civil appeals followed the case of *Cameron v. Fay*, 55 Tex. 58, so far as to hold, that there should be exempt to the plaintiffs in error a portion of the insurance money; that is, a reasonable sum with which to build a residence for the family. For this limitation upon the amount, the court of civil appeals finds warrants in the case of *Cameron v. Fay*, 55 Tex. 58, wherein it is said that the money would be protected from appropriation to payment of debts by judicial process, for a reasonable time. Upon the same ground, defendant in error seeks to sustain that ruling, and asks this court to hold that the insurance ²²⁶ money over and above a sum reasonably sufficient to build another home shall be declared subject to his debt. In limiting the time within which the exemption should continue, this court applied to the same subject in its new form the proviso of section 51, article 16, of the constitution, "that the same shall be used for the purposes of a home." The property insured, being once a homestead, would not be exempt after it ceased to be used as a home, that is, if abandoned for such uses; and, applying the same principle to the proceeds of the policy upon such home, the money would cease to be protected after the lapse of such time as showed an intention to abandon its use for such purpose.

When a court ascertains that the meaning and intent of a law embraces that which is not expressed in the language, this becomes a part of the law, the same as if it had been so written: *Higgins v. Rinker*, 47 Tex. 401; *United States v. Freeman*, 3 How. 565; *Riddick v. Walsh*, 15 Mo. 519. In other words, we are to treat the exemption of the insurance money as if it had been named in the constitution. We must, therefore, determine the question as to the right to limit the amount to be protected, by applying the rule expressed in the constitution for homestead improvements.

On the twenty-sixth day of January, 1839, an act was passed by the congress of the republic of Texas exempting to every head of a family, free from forced sale, fifty acres of land in the country, or one lot in a town, including the improvements, not to exceed in value five hundred dollars: *Laws 1839*, p. 125. By the constitution of the state, adopted in 1845, the homestead

was extended to two hundred acres of land in the country, or a lot or lots in town or city, not to exceed two thousand dollars in value. This was construed to include the improvements made upon the lots, and the excess in value over that sum was subject to debts: *Wood v. Wheeler*, 7 Tex. 13; *North v. Shearn*, 15 Tex. 174; *Williams v. Jenkins*, 25 Tex. 279. In *Wood v. Wheeler*, 7 Tex. 13, Chief Justice Hemphill said: "It is in my view to be regretted that any limitation as to value was placed on the homestead exemption. Property in value is subject to great mutations; at one period depreciated to the lowest, at another inflated to the highest, degree. Homesteads on town lots procured for a few hundred dollars may, in a short time and without additional improvements, from the increased value of the property, exceed the constitutional limit of exemption. If from this accretion in its appraised value it be subject to forced sale, and the portion of the proceeds paid the owner be invested in another homestead, this again in a short period may augment in value, and the family be a second time expelled from their home."

The difficulties here pointed out were met by the legislature in 1860, in the following short act: "That the homestead in a town or city, exempt from forced sale, is hereby declared to be the lot or lots occupied or destined as a family residence, not to exceed in valuation two thousand dollars at the time of their designation as a homestead; nor shall the subsequent ²²⁷ increase in value of the homestead, by reason of improvements or otherwise, subject the homestead to forced sale": *Paschal's Digest*, art. 3928. The constitution of 1866 contained the same provisions upon this subject as that of 1845, and in 1866 the legislature passed an act containing the same provisions as the law of 1860, quoted above, in order to guard against such construction as had been placed upon the former constitution by the courts. The provisions of the constitution of 1869 were substantially the same as those of section 51, article 16, of the present constitution, which places the value on the lot or lots at the time of their designation as a home, and excludes from such valuation all improvements thereon.

This short review of the history of homestead exemptions in this state shows that each and every decision of the courts which placed a limit or restriction upon the homestead has been met with legislative enactments and constitutional provisions overruling the decisions of the courts, enlarging the value of the homestead exemption, and placing in the constitution safeguards against the contingencies of future judicial construction.

We must, as before stated, apply to the money arising from the

policy of insurance the same rule that the constitution applies to the improvements, which is, that there is no limitation upon their value, and the courts of this state have no power to say that only a reasonable portion of such a fund shall be exempt; it is all exempt when derived from a policy on the homestead improvements.

It is said that the amount involved is a large sum for an insolvent debtor to be permitted to withhold from his creditors for the purpose of building a residence for his family. The amount invested in the house, according to the allegations, was larger, and yet the constitution of the state exempted the house. If there be injustice in the matter, it arises out of the constitutional provision exempting the house of such value, for there is no wrong done in protecting from the debt of defendant in error the money arising out of the destruction of that to which he had no right. Whatever judges of courts may think of the policy of exempting homestead improvements of great value from the payment of the debts of the owner, the policy of the state is too unmistakably settled, by the specific changes made from time to time in the constitution, for any court to assume to give a new policy to the state upon this question. The people of Texas made the constitution, and they have a right to change it if it is found to work harshly and unjustly; but courts have no choice but to enforce and obey its mandates.

The court of civil appeals erred in reversing the judgment of the district court and remanding this cause, for which error the judgment of the court of civil appeals is reversed, and the judgment of the district court is affirmed.

HOMESTEAD — EXPENDITURES — VALUE — RIGHTS OF CREDITORS.—The value of a homestead is not limited, in Iowa, so long as the building shall come within the meaning of a homestead: *Rhodes v. McCormick*, 4 Iowa, 368; 68 Am. Dec. 663. In the absence of fraud, the amount of money expended upon a homestead cannot be considered in determining whether it should be subjected to the debts of the owner: *Note to Sanders v. Russell*, 21 Am. St. Rep. 30. If the value is limited, however, the law does not contemplate that a homestead once assigned may "grow to be three or four times the amount fixed by law, and yet the whole be out of the reach of creditors." Hence, the excess above the statutory homestead valuation is subject to the lien of a judgment against the homestead debtor: See monographic note to *Vanstory v. Thornton*, 34 Am. St. Rep. 505, discussing judgment liens on homesteads.

HOMESTEAD—EXEMPTION OF INSURANCE MONEY.—When there has been an involuntary conversion of the homestead, or some part of it, into money, as where the buildings thereon have been destroyed by fire, while the subject of insurance, and the insurer has paid the loss thus occasioned, the better view is that the proceeds of such insurance cannot be reached by a creditor, though there are cases to the contrary: See monographic note to *Morgan v. Roun-*

tree, 45 Am. St. Rep. 238, discussing the exemption of the proceeds and produce of a homestead.

STATUTES—CONSTRUCTION.—The intention of the legislature is to be gathered from the words used, taken in their plain and obvious sense: *Keener v. State*, 18 Ga. 194; 63 Am. Dec. 269. A statute is to be construed with reference to its manifest object, and so as to give effect to such object consistently with the constitution: *Ex parte Cohen*, 104 Cal. 524; 43 Am. St. Rep. 127. The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, and the purpose which was designed: *Bennett v. American Exp. Co.*, 83 Me. 236; 23 Am. St. Rep. 774. But statutory construction cannot authorize the extension of the statute to a case clearly not within its provisions: *Campbell v. Cook*, 86 Tex. 630; 40 Am. St. Rep. 878.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY v. CRAWFORD.

[88 TEXAS, 277.]

RECEIVER'S SALE—RAILROADS—PURCHASER UNDER ORDER OF COURT.—One who buys a railroad at a sale made under an order of a court holding the custody of the property, by a receiver, takes the property subject to such liability only as may be imposed upon him by the terms of the order.

RECEIVER'S SALE—RAILROADS—LIABILITY OF PURCHASER.—If a railroad is in the hands of a receiver, and the court orders it sold, and directs possession to be delivered to the purchaser subject to the payment of such claims against the receiver as may be established before the court within a given time, the purchaser is not liable for a claim which has not been presented in accordance with the order imposing the liability.

RECEIVER'S SALE—RAILROADS—CLAIMS FOR WHICH PURCHASER IS LIABLE.—If a railroad in the hands of a receiver is sold by order of a court of competent jurisdiction, but remains in the receiver's hands, by order of such court, after the confirmation of the sale, claims arising, before the delivery of the property, out of the operation of the road by the receiver, whether under contract or for tort, have the right to payment out of the revenue accruing from the operation of the road superior to the lien of prior mortgage debts; and, in case such funds are invested in permanent improvements, the purchaser is liable for such claims to the extent of the funds thus invested, though he would not be liable for claims arising prior to the sale.

RECEIVERS—SUITS AGAINST—CONFLICT OF LAWS—JURISDICTION.—If a railroad in the hands of a receiver appointed by a circuit court of the United States is sold by order of that court, but possession is retained by the receiver, after the sale, under the order of such court, one who claims damages for injuries alleged to have been received while in the employment of the receiver, after the sale and its confirmation, but before delivery of the property, may sue the receiver in a state court without the consent of the court which appointed him, and his claim is not affected by a failure to present it to the federal court. After the circuit court has discharged its receiver and turned over the property to the purchaser, its jurisdiction ceases, and the state court, though the suit was commenced prior to such delivery, has the power to proceed to adjudicate the rights of the parties and to enforce its own judgment according to the laws of the state.

Baker, Botts, Baker & Lovett, for the appellant.

F. Chew, Sr., and Ewing & Ring, for the appellee.

278 BROWN, A. J. The circuit court of the United States for the eastern district of Texas, sitting at Galveston, placed the property of the Houston & Texas Central Railroad Company in the hands of Charles Dillingham, as receiver, who took possession of and operated it under the orders of that court. On the fourth day of May, 1888, the said court foreclosed mortgages upon said road, and ordered the same to be sold. On the eighth day of September, 1888, the sale was made, F. P. Olcott being the purchaser. The sale was confirmed by the court December 4, 1888, and the master was ordered to make deed to the purchaser. December 24, 1890, upon petition of the purchaser, Olcott, the said court ordered the receiver to deliver the possession of the property to him, "subject to and charged with the obligations and liabilities, contractual or resulting from torts, or otherwise, incurred by the receiver or receivers, as the same should be fixed and determined by said court, and subject to the right, which the court reserved, to charge upon the property, or any part thereof, the payment of any amount that should be found and determined by the court to be due and payable by reason of intervening petitions filed in said cause prior to the decree of foreclosure rendered May 4, 1888, and entitled to priority over the mortgage, and the bills in the case were retained for the purpose of investigating such obligations, liabilities, and petitions, and for such other purposes as might seem needful."

The execution of this order was suspended, by order of the court, during the pendency of an appeal by Cary et al. from an order on an intervention in said cause, until the fourth day of April, 1893, when a final order was made for the delivery of the property to the purchaser; which last order provided that "all claims and demands of every nature, arising out of the management and operation of the properties purchased by F. P. Olcott at the sale made in the above-entitled cause, pursuant to the final decree of this court therein, in respect of which any lien upon the funds derived from said sale, or upon money or property which came to the hands of the receiver or receivers, or upon the property sold to said Olcott, whether against the receiver or receivers or upon the property sold to said Olcott, is claimed, whether against **279** the said receiver or receivers, or against the mortgagor company, shall be presented and prosecuted by intervention in this court prior to the first day of October, 1893; and all such claims and demands as may not be presented on or

before the date last mentioned above, by intervention as aforesaid, shall be declared stale, and shall not be a charge upon or enforced against the property herein ordered to be delivered to said Olcott or his assigns, or said funds derived from said sale, or said moneys derived from said sale of property which came to the hands of said receiver or receivers."

On the tenth day of April, 1893, the receiver delivered to the purchaser the property, who conveyed and delivered the same to the defendant, a corporation organized under the laws of Texas.

March 22, 1892, Crawford filed suit in the district court of Harris county against Charles Dillingham, as receiver, to recover damages for injuries alleged to have been received while in his employ as receiver of the Houston & Texas Central railroad, the injuries being inflicted on the seventeenth day of May, 1892, after the sale to Olcott and its confirmation, but before delivery of the property. After the delivery of the property to the Houston & Texas Central Railroad Company, Crawford made it a party to the suit, alleging that it had purchased the road charged with his claim, and that the revenues and earnings of the railroad while in the hands of the receiver were applied to the making of permanent improvements upon the railroad. It is not stated whether the receipts of the road thus invested were derived from its operation after the sale or before.

The statement accompanying the question contains this language: "Surplus earnings and increase of the road during the receivership, after paying operating expenses, were appropriated to the improvement of the road, and exceeded the amount claimed by the plaintiff, and all other claims which accrued during the receivership." We presume that this refers to receipts before as well as after the sale.

Question: "Did the appellant [the railroad company] receive said railroad from the receiver, freed from the claim of the appellee?"

Three questions arise out of the foregoing statement, necessary to be considered in answering the question submitted: 1. Is the purchaser liable in this case under the orders of the United States circuit court? 2. Is the purchaser liable to the plaintiff under the facts, independent of the orders of the circuit court? 3. If the purchaser is liable to plaintiff, is the claim barred by a failure to present the claim to the United States circuit court?

As a general rule, the purchaser of a railroad at a sale made under an order of a court holding the custody of the property, by a receiver, takes the property free from claims against the receiver arising out of the operation of the road; but the court

ordering the sale may impose upon the purchaser liability for such debts, as a part of the consideration of his purchase: *Hicks v. International etc. Ry. Co.*, 62 Tex. 41; *Beach on Receivers*, 280 sec. 735. A purchaser under such order can only be held liable according to its terms. In this case, the order directing that possession be delivered to the purchaser prescribed that he should take the property subject to the payment of such claims against the receiver as might be established before that court within a given time. This was a condition of liability, and the purchaser cannot be held by virtue of the order alone, except for the claims so ascertained and allowed: *Olcott v. Hendrick*, 141 U. S. 543. It follows that the purchaser cannot be held in this case under the orders of the court, the plaintiff not having presented his claim in accordance with the orders imposing the liability.

The second question presents greater difficulty. We have carefully examined the authorities, and find no case like this, nor in any text-book a discussion of the question. We must, therefore, determine it upon general principles applied by courts of equity in analogous cases.

From the statement, it appears that the sale was made and confirmed in 1888, and in the order of confirmation the master is directed to make deed of conveyance to the purchaser. In the subsequent orders, there is no mention made of the matter of making a deed, from which we conclude that the deed was made at the time of confirmation, in pursuance of that order, and also that the purchase money was paid, perhaps arranged as a credit on the mortgages, which was legitimate: *Ryan v. Hays*, 62 Tex. 50. The sale, confirmation, payment, and deed clearly placed the title in the purchaser, and the court thereafter, in continuing the property in the hands of the receiver, held it as the property of the purchaser. The old company and the mortgagees, under whose mortgage the foreclosure was had, no longer had any right in the property; their rights were in the proceeds of sale.

When a railroad is in the hands of a receiver by virtue of orders of a court of competent jurisdiction, the claims arising out of the operation of the road by the receiver, whether under contract or for tort, have right to payment out of the revenue accruing from the operation of the road, superior to the lien of prior mortgages or other debts; and in case the funds arising from that source be by the receiver invested in permanent and valuable improvements upon the property, and the railroad be, without sale, returned to the owner, such owner will be liable for all

such claims against the receiver to the extent of the funds so invested: *Ryan v. Hays*, 62 Tex. 42; *Texas etc. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60.

The plaintiff was entitled to have the earnings of the road, while operated by the receiver after the sale and conveyance to the defendant, applied to the satisfaction of his claim; and this fund was diverted from its proper application, the payment of this claim, and invested in betterments upon the property of the defendant.

The improvements made by the receiver after the sale to Olcott and the confirmation of that sale added to the value of the property over and above what it was at the date of the purchase; all improvements ²⁸¹ made before the sale were included in and paid for in the price bid by Olcott, but subsequent improvements were not so included, and not so paid for by him. These improvements, being made with earnings of the road under the management of the receiver, were the result of a diversion of that fund from the payment of claims against that receiver, which claims had a prior equitable lien upon that fund, and the railroad company, the defendant, having received the benefit of that fund, is liable to the plaintiff to the extent of its investment in such betterments after Olcott's purchase, the same as if it had been the original owner of the property which had been turned back under the order of the court without a sale.

The plaintiff had the right to sue the receiver in the state court, under the act of Congress, without the consent of the circuit court which appointed him, which jurisdiction could not be directly or indirectly taken from the state court by the United States circuit court. If the court that appointed the receiver had retained jurisdiction of the property and continued its receiver until the termination of the suit in the state court, the judgment of the latter must have been enforced by the former; but having discharged its receiver and turned over the property to the purchaser, its jurisdiction ceased, and the state court had the power to proceed to adjudicate the rights of the parties and enforce its own judgment according to the laws of the state: *Texas etc. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60; 151 U. S. 81. The plaintiff's claim was not affected by a failure to present it to the court which appointed the receiver.

We answer the question submitted, that, under the facts stated, the defendant is liable to the plaintiff to the extent that improvements were made with funds derived from the operation of the road after the title was vested in Olcott, who purchased at the sale.

RECEIVERS OF RAILROADS—EARNINGS SUBJECT TO CLAIMS—SUITS AGAINST RECEIVERS—JURISDICTION—SALES.—The custody of a receiver is the custody of the court: *Bell v. American Protective League*, 163 Mass. 558; 47 Am. St. Rep. 481. A claim for damages caused by injuries inflicted through the negligence of a receiver while he is operating a railroad is entitled to payment out of the current receipts or earnings of the road: *Texas Pac. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60, and note; note to *McNulta v. Lockridge*, 31 Am. St. Rep. 374. A receiver is liable in his official capacity for injuries resulting from the negligent operation of the road in all cases where the company itself would be liable if it were carrying on the business in its own name; and the earnings of the road in his hands are chargeable with the amount of any damages recovered against him in a suit for negligence: See monographic note to *Naglee v. Alexandria etc. Ry. Co.*, 5 Am. St. Rep. 315, on the liability of railroad corporations while the road is in the hands of trustees or receivers. So, if the earnings of a railway in the hands of a receiver are invested in betterments, which, without sale, are returned to the company, with its other property, at the close of the receivership, the company is liable for the satisfaction of any claim which the receiver ought to have paid out of the earnings: *Texas Pac. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60. The discharge of the receiver, and return of the property to the owner, leaves the property subject to any claim or charge legally resting upon it; and this may be enforced, through appropriate process, by any court having jurisdiction: *Texas Pac. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60; which case also discusses the power of the court to fix, arbitrarily, by order, the time within which a claim must be established upon the discharge of the receiver. A state court has jurisdiction of a suit against a receiver appointed and acting on an order made by a United States court: Note to *McNulta v. Lockridge*, 31 Am. St. Rep. 374; and it may be brought without asking leave of the court which appointed him: *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753; but upon this point the authorities are divided: Note to *Naglee v. Alexandria etc. Ry. Co.*, 5 Am. St. Rep. 316. As against the purchaser at a valid receiver's sale, no lien can be made to attach to the property which did not rest upon it at the time of the institution of the suit under which the sale was made: *Texas etc. Ry. Co. v. Lewis*, 81 Tex. 1; 26 Am. St. Rep. 776.

MUTUAL LIFE INSURANCE COMPANY v. SIMPSON.

[88 TEXAS, 339.]

INSURANCE, LIFE—EFFECT OF FALSE ANSWERS AS TO SPECIFIC AILMENTS.—A policy of insurance is avoided by false answers of the insured as to his freedom from specific diseases, without reference to their materiality as to the risk, as answers respecting specific ailments are warranties, whether material to the risk or not.

INSURANCE, LIFE—"DISEASE"—WARRANTY AS TO SPECIFIC AILMENT.—The word "disease" may include, and is often used to designate, ailments more or less trivial; and an insurance company may, if it elects, inquire about any ailment, and take a warranty concerning it, lest it may affect the risk, although it cannot be known that it will.

INSURANCE, LIFE—FALSE ANSWER AS TO HEADACHE—INSTRUCTIONS—REVERSIBLE ERROR.—If an applicant for insurance answers that he has never been subject to "headache—

severe, protracted, or frequent," and there is testimony, under proper pleadings, showing the answer to be false, it is reversible error to instruct the jury that "temporary illness of the assured in the course of every-day life, brought on by excessive exercise or overwork, is not embraced in said application," and that the answers of the assured have reference "to such diseases or ailments as indicate a vice in the constitution, or are so serious as to have some bearing on the general health," and in the continuance of life.

Ewing & Ring, for the appellant.

Baker, Botts, Baker & Lovett, for the appellee.

335 ALEXANDER, S. A. J. This was a suit by Elizabeth K. Simpson against the plaintiff in error to recover on a life insurance policy, insuring the life of her husband, William Simpson, in the district court of Harris county, in which she recovered judgment on a trial before a jury, which was, on appeal, affirmed by the court of civil appeals; and, on application of the insurance company, a writ of error has been granted.

The insurance company defended, on the ground, among others, that there was a breach of the warranties made by the assured, on the faith of which the policy was issued, and that it was thereby avoided. The record discloses that preliminary to the insurance, and as a basis thereof, inquiry was made of the applicant for insurance, as follows: "Have you ever had any of the following diseases?" Then follow inquiries as to a variety of ailments, some of which are universally known to be fatal, or likely to affect the duration of life, such as "consumption," "spitting or coughing of blood," "paralysis," "apoplexy," and "disease of the heart." There are also inquiries made as to certain other physical disabilities, not necessarily or probably coming in the category above mentioned, such as "frequent or difficult urination," "dizziness," "palpitation of the heart," "shortness of breath," "headaches—severe, protracted, or frequent."

To the inquiry as to the last mentioned the assured answered, "No." It is conceded that the answers were warranties, and, if untrue, that the policy was avoided, without reference to their materiality as to the risk.

336 The evidence shows that for many months prior to the contract, at irregular intervals, but frequently, the assured had what is designated in the evidence as sick headache; that it was severe, accompanied by vomitings and a pain in the region of the chest, which disability continued from six to eighteen hours, but after sleep, which followed the vomitings, a normal condition existed. It also appears that all of these spells were preceded by excessive work and fatigue and loss of sleep, which are assigned by the witness, plaintiff below, as the cause thereof.

And it sufficiently appears that the assured was otherwise a man of robust health.

The district court charged the jury to find for plaintiff, "unless . . . the assured in his application and examination, upon which the policy was issued, touching his drinking wine, spirituous and malt liquors, and to what extent, and his former habit of drinking wine, spirituous and malt liquors, answered falsely; or unless they believed that in such application, touching whether assured ever had diseases, such as headaches, severe, protracted, or frequent, and the particulars and duration of same; and as to his being in perfect health, the said assured answered falsely, in which case you will find for defendant. But you are charged that temporary illness of assured in the course of everyday life, brought on by excessive exercise or overwork, is not embraced in said application, nor is an occasional drink of spirituous, vinous, or malt liquors embraced in the said application, but the answers in said application have reference to such diseases or ailments as indicate a vice in the constitution, or are so serious as to have some bearing on the general health, and such as, according to general understanding, would be called a disease. And you are charged that the questions and answers respecting the drinking of spirituous, vinous, or malt liquors by assured, and former habits mentioned in said application, have no reference to an occasional drink taken, nor to occasional indulgences, unless such drinking was habitual."

This charge is approved by the court of civil appeals as a correct exposition of the law of the case. There is no complaint in the application for writ of error that this charge is on the weight of the evidence.

It is not deemed necessary to set out the charges requested and refused, or the assignments of error complaining of the charge and the refusal of charges. They are sufficient to require a determination as to whether there was material error in the instructions of the court. Justice Ramsey and the writer agree that the part of the charge which instructs the jury that the answers of the assured have reference to such diseases or ailments as indicate a vice in the constitution, or are so serious as to have some bearing on the general health and in the continuance of life, was a material error, prejudicial to defendant, for which the judgment of the court of civil appeals should be reversed.

We are not unmindful of the well-recognized rules as to the construction of contracts of insurance—that forfeitures are not favored, that ³³⁷ generally, in cases where there is doubt or ambiguity, that construction should be adopted most favorable to

the assured, the reasons for which are obvious, and need not be recounted. On the other hand, when the language of contracting parties is plain and unambiguous, and there is no reason for misunderstanding the purport thereof, effect must be given to it, enlarged or limited only by the nature of the subject to which it is applied.

Said the United States supreme court, speaking by Justice Jackson, in the case of the Imperial Insurance Co. v. Coos Co., 151 U. S. 462: "It is settled by this court that when an insurance contract is so drawn as to be ambiguous, as to require interpretation, or to be fairly susceptible of two different constructions, that construction will be adopted which is most favorable to the assured. But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." As said by the court of appeals of New York (Mack v. Insurance Co., 106 N. Y. 560), as quoted by Judge Jackson: "It tends to bring the law itself into disrepute when, by astute and subtle distinctions, a plain case is attempted to be taken without the operation of a clear, reasonable, and material obligation of the contract."

The charge of the court and the opinion of the court of civil appeals virtually assume that, because the inquiry is about diseases, it is necessarily and always about diseases which either indicate a vice in the constitution, or are so serious as to have some bearing on the general health and in the continuance of life; and this, notwithstanding the specific inquiries may be as to physical disabilities or ailments which, according to common understanding, are diseases, but which, nevertheless, are not understood to indicate the conditions enumerated in the charge. This seems to reverse a common rule of the construction of language. If it be true that, when an inquiry about diseases is made, it means only such as are mentioned in the charge, notwithstanding the specific inquiries are about ailments not usually indicating such conditions, the well-established distinction between warranties and representations would be useless, for then there would be a breach of warranty only when the matter warranted was both false and material to the risk.

The word "disease" may include, and is often used to designate, ailments more or less trivial. Medical science, as expounded by its experts, has not definitely determined all of the physical ailments which indicate a vice in the constitution, or have

a direct tendency to shorten life. Through abundant caution the insurance company may, if it elects, inquire about any ailment, and take a warranty concerning it, lest it might affect the risk, although it cannot be known that it will.

338 The length of this opinion precludes more than a brief reference to some of the cases cited by defendant in error, and discussed by the court below.

In the Cushman case, 70 N. Y. 73, from the opinion in which the language of the charge under discussion seems to have been copied, it is noticeable that the court says that "it must be generally true, that before an ailment can be called a disease it must be" such as is indicated in the language of the charge. The case was one upon conflicting evidence as to whether assured had ever had disease of the liver, or any serious disease, and it was decided that the defendant was not entitled to have a nonsuit entered, and that whether there were such diseases was properly submitted to the jury; and this is all that the case decides.

In the case of Trefz, 104 U. S. 197, the assured, to questions about various diseases, answered, "Never sick"; and it distinctly appears that he was never sick of any of the diseases inquired about. And notwithstanding an apparent disclaimer by the court, the case obviously was in part determined upon the fact that the assured was a foreigner, unfamiliar with the English language.

In the case of Insurance Co. v. Trust Co., 112 U. S. 250, the inquiry was about an affection of the liver; and we think it is distinguishable from an inquiry about "headaches, severe, frequent, or protracted."

To avoid misconstruction, we state that we do not think, if the disability inquired about was not inherent, but was produced by extraordinary conditions, such as those described in the record, that the answer to the question should be held untrue.

For the purpose which will appear, we state that the following further inquiries were made of the assured, which his answers follow: "Do you ever drink wines, spirits, or malt liquors? No. To what extent? Not at all. Former habit of drinking wines, spirits, or malt liquors. Not at all."

Justice Ramsey desires it stated that, in his opinion, that part of the charge which instructs the jury that an occasional drink of liquor is not embraced in the application, and the questions and answers have no reference to an occasional indulgence, unless such drinking was habitual, was material error, for which the judgment should be reversed. He holds that the questions

must be considered together, and that the obvious purpose of the questions was to ascertain whether the assured, at the time or in the past, had been addicted to the use of intoxicating liquors, and the extent thereof; and that the charge precluded the jury from giving proper consideration of the evidence about the drinking of the assured; and that the meaning of these questions and answers should have been submitted to the jury, unrestrained by these limitations in the charge.

The writer is of the opinion that since the question of former habit was properly submitted, and since there was no evidence of the falsity ³³⁹ of the answers to the first two questions, if there was error in this part of the charge, it was harmless.

It is not believed that the other complaints of error are well founded, nor is it considered necessary to discuss them. For the error first indicated, the judgment of the court of civil appeals is reversed and the cause is remanded.

HUME, S. C. J., dissenting. I am of opinion that this case was properly determined by the court of civil appeals.

Conceding all that is claimed as to the distinctive force of a warranty, it is still true that the situation and purposes of parties to it must be considered, just as they are in cases of contracts in other forms.

The purpose of a life insurance company is to secure risks on sound lives. It is interested in knowing that the applicant for insurance is not affected with infirmities that will hasten the event against which it insures. It inquires about his "diseases." I think that, according to common understanding, a disease is an affliction that takes hold of its victim, abides with him, impairs or menaces his functional vitality, and lessens the probabilities of the average duration of his life.

The charge upon which the case is reversed seems to me to be warranted by the evidence upon both points named in the opinion.

INSURANCE, LIFE—DISEASE—UNTRUE ANSWERS.—If the application for insurance on a person's life is expressly declared to be a part of the policy, and the statements therein are warranted to be true, such statements will be deemed material, whether they are so or not; and, if the statements of the applicant concerning his health are shown to be false, there can be no recovery on the policy. Numerous decisions sustain the general rule that a temporary ailment cannot be considered a disease unless it indicates a vice in the constitution, or is so serious as to have some bearing upon the general health and continuance of life, or such as, according to common understanding, would be called a disease: See monographic note to *Continental Life Ins. Co. v. Yung*, 3 Am. St. Rep. 634, 635, on the invalidity of a life insurance policy owing to the existence of disease affecting the applicant.

HUFF v. CRAWFORD.

[88 TEXAS, 368.]

LIMITATIONS OF ACTIONS—REAL ESTATE—TEMPORARY ABSENCE.—A statute of limitations, providing that the temporary absence of defendant from the state shall not be accounted or taken as a part of the time limited, applies to all suits alike, including actions for the recovery of real estate, and, therefore, applies to an action of trespass to try title, but does not apply to persons who were nonresidents of the state at the time the cause of action accrued.

LIMITATIONS OF ACTIONS—REAL ESTATE—ABSENCE OF DEFENDANTS.—In an action of trespass to try title where the defendant has held possession by an agent, and has been absent from the state, and a resident of another state, during the time necessary to complete the bar, the running of the statute of limitations, concerning absent defendants, is suspended during the defendant's absence, if he was a resident of the state at the time the adverse possession was taken by his agent, but, if he was not, the statute does not apply.

REAL PROPERTY—POSSESSION BY AGENT.—The possession of land by an agent has the same effect as possession by a tenant.

R. E. Huff and J. A. Templeton, for the appellant.

A. H. Carrigan, for the appellee.

372 GAINES, C. J. The court of civil appeals for the second supreme judicial district have certified to us for our determination the following question:

"G. F. and S. Y. Collins are among the defendants in this action of trespass to try title. They plead the statute of limitations for four years. They claim the land, on account of which the plea is entered, under a deed duly recorded for more than five years prior to the institution of the suit, paying taxes as prescribed by the statute. The land has been in actual possession under this deed and claim for the requisite time. The possession has, however, been held for them, in their name, and for their use and enjoyment, by an agent. During the **373** time necessary to complete the bar, the defendants named have been absent from the state and residents of another state.

"Question: Do the provisions of article 3216 of the Revised Statutes preclude these defendants, under the foregoing facts, from interposing the defense stated?

"It is contended that the opinion in the case of *Hunton v. Nichols*, 55 Tex. 217, is not to be regarded as an interpretation of this article; or, if so, that the announcement therein made of this question is obiter dictum."

The case referred to contains the only decision of this court which bears directly upon the question. The report is so defective that it is impossible to determine from it with any de-

gree of satisfaction the precise point which was decided. By referring, however, to the original transcript and briefs among the records of this court, we find that the question was presented, though, as we have concluded, it was not involved in the decision of the case. The appellants in that case had sued in trespass to try title to recover of appellees certain real estate in the city of Austin. Brush, one of the defendants below, pleaded, among other defenses, the statute of limitations; and introduced evidence tending to show his possession of the property for the requisite period. The plaintiffs replied that during the time of his occupancy he was absent from the state. In their brief as appellants, they made the point that on account of Brush's absence the statute did not run in his favor. The point was not noticed in the briefs of appellee. The evidence was to the effect that Brush held possession by tenants, but that during a great part of the time he had a residence in Brooklyn, in the state of New York; that he resided there during five or six months of each year; and that during the other months he resided in Austin. If the statute of limitations did not run in Brush's favor during any portion of the time that he was in possession of the property, the burden was upon the plaintiffs to show it. When the case was decided, it was the settled law of the state that the provision of the statute of limitations in regard to absent defendants did not apply to persons who were nonresidents of the state at the time the cause of action accrued: *Lynch v. Ortlieb*, 87 Tex. 590. The plaintiffs had failed to show that Brush was a resident of the state, or that he was within the state at the time he took possession by his tenants of the property in suit; hence, in our opinion, the question whether the provision of the statute in question applied to actions for the recovery of real property was not involved in that case. If Brush was a nonresident and absent from the state at the time the cause of action accrued against him, his absence was not to be accounted against him. Therefore, we think that if the court intended in that case to hold that the provision did not apply to suits for real estate, the holding is not binding as an authority.

We therefore regard the question of the applicability of article 3216 of the Revised Statutes to actions for the recovery of real estate as an ³⁷⁴ open one in this court, and are of opinion that it applies to all suits alike. That article is but a re-enactment of section 22 of the "Act of Limitations," approved February 5, 1841: *Paschal's Digest*, art. 23. That act was an adaptation of the statute of 21 James I., upon which it is evidently modeled: See *Wood on Limitations*, 631. The corresponding provision of

the statute of James is, by its express terms, made applicable to certain personal actions only; and it is significant that the words by which its operation is limited are omitted from section 22 of the act of 1841. The periods within which actions for the recovery of real estate, as well as actions of a personal nature, were prescribed in the previous sections of that act, and its place would indicate that it was to apply to every case for which a limitation had been provided. Title 62 of the Revised Statutes is a reproduction in substance of the main features of the act of 1841. It is divided into three chapters, the first of which is entitled "Limitation of Actions for Land"; the second is devoted to limitations of personal actions; and the third is entitled, "General Provisions," some of which are necessarily applicable to both classes. There is nothing in the terms of the article in question which indicates that it was to be limited in its application, and the fact that it is inserted in the general provisions indicates that it was to apply as well to the actions specified in the first chapter as to those designated in the second. There may be reasons why suits for the recovery of land should be excepted from the operation of the article, but there are none which are sufficiently cogent to induce us to believe that the legislature did not intend what by its language it has so clearly expressed.

Similar provisions, couched in the same general terms, have been held to apply to suits for the recovery of lands by the courts of other states: *Chicago etc. Ry. Co. v. Cook*, 43 Kan. 83; *Morrell v. Ingle*, 23 Kan. 32; *Heaton v. Fryberger*, 38 Iowa, 185; *Lagow v. Neilson*, 10 Ind. 183; *Wright v. Strauss*, 73 Ala. 227. We have been cited to no contrary ruling, nor have we found any.

Such is our construction of article 3216. But the question does not advise us whether or not the defendants named were residents of the state or within the state at the time the adverse possession was taken by their agent. We therefore cannot give an explicit answer. If not, then the statute ran in their favor until their return to the state, if they ever returned. If they were within the state at that time, then during their absence the running of the statute was suspended. We are of opinion that the possession by an agent should be deemed to have the same effect as possession by a tenant.

ADDENDUM.

GAINES, C. J. Since the opinion in this case was filed and certified to the court of civil appeals, our attention has been ³⁷⁵ called to certain language which, to say the least of it, is calcu-

lated to mislead. It is said in the opinion: "But the question does not advise us whether or not the defendants named were residents of the state or within the state at the time the adverse possession was taken by their agent. . . . If not, then the statute ran in their favor until their return to the state, if they ever returned." This probably admits of the construction that if the defendants, though residents of the state, were absent at the time possession was taken, the statute would run in their favor, notwithstanding such absence. Such a construction would be in the very teeth of the statute, and we did not intend to so hold.

It is ordered that this be published as an addendum to the opinion referred to, and that it be published therewith.

LIMITATIONS OF ACTIONS—REAL ESTATE—ABSENCE OF DEFENDANTS—SUSPENSION.—THE POSSESSION of a tenant or agent employed to hold possession is the possession of the person under whom he holds. Possession by a tenant is the same in all respects as if by the party himself: *Note to Omaha etc. Trust Co. v. Parker*, 29 Am. St. Rep. 509. Adverse possession by a nonresident, maintained by his tenant, will, if sufficiently long continued, create title by prescription: *Lindenmayer v. Gunst*, 70 Miss. 693; 35 Am. St. Rep. 685. If adverse possession of land is begun by a person by actual entry, and continued by him through his agent or tenant, his absence from the state will not suspend the right to bring an action to recover the possession of the land, nor interrupt the running of the statute of limitations in his favor: *Omaha etc. Trust Co. v. Parker*, 33 Neb. 775; 29 Am. St. Rep. 506. That the statute does not apply to nonresidents, see *Wilson v. Daggett*, 88 Tex. 375; post, p. 766.

WILSON v. DAGGETT.

[88 TEXAS, 375.]

LIMITATIONS OF ACTIONS—REAL ESTATE—TEMPORARY ABSENCE.—A statute of limitations, providing that the temporary absence of defendant from the state shall not be accounted or taken as a part of the time limited, is applicable to real as well as to personal actions.

LIMITATIONS OF ACTIONS—POSSESSION OF NONRESIDENT BY TENANT—TEMPORARY PRESENCE.—A person who has at all times been a nonresident of this state, but who was temporarily within the state before taking adverse possession of land by tenant, though he was absent when such possession was taken, and has ever since been absent, is not a person "without the limits of this state," within the meaning of a statute of limitations respecting absent defendants.

LIMITATIONS OF ACTIONS—VISIT BY NONRESIDENT—"RETURN."—If a nonresident person comes to this state for a temporary purpose only, after having taken adverse possession of land by tenant, and remains here but a short time upon business, his visit is not "a return to the state," within the meaning of a statute of limitations respecting absent defendants, and his absence, after such visit, does not suspend the running of the statute in his favor.

LIMITATIONS OF ACTIONS—POSSESSION OF NONRESIDENT BY TENANT.—As applied to real actions, where adverse possession of land has been taken by tenant, a statute of limitations providing that the temporary absence of defendant from the state shall not be accounted, or taken as a part of the time limited, does not apply to those who were not residents of the state when possession was taken, unless, perhaps, they took possession in person.

F. E. Dycus and R. F. Arnold, for the appellants.

A. H. Carrigan, for the appellees.

375 GAINES, C. J. The court of civil appeals for the second supreme judicial district have certified for our determination the following questions:

"L. F. Wilson & Co., a firm composed of L. F. Wilson, M. B. Wilson, and W. E. McCrory, having acquired a deed as firm property to ³⁷⁶ the land in controversy, sought to hold it under the five years' statute of limitation. When they took possession by tenant they were nonresidents of the state of Texas, as well as before and since that time. Before taking such possession, each of them had been in the state for a short time temporarily on business, and since taking possession one of them, L. F. Wilson, has also been in the state from time to time looking after his business here; but the evidence tends to show that neither of them was here when possession was taken, and no one of them has ever been a resident citizen of Texas.

"In view of some expressions of the opinion in *Huff v. Crawford*, 88 Tex. 368, ante, p. 763, holding that article 3216 of the Revised Statutes is applicable to actions for recovery of real estate, as well as in the case of *Lynch v. Ortleib*, 87 Tex. 590, and prior cases, we desire to know what construction that article should receive in its application to the above state of case; that is to say:

"1. Is a person who has at all times been a nonresident of this state, but who was temporarily within the state before taking adverse possession of the land by tenant, though absent at that time and ever since, a person 'without the limits of this state,' within the meaning of that article?

"2. In case such nonresident person comes to this state for a temporary purpose only after taking such possession, and remains here for a short time, is that a 'return to the state,' within the meaning of that article?

"3. What effect, if any, would the holding of the land as partnership property have upon the question?"

In *Huff v. Crawford*, 88 Tex. 368, ante, p. 763, and in *Lynch v. Ortleib*, 87 Tex. 590, we held that the decision in *Snoddy v. Cage*, 5 Tex. 106, to the effect that, in personal actions, the ab-

sence from the state of one who had never been a resident here did not suspend the running of the statute of limitations, had become the settled law of the state; and that the rule applied as well to suits for land as to personal actions. We were driven to that ruling, because the decision in that case had been repeatedly affirmed by this court, and because the statute had been re-enacted without material change in its language after it had been so construed. That the provision applied to real actions was held, for the reason that we could find nothing, either in the original act or in the Revised Statutes, upon the subject to countenance the theory that suits for land were to be excepted from its operation.

As was said in *Lynch v. Ortleib*, 87 Tex. 590, referred to above, the construction placed upon the statute in question in *Snoddy v. Cage*, 5 Tex. 106, is in conflict with that given to similar statutes in other states; and it would seem that the eminent judges who concurred in the majority opinion in that case looked only to actions of debt, and did not apprehend the difficulties that arise when we come to apply it to suits for land. In *Ayres v. Henderson*, 9 Tex. 539, it was held that the statute was suspended by the departure of one who, while residing in the state, had contracted a debt here, and had subsequently removed to 377 and fixed his permanent residence in another state. The court say: "But the object of the section was for the protection of domestic creditors. It was to their advantage that their debtors should remain within the limits of the state. And it was intended to protect them from the inconvenience and loss to which they would be exposed by the absence of their debtors, and the consequent immunity of the latter from process and judgment." The reason given is satisfactory, and the construction so far stands upon a safe foundation. But while the language of the provision admits of no distinction between actions for debt and actions for the recovery of land, to say broadly that the statute is suspended as to one who has once lived in the state, or has visited the state, and one who, after taking up his residence beyond its limits, takes possession of land through his agent or tenant, is to adopt a rule for which no sound reason can be given. Merely because it may be predicated of one who has crossed the line of the state that he may "return" to the state, to hold that the provision applies to him, when it is not held to apply to one who has never been within its limits, is to draw a distinction too arbitrary for us to believe that the legislature ever intended it. It may be that the statute should not be suspended as to one who, being a resident of the state, takes possession of a

tract of land, or one who, not being a resident, occupies in person the disputed premises, and then leaves the state, continuing his possession through an agent or tenant. Such a rule is not unreasonable, and is analogous to the case of one who, as in *Ayres v. Henderson*, 9 Tex. 539, contracts a debt while residing here, and then takes up permanent abode in another state.

There are reasons why absence should not suspend the running of the statute in any suit for the recovery of land. To continue its operation, there must always be some one in possession; and such possessor may be sued at any time. The nonresident himself may be sued by publication, and his title determined: *Arndt v. Griggs*, 134 U. S. 316, Co-operative ed., bk. 33, p. 918. The loose method of conveying lands and land certificates which obtained here at an early day has rendered short periods of limitations necessary for the repose of titles; and the policy has been favored by our legislatures and by our courts. Nevertheless, we have felt constrained to hold, as has been held in construing like statutes by the courts of other states, that the provision is applicable to real as well as personal actions.

1. Our conclusion as to the first question certified is, that it should be answered in the negative.

2. We understand that the purpose of the second question is to elicit an answer to the inquiry, whether the absence of L. F. Wilson, after coming to the state upon business subsequent to the accrual of the cause of action, suspended the running of the statute in his favor. We think it did not. We see no sound reason for drawing a distinction between the case of a nonresident who comes to the state before, or one who visits it upon temporary business after, the cause of action ³⁷⁸ has accrued. The original construction placed upon section 22 of the old statute of limitations, now article 3216 of the Revised Statutes, is based in part upon the literal meaning of the word "return," and in part upon the supposed policy of the republic of Texas to induce immigration—a result of the use of the term which was probably not contemplated by the Congress which passed the act. We think, in the construction placed upon the section in the earlier decisions of the court, the word has already been given all the effect which can be justified by sound reason; and we are unwilling to push this etymological construction further. The effect of these decisions is to hold that, as to actions of debt, the provisions contained in article 3216 do not apply as to those who were nonresidents of the state, both when the debt was created and when the cause of action accrued; and we are of the opinion that, as applied to real actions, the article should not apply to

those who were not residents of the state when possession was taken, unless, perhaps, they took possession in person.

3. So far as we can see from the statement accompanying the questions, the answer to the first two renders an answer to the third unnecessary.

LIMITATION OF ACTIONS—REAL ESTATE—POSSESSION BY TENANT—SUSPENSION—NONRESIDENTS.—If a defendant is absent from the state when a cause of action accrues against him, his occasional or frequent visits to the state, giving the plaintiff an opportunity, by the exercise of ordinary diligence, to commence an action against him, will be of no avail to him under a plea of the statute of limitations, however open and notorious his visits may have been, unless he has been within the state and the jurisdiction of her courts for the full period limited by the statute, either continuously or in the aggregate. The statute of limitations does not run in favor of a defendant while he is absent from the state, no matter if he was so absent when the cause of action accrued; and whenever he departs from the state after having come into it, the running of the statute is suspended from that time and during his absence, whether the cause of action first accrued while he was in, or while he was absent from, the state: *Stanley v. Stanley*, 47 Ohio St. 225; 21 Am. St. Rep. 806. A "return" to the state, which will set the statute running, must be open and notorious, and under such circumstances that the creditor could, with reasonable diligence, find his debtor and serve him with process: See monographic notes to *Langdon v. Doud*, 83 Am. Dec. 645, on what constitutes absence from the state, and its effect upon the running of the statute of limitations: *Moore v. Armstrong*, 36 Am. Dec. 76. A mere temporary return, or "flying visits," after residence is changed, will not remove the bar of absence: Note to *Cook v. Holmes*, 77 Am. Dec. 550; *McCann v. Randall*, 9 Am. St. Rep. 675. The statute of limitations will not run in favor of a nonresident so as to bar an action for the recovery of real estate, although the nonresident may always have had a tenant in possession: See monographic note to *Moore v. Armstrong*, 36 Am. Dec. 76, on limitations of actions. Compare *Huff v. Crawford*, 88 Tex. 368; ante, p. 763.

HIGGINS v. BORDAGES.

[88 TEXAS, 458.]

HOMESTEAD—EXEMPTION OF, FROM ASSESSMENT FOR SIDEWALK.—A constitutional provision exempting a homestead from forced sale for all debts, except for the purchase money or a part of it, or for an improvement thereon, under a contract made as required by the constitution, or for taxes due thereon, exempts it from forced sale for the payment of an assessment for building a sidewalk in a city, as such indebtedness is not embraced in any of the three classes of debts named. The cost of the sidewalk is not a tax, general or special, the term "taxes due thereon" does not include such assessment; and the legislature cannot, therefore, give a lien upon a homestead for it.

JUDGMENT WITHOUT JURISDICTION IS VOID.—Hence a judgment directing foreclosure proceedings, and a sale, to enforce an assessment for building a sidewalk in a city is void, where the court

is without jurisdiction of the amount of the demand, and there is no lien upon the lot sold. A sale thereunder does not confer any title upon the purchaser.

APPEAL—WANT OF JURISDICTION—NOTICE OF.—If facts showing a want of jurisdiction of the subject matter of the suit appear upon the face of the record, the nullity of the judgment will be taken notice of by any court, and at any time.

Greer & Greer, for appellants.

J. F. Lanier, for appellee.

458 BROWN, A. J. The city of Beaumont was duly incorporated under the general laws of the state. The city adopted an ordinance for the construction of sidewalks in the city, providing, that if the abutting property owner, upon notice, failed to make the sidewalk, the city would construct it, and the cost should constitute a lien upon the lot abutting upon it; and providing also for a foreclosure of the lien by suit in any court having jurisdiction.

459 William Higgins and his wife, Mary, were living at the time upon the lot in suit, as their homestead, and continued to live upon it as a homestead from that time to the time of the trial of this case. Notice was given William and Mary Higgins to build the sidewalk, and they having failed to do so within the time prescribed by the ordinance, the city had the sidewalk constructed at a cost of twenty dollars. Higgins refusing to pay the cost of construction, suit was instituted in the district court of Jefferson county by the city of Beaumont against William and Mary Higgins, as husband and wife, to foreclose the lien upon the lot. The petition in that case alleged that Mary and William Higgins were husband and wife; that they occupied the lot at the time of the construction of the sidewalk; and the judgment entered described the lot as occupied by William and Mary Higgins. The petition alleged that the city complied with the requirements of the general law and the ordinance passed by the city council in making the sidewalk.

Judgment was rendered by default against William and Mary Higgins, foreclosing the lien of the city of Beaumont for the cost of said sidewalk upon the lot in question. An order of sale was issued and the lot sold, when the plaintiff, Bordages, purchased it for thirty-five dollars. He says in his evidence in this case that the lot was worth six hundred dollars. He says, also, that he knew at the time that it was the homestead of the defendants, William and Mary Higgins.

Bordages sued Higgins and wife for the lot in trespass to try title, and the district court of Jefferson county, upon a trial before the court, gave judgment for plaintiff for the lot, from

which judgment the defendants, Higgins and wife, 'appealed to the court of civil appeals, which affirmed the judgment of the district court.

If the district court of Jefferson county had jurisdiction of the subject matter involved in the suit of Beaumont v. William and Mary Higgins, then the judgment is not subject to collateral attack, and the judgment in this case must be affirmed. If, however, the court did not have jurisdiction of the subject matter in that suit, then that judgment was void, and a sale under it did not confer title upon Bordages, and the judgment in this case must be reversed.

The petition having alleged that William and Mary Higgins were husband and wife, and that they occupied the land, in effect alleged that the lot was their homestead, which is, in effect, the recital of the judgment; besides which, the proof fully establishes that fact without contradiction.

The court did not have jurisdiction of the amount of the demand, and, if the assessment for sidewalk did not by law have a lien upon the lot, then the court had no jurisdiction.

It has been held by this court in a number of cases that under the charter of the city of Galveston, in which there is language identical with article 376 of the Revised Statutes, the city had a lien for like claim. Assuming, then, that ordinarily, that is, if the property were not homestead, the lien would exist in favor of the city, the question presented ⁴⁶⁰ for determination is, Can the legislature give a lien upon a homestead for such assessments?

The constitution of this state, article 16, section 50, reads as follows: "The homestead of a family shall be and is hereby protected from forced sale for the payment of all debts, except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead. . . . No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust deed or other lien shall have been created by the husband alone, or together with his wife."

By the terms of the foregoing section of the constitution, the homestead is unmistakably exempt from forced sale for every kind of indebtedness which is not embraced in one of the three classes of debts named therein.

The claim for which suit was instituted in the case of *Beaumont v. William and Mary Higgins* was not for the purchase of the lot, nor for a part of the purchase money; neither was it for improvement thereon under a contract made as required by the constitution. It necessarily follows that it cannot be enforced upon the homestead, unless it comes within the meaning of "taxes due on it."

We will examine the question as to whether or not the assessment for building sidewalks is a tax within the terms of the constitution as above quoted.

Article 8, section 9, of the constitution, contains this provision: "No county, city, or town shall levy more than twenty-five cents for city or county purposes, and not to exceed fifteen cents for roads and bridges, on the one hundred dollars' valuation, except for the payment of debts incurred prior to the adoption of this amendment; and for the erection of public buildings, street, sewer, and other permanent improvements, not to exceed twenty-five cents on the one hundred dollars' valuation in any one year, and except as in this constitution otherwise provided." If the sidewalk improvement is a tax authorized by the constitution, it must be embraced in the provision for streets, is limited in amount to twenty-five cents on the one hundred dollars, and must be levied as an *ad valorem* tax. Such a tax might be levied under this section of the constitution, if authorized by law; but the assessment in this case is clearly not an exercise of the power granted in the language above quoted. If it rested upon that for its support, it would be void, because it is not uniform and equal, and exceeds the limit in amount.

Article 11, section 5, of the constitution, is in this language: "Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the legislature, and may levy, assess, and collect such taxes as may be authorized by law; but no tax for ⁴⁶¹ any purpose shall ever be lawful, for any one year, which shall exceed two and one-half per cent of the taxable value of the property of such city," etc.

The city of Houston, having more than ten thousand inhabitants, levied under its charter taxes to the amount of two per cent, and, in addition, ordered the paving of streets, and that a part of the cost be assessed upon the abutting property. Such assessment having been made upon the property of a citizen, which amounted to about two and one-half per cent of its value making four and one-half per cent when added to the general tax, suit was instituted to enforce it.

In the case of *Taylor v. Boyd*, 63 Tex. 533, the validity of

the assessment was contested, upon the ground, among others, that it, with other taxes levied, exceeded the constitutional limit. In a well-considered opinion by Judge Stayton, this court held that the assessment was not a tax within the meaning of the language, "tax for all purposes," and it was enforced against the property. If the assessment is not included in this broad language, then it is certainly not a tax, within the meaning of that word as used in any part of the constitution. If it is a tax for any purpose, it could not be held not to be embraced in the language there used; a tax for any purpose must be within the terms, "tax for all purposes."

Article 8, section 1, of the constitution of this state, contains this language: "Taxation shall be uniform and equal. All property in this state, whether owned by natural persons or corporations other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be prescribed by law." It has been held by this court in a number of cases, and also by courts of many other states, that this and like provisions do not apply to assessments of this character, for the reason, always assigned in such cases, that the assessments are not taxes within the intent and meaning of the constitution: *Taylor v. Boyd*, 63 Tex. 533; *Roundtree v. Galveston*, 42 Tex. 612; *Allen v. Galveston*, 51 Tex. 320.

If the section of the constitution under consideration had exempted homesteads from the payment of taxes, under the authorities in this state and in many others, it must have been held by this court that the exemption would not relieve such homesteads from liability for assessments for local improvements, because it is held by the courts, almost unanimously, that assessments of that character are not taxes within the meaning of such statutes and constitutions, notwithstanding the language in many cases has been as comprehensive as it could be made, without expressing the very kind of demand here asserted: *County of Harris v. Boyd*, 70 Tex. 241; *Matter of Application of Mayor, etc.*, 11 Johns. 77; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Matter of College St.*, 8 R. I. 474; *Worcester etc. Soc. v. Mayor*, 116 Mass. 189; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; 11 Am. Rep. 412; *Mayor etc. v. Green Mount Cemetery*, 7 Md. 517; *Paterson v. Society*, 24 N. J. L. 385; *Trustees etc. v. Chicago*, 12 Ill. 403; *Cooley on Taxation*, 207, note 3. If the use of the same words would not have included this ⁴⁰² character of claim if it had expressed an exemption from taxes, how can it be said that it does include it when used to subject the homestead to the payment of taxes? We can see

no sound reason for varying the meaning of the language, because in the one case it would subject and in the other exempt the property.

The legislature of this state enacted a law, which was approved August 21, 1876, empowering the collectors of taxes for counties, cities, and towns to sell the property of delinquent taxpayers for the purpose of collecting unpaid taxes. Assessments for shelling the streets of the city of Galveston had been made against the property of certain citizens, who refused to pay, and under this act the collector of the city advertised the property upon which the assessments were made for sale to pay the unpaid assessments. Allen sued out on injunction against the sale, and the court held that the law did not confer power upon the assessor to sell the property for such assessments, because assessments of that character were not taxes within the meaning of that act: *Allen v. Galveston*, 51 Tex. 302. If an act of the legislature authorizing the sale of property for taxes unpaid would not empower the collector to sell for assessments for local improvements, it would seem that, with equally strong and cogent reasoning, it can be held that the authority in the constitution to sell the homestead for like taxes would not authorize the forced sale of the homestead for the same character of assessments. We can see no sound reason for drawing any distinction between the two cases, when in fact no distinction can exist.

In the case of *Taylor v. Boyd*, 63 Tex. 533, the court said: "The words 'tax,' 'taxes,' and 'taxation,' as used in the constitution, without some qualifying words, in reference to property, evidently mean ad valorem tax, taxes, and taxation." In the section of the constitution under consideration, the word "taxes" is used with reference to property, and without any qualifying words except the words "due on it," which simply limit it to the taxes due upon the particular property, and, according to the rule above quoted, must be held to mean ad valorem taxes; that is, the word is used with reference to the kinds of taxes mentioned in the constitution, and should be construed with reference to the use of it in other portions of the constitution. In the same case, the court said: "The power of the legislature over assessments for local improvements is to be measured by its own will, in the absence of some constitutional restrictions, and we find none such in the constitution of this state where the power is used for the purposes for which that method of taxation has so long been deemed lawful."

A careful examination of the decisions of our own and the courts of other states will show that the foregoing remark is ful-

ly justified as a correct statement of the result of the adjudications of courts of last resort.

But the constitution of this state, in the sixteenth article and fiftieth section thereof, has in such plain and unmistakable language defined ⁴⁶³ and limited the liability of homesteads to forced sale that no department of the state government can disregard it. From the inception of homestead exemptions in this state, the changes have all been in the direction of larger exemptions and more perfect protection. Every decision of the courts which trenched upon the liberal spirit of the constitution in that particular has been met at the next assembling of the people in convention by provisions to meet the construction thus given. Whether it is good or bad policy is not a question for the courts. The constitution is paramount, and must be observed and enforced.

In the case of *Galveston v. Heard*, 54 Tex. 448, the right to sell the homestead for assessment for street improvement was denied, but the court waived the question as not being necessary to the determination of that case, and said, "we have no design to intimate that the defense, if established, would have been of any avail."

In *Lufkin v. Galveston*, 58 Tex. 545, the same question was presented, and the court there held that the homestead was subject to sale in satisfaction of this class of demands. The opinion was delivered by Judge West, who said: "The constitution of the state, article 16, section 50, makes no difference between the homestead and other real property as to its liability to be sold for taxes that may be due on it. Nor does it draw any distinction between general and special taxes to which it may be subject. The plain import of its terms is, that it is not protected from forced sale for taxes that may be due on it." No authority is cited, nor is there any inquiry as to whether or not the assessment is included in the terms of the constitution. It is assumed that the assessment is a special tax, and upon that assumption the homestead was held to be liable. Mr. Desty, in his work on *Taxation*, defines special taxation as follows: "Special taxation, as distinguished from taxation for general municipal purposes, is the levy of taxes to meet a special burden, either imposed by the legislature or authorized by the legal voters of the district to be taxed": 2 *Desty on Taxation*, 1186. And we believe that the definition might be enlarged so as to include not only the tax levied by the legislature or voted by the voters, but also such as by law a municipal corporation may levy. As an instance of special tax authorized by the voters, we mention the tax to sup-

port free schools within a city; and as an instance of that character of taxes which the legislature might authorize without such vote, we would suggest that under article 8, section 9, of the constitution, the legislature might empower the city to levy a tax not to exceed twenty-five cents on the one hundred dollars for streets and other public improvements; and for either or both of these the homestead would be liable, if levied as a tax under the constitutional limitations.

The learned judge who wrote the opinion in the case of Lufkin v. Galveston, 58 Tex. 545, said, as above quoted, that "the plain import of its [the constitution's] terms is, that it is not protected from taxes that may be due ⁴⁶⁴ on it." And again he says: "Nor does it draw any distinction between general and special taxes to which it may be subject." It is not asserted that the assessment in question is a tax, general or special; but we conclude that it must have been treated as a special tax, as it is too clear for argument that it is not a general tax. Is it a special tax? If it be a special tax, then it is taxation, and would fall within the requirement, that "all taxation must be uniform and equal." If a special tax, it must be a tax for some purpose, and would come under the limitation as to taxes "for all purposes." And again, if it were a tax, though it be for a special purpose, it would be embraced in the terms of the law authorizing the collector to sell property for unpaid taxes. Our courts have held that such assessments are not included in any of these expressions, and we cannot see how it can be held to be a special tax, when it has none of the characteristics of a tax in any sense in which it is used in the constitution.

We feel constrained, upon authority and sound reasoning, to hold that the charge made against the homestead of William and Mary Higgins for the cost of the sidewalk was not a tax, general or special, within the meaning of article 16, section 50, of the constitution; and that the case of Lufkin v. Galveston, 58 Tex. 545, is in conflict with the decisions of this court, and, in so far as it holds the homestead liable to forced sale for such assessments, that case is hereby overruled.

There being no lien upon the lot sought to be subjected to sale in the case of Beaumont v. Higgins and wife, and the amount claimed being for a sum less than five hundred dollars, the judgment rendered by the court foreclosing a lien upon the lot was void, and the sale of the lot under that judgment conferred no title upon Bordages. These facts showing want of jurisdiction of the subject matter of the suit appeared upon the face of the record, and the nullity of the judgment will be taken notice of by any court, and at any time.

The district court erred in rendering judgment for the plaintiff below, and the court of civil appeals erred in affirming the judgment (in which, however, both followed *Lufkin v. Galveston*, 58 Tex. 545), for which errors the judgments of both courts are reversed, and judgment will be here rendered that the plaintiff below, I. R. Bordages, take nothing by his suit, and that the defendants, Henry Higgins and Mary Higgins, go hence without day, and that they recover of the said I. R. Bordages all costs in this case in all the courts.

Reversed and rendered.

Denman, A. J., did not sit in this case.

HOMESTEAD—FOR WHAT CLAIMS LIABLE.—A homestead is not exempt from sale for taxes or assessments levied against it: See monographic note to *Mertz v. Berry*, 45 Am. St. Rep. 387, on homesteads, for what claims liable; citing *Lufkin v. Galveston*, 58 Tex. 545, holding that an assessment or tax levied against a homestead to cover the cost of a local improvement in constructing a sidewalk in front of it is a valid lien for which the homestead is liable, but which case is overruled in the principal one.

JUDGMENT—VOID FOR WANT OF JURISDICTION—NOTICE. A judgment showing upon its face that the court rendering it had no jurisdiction, either of the person or of the subject matter, is absolutely void: *Moyer v. Bucks*, 2 Ind. App. 571; 50 Am. St. Rep. 251, and note; *Hope v. Blair*, 105 Mo. 85; 24 Am. St. Rep. 366. A want of jurisdiction, either of the person or subject matter, appearing upon the face of the record, can be taken advantage of at any time, and in any court, where the conclusiveness of the judgment or decree is the subject of judicial inquiry: Note to *Rogers v. Cady*, 43 Am. St. Rep. 105. A court will recognize a want of jurisdiction even if no objection is made: *State v. Van Beek*, 87 Iowa, 569; 43 Am. St. Rep. 397.

NORTHSIDE RAILWAY COMPANY v. WORTHINGTON.

[88 TEXAS, 562.]

CORPORATIONS—EXERCISE OF POWERS.—While corporations are creatures of the law and can exercise such powers only as are granted by the law of their creation, an express grant of power is not necessary.

CORPORATIONS—IMPLIED POWERS.—In every express grant of power to a corporation there is implied a power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred.

CORPORATIONS—IMPLIED POWERS.—A company may foster its legitimate business, whatever it is, by all the usual means, but it can go no further. If the means are such as are usually resorted to, and a direct method of accomplishing the purpose of the incorporation, they are within its powers; but if they are unusual, and tend in an indirect manner only to promote its interests, they are ultra vires.

CORPORATIONS—LIMIT OF IMPLIED POWERS.—A business corporation has implied power to do that which is reasonably

necessary to the business, or that which is usually incident to its prosecution, but this is the limit of its implied power. It cannot exercise abnormal and extraordinary powers to carry out its purpose.

CORPORATIONS—IMPLIED POWERS—BUSINESS STATED BY STATUTE.—A corporation created for the purpose of carrying on a business under a statute which merely states the nature of the business, and does not further define its powers, may exercise such powers as are reasonably necessary to accomplish the purpose of its creation. It may exercise such powers as are usually incidental in practice to the prosecution of the business, but no more.

CORPORATIONS—AIDING EACH OTHER—IMPLIED POWERS.—The law does not recognize a street railway company as a usual means of carrying out the purpose of a corporation organized to purchase and subdivide lands and to sell them in lots; neither can the latter corporation, without statutory authority, embark its capital in a street railway enterprise. Neither corporation has lawful power to aid the other, though it might be mutually beneficial, as the furtherance of the interests of one is not necessary to the business of the other; but each should confine itself to its proper business, and not divert its capital or extend its credit to the assistance of the other.

CORPORATIONS—AIDING, AND BECOMING SURETY FOR, EACH OTHER—LIABILITY ON BONDS—ULTRA VIRES.—If two business corporations, such as a street railway company, and a company organized to purchase and subdivide lands and to sell them in lots, borrow a sum of money, to be divided between them, and bind themselves jointly and severally for the payment thereof by the issuance of bonds which are sold below par, the bonds are not necessarily ultra vires and void as a whole because of the fact that neither corporation can lawfully divert its capital or extend its credit in aid of the other, where there is no fraud in the transaction and a fair equivalent is given for the obligations; but each company is liable for such proportion of the bonded indebtedness as the amount actually received by it bears to the amount paid for the bonds; and is not liable for more than its proportionate amount of the debt incurred.

CORPORATIONS—BECOMING SURETY FOR EACH OTHER.—If two business corporations have different charter purposes, and have, therefore, no lawful right to aid or assist each other in business, one cannot, in the absence of statutory authority, become surety for the other. Hence, one of the corporations is not liable upon its indorsement of a promissory note given by the other corporation for machinery furnished to the latter for its own use.

CORPORATIONS—ULTRA VIRES CONTRACT—LIABILITY. A company organized to purchase and subdivide lands and to sell them in lots is not liable upon its joint obligation with a street-car company for the cost of street-cars furnished the railway company as the charter purposes of the two companies are different, and neither can aid the interests of the other.

Walton, Hill & Walton, C. M. Templeton, and J. C. Randolph, for the appellants, Mrs. Sallie Huffman, Northside Railway Company, and Fort Worth City Company.

Ross, Chapman & Ross, for Thomas Worthington and the American Loan and Trust Company, Trustee, appellees.

566 **GAINES, C. J.** The following statement of the nature and result in the trial court of this suit is taken from the brief of appellants filed in the court of civil appeals:

"This suit was instituted in December, 1891, by Thomas Worthington, one of the appellees, and plaintiff below, in the district court of Tarrant county, against the Northside Railway Company, the Fort ⁵⁰⁷ Worth City Company, the Fort Worth Street Railway Company, Mrs. Sallie Huffman, the Thompson-Houston Electric Company, Brownell Car Company, the Smith Bridge Company, and Aldace W. Caswell. The American Loan and Trust Company subsequently became a party plaintiff.

"The main suit was for judgment against the two first defendants on certain joint bonds executed by them, and to foreclose a mortgage, also jointly executed by them, on all their property, property rights, and franchises, to secure the payment of said bonds. The action against the other defendants was collateral in a great measure, if not wholly.

"The Thompson-Houston Electric Company and Brownell Car Company each by cross-bill set up alleged causes of action against the Northside Railway Company and Fort Worth City Company upon promissory notes which they allege the latter jointly executed, and each sought to foreclose a mortgage alleged to have been executed by the Northside Railway Company.

"There were interventions by other creditors and relief prayed by them, but the issues joined on pleadings of intervenors are not vital, except P. E. Lane, Wallace Hendricks, and George Hendricks, who occupy the same status as plaintiffs.

"The defendants Sallie Huffman and A. W. Caswell, who were joined by the Northside Railway Company and the Fort Worth City Company, made by their pleadings the main issues in the case, and upon which this appeal has been taken and will be prosecuted.

"Contemporaneously with the institution of the suit, a receiver was prayed for by the plaintiffs and appointed by the court, for the benefit of all and whomsoever was concerned.

"The court appointed a master in chancery, to whom was referred all the issues made by the pleadings, including the validity of the bonds, notes, and acceptances sued on, and the deeds of trusts or mortgages given to secure the payment thereof. This master made report, but, by agreement, it was waived by all parties in so far as report was made passing on validity of the said bonds, notes, etc., and mortgage, which issue was tried as an original question by the court.

"A trial was had, the plaintiffs prevailing, securing judgment on the bonds with foreclosure of the mortgage, order of sale, etc., the holders of notes securing judgments and foreclosures as well."

The defendants Northside Railway Company, Fort Worth City Company, and Mrs. Huffman, perfected an appeal to the court of civil appeals, where the judgment of the trial court was affirmed.

The Fort Worth City Company and the Northside Street Railway were both organized under the general laws of this state which provide for the creation of private corporations—the purpose of the first, as expressed in its charter, being “the purchase, subdivision, and sale of lands in cities, towns, and villages” and that of the second, “the construction and maintenance of street railways.” They were organized ⁵⁶⁸ about the same time, the stock taken by the same persons, with some unimportant exceptions, and in the same proportions. The same persons held the offices of directors, president, and secretary, respectively, in each company. The city company acquired title to a tract of land consisting of about fourteen hundred acres, lying north and northwest of the city of Fort Worth, and laid it out in streets, alleys, blocks, and lots, for the purpose of selling to settlers and of building up the suburb. The street railway was projected to extend from a point in the city to and through the city company’s property. There was testimony to show that the street railway was calculated to enhance the value of the lots, if not necessary to enable the city company to sell them at a profitable price; and also that it was essential to build up the suburb in order to make the street railway a paying investment. Such was the condition of affairs when the bonds in controversy were executed. The city company needed a large sum of money to pay off an indebtedness and for other purposes, and the street railway company needed funds for the construction and equipment of its line of street railway. The officers of the two corporations thereupon agreed to issue a series of bonds, one hundred and fifty in number, and for one thousand dollars each, to be executed by the two corporations jointly, and to be secured by a mortgage on their property. The formalities of the law having been complied with, the bonds were issued and sold at ninety-five cents on the dollar, and the plaintiff Thomas Worthington became the holder of those here sued upon, one hundred and forty-two in number.

It is contended on behalf of the plaintiffs in error that the execution of the bonds was ultra vires, and that, therefore, they are void. In determining this question, we may recur to a few leading principles. Corporations are the creatures of the law, and they can only exercise such powers as are granted by the law of their creation. An express grant, however, is not necessary. In every express grant, there is implied a power to do

whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. The difficulty arises, in any particular case, whenever we attempt to determine whether the power of a corporation to do an act can be implied or not. The question has given rise to much litigious controversy, and to much conflict of decision. It is not easy to lay down a rule by which the question may be determined; but the following, as announced by a well-known text-writer, commends itself not only as being reasonable in itself, but also as being in accord with the great weight of authority: "Whatever be a company's legitimate business, the company may foster it by all the usual means; but it may not go beyond this. It may not, under the pretext of fostering, entangle itself in proceedings with which it has no legitimate concern. In the next place, the courts have, however, determined that such means shall be direct, not indirect; i. e., that a company shall not enter into engagements, as the rendering of assistance to other undertakings from which it anticipates a ⁵⁶⁹ benefit to itself, not immediately, but immediately by reaction, as it were, from the success of the operations thus encouraged—all such proceedings inevitably tending to breaches of duty on part of the directors, to abandonment of its peculiar objects on part of the corporation": Green's Brice's *Ultra Vires*, 88.

In short, if the means be such as are usually resorted to and a direct method of accomplishing the purpose of the corporation, they are within its powers; if they be unusual and tend in an indirect manner only to promote its interests, they are held to be *ultra vires*. For example, a railroad company may establish and maintain refreshment houses along its line for the accommodation of its passengers: *Flanagan v. Railway*, L. R. 7 Eq. 116. Such establishments are not unusual, are strictly subordinate to the main purpose for which such companies are created, and tend immediately to increase their traffic. So it has been held that a railroad corporation has the power to contract with the owner of a steam vessel to maintain a through traffic and carry beyond its line, and that it can recover of the owner of such vessel damages to goods resulting from its unseaworthiness, for which the company have had to pay: *South Wales Ry. Co. v. Redmond*, 10 Com. B., N. S., 675. It is now generally recognized, that a railway company may contract to carry beyond its line, and it would seem to follow that a reasonable traffic arrangement with another carrier for through transportation is legitimate. On the other hand, in *Coleman v. Eastern Counties Ry. Co.*, 10 Beav. 1, the performance of a contract by which the company sought

to establish a line of steamships between a terminus of one of its branches and a foreign port, and by which it attempted to guarantee a dividend on the venture, was enjoined. Upon a hasty consideration, the two cases may appear not clearly distinguishable; but we think them entirely consistent, and that they well illustrate the rule which we have stated. In the former, the contract was subsidiary to the legitimate business of the company, and was such as was reasonable and appropriate to a railroad, one of the termini of which was upon the seashore. It tended directly to increase the traffic of the company. In the latter, the establishment of the line of steamships was not subordinate to the business of the railroad company, but was in its nature a distinct enterprise. It tended to increase the business of the port to which the company's branch line extended, and the increase of the business of the port tended to increase the traffic of the railroad; but this was a mediate, and not a direct, result.

As illustrative of the principle which we have announced, we call attention to some cases in addition to those already cited. In *Davis v. Old Colony R. R. Co.*, 131 Mass. 258, 41 Am. Rep. 221, it is held that it is beyond the powers of a railway company, or of a corporation organized under the general statutes of Massachusetts for the manufacture and sale of musical instruments, to guarantee the payment of the expenses ⁵⁷⁰ of a musical festival. The opinion in that case is by Chief Justice Gray, and is a very able and exhaustive discussion of the question. In *Pearce v. Madison etc. R. R. Co.*, 21 How. 441, it was held that two railroad companies, which had consolidated, were not authorized to establish a steamboat line to run in connection with their railroads. In *Plymouth R. R. Co. v. Colwell*, 39 Pa. St. 337, 80 Am. Dec. 526, it was decided that a railway company was not authorized by its charter to maintain a canal. In *Timkinson v. South Eastern Ry. Co.*, L. R. 35 Ch. Div. 675, it was held that a proposed subscription by the company to an institution known as the "Imperial Institute" was not prevented from being ultra vires by the fact that the establishment of the institute might benefit the company by causing an increase of passenger traffic over their line.

To these cases others might be added, but they are sufficient to illustrate the doctrine that a corporation, created for the purpose of carrying on a business under a statute which merely states the nature of the business and does not further define its powers, may exercise such powers as are reasonably necessary to

accomplish the purpose of its creation; and it may be such as are usually incidental in practice to the prosecution of the business, and no more: See *Frierson etc. Lime Works v. Dismukes*, 87 Ala. 344; *Searight v. Payne*, 6 Lea, 283.

These principles, applied to the facts of this case, lead to the conclusion that neither the Fort Worth City Company nor the Northside Street Railway Company had the power to extend its credit to foster the interests of the other company. Viewed in the light of the peculiar facts of the case, it is apparent that the building up and settlement of the suburb tended to increase the business of the street railway which connected that suburb with the city of which it was the outgrowth. On the other hand, it is equally clear that the establishment of the street railway tended to promote the enterprise of the other corporation. It is also clear that the establishment and maintenance of a street railway is not an object which was expressed in the articles of incorporation of the city company, and that the building up of an addition to a city is not a purpose expressed in the charter of the other corporation. That the success of the one enterprise tended to promote the success of the other was not itself sufficient to authorize the one corporation to aid the other, for the reason that the benefit which was to accrue was not the direct result of the means employed.

The transaction in controversy, when properly analyzed and stripped of its form, is one in which the two corporations agreed to borrow a sum of money, to be divided between them, and that each should become the surety for the other for the amount received by such other. It is too well settled to require the citation of authority that a corporation of the character of those in question, in the absence of statutory authority, cannot bind itself by accommodation paper executed for the benefit of another party. It follows that if either corporation in ⁵⁷¹ this case is to be held bound for more than its proportionate amount of the debt incurred, it must be upon the ground that it had power to aid in the prosecution of the business of the other.

Did the street railway company have such power? If it is to be held that, because of the indirect benefits which would result to it from the success of the enterprise, it was authorized by the law to aid in building up the suburb of the city company, then it should also be held that it had the power to employ its funds and its credit in fostering any other undertaking which was calculated to increase the population of the city of Fort Worth or of any portion of the territory which lies along its line. The effect of that ruling would be to empower every business corpo-

ration not only to carry on the very business it was created to prosecute, but also to engage in every enterprise which would tend to increase the volume of its principal business and the revenues to be derived therefrom. This would leave the scope of its operations without any reasonable limit. That such is not the law, the authorities already cited are sufficient to show. Street railways are projected for the carriage for hire of people living within and near cities and towns. Street railway companies are chartered for the specific purpose of establishing and operating street railways, and not to increase the population of the towns and cities through which they are established—though their operation may have that effect, and though an increase of population may result indirectly to their benefit.

The same principles apply to the case of the Fort Worth City Company. The general law in force at the time this corporation was created provided that a private corporation might be formed for the purpose, among others, of "the purchase, subdivision, and sale of lands in cities, towns, and villages": Laws 1885, p. 59. We construe this to give the power to purchase lands, and to lay them off into streets, blocks, and lots, and to sell them in subdivisions for the purpose of profit. Many enterprises suggest themselves which might be entered into by such a corporation, which would tend to promote the success of the undertaking. As a general rule, there is probably none that would be better calculated to produce that effect than the construction and maintenance of an ordinary railroad. But can it be said that such a corporation has the power to embark its capital in such an enterprise? A limit must be laid down as to the implied powers of a corporation; and, with reference to a company chartered for a business purpose, we think the proper line of demarkation is between those powers which are reasonably necessary to the business, or which are usually incident to its prosecution, and those which are not.

It occurs to us, that in determining the powers of a corporation a distinction should be observed between such as are created by special charters and such as come into existence by virtue of authority conferred by a general law. A charter is in the nature of a contract, and it may be that, in construing a special charter, we should construe it in the light of the special circumstances attending the enterprise which ⁵⁷² was intended to be promoted—as in case of a railroad, its connection with other lines of transportation, whether by water or land, or its terminus at a seaport. The last-mentioned circumstance seems to have had a controlling influence upon the court in the case of the South

Wales Ry. v. Redmond, 10 Com. B., N. S., 675, already cited. For example, if the legislature had the power to grant and had granted a special charter to the city company, and it had appeared that a street railway was necessary to the success of the corporation, and that this fact was known, it may be that the power to construct, or at least to aid the construction of, the street railway would have been implied. But this corporation having been created under a general law, we do not see that it can claim the right, by reason of its peculiar surroundings, to exercise a power which another like corporation could not exercise by reason of different circumstances. Our constitution provides that corporations shall be created only by general laws; and it would seem that one purpose of the provision was to prevent the legislature from granting to one corporation special powers or special privileges. At all events, the general law, as we think, should be construed as a general rule conferring upon each member of each particular class of corporations precisely the same powers.

Cities and towns have grown up without the aid of street railways. The origin of the latter is comparatively very recent. The law does not recognize them as a usual means of carrying out the purpose of a corporation organized to purchase and subdivide lands and to sell them in lots. They are provided for in the general law as a distinct purpose for which corporations may be created. The two enterprises may be of mutual assistance; and if the same persons desire to form two distinct corporations for the prosecution at the same time of two undertakings, with a view to the mutual benefit which may result from the concurrent operation of the two, no reason is seen why they should not do so. But each should confine itself to its proper business, and should not divert its capital or extend its credit to the assistance of the other.

In the case of Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294, the supreme court of the United States held that the contract of the city company to contribute to the construction of a bridge across a river which separated its lands from the city of Fort Worth was not ultra vires. The court say: "The object of the creation of the corporation was the acquisition and sale of lands on subdivision, and it cannot be successfully denied that the object would be directly promoted by the use of legitimate business methods to render the lands accessible. This involved the expenditure of money or the assumption of liability; but there is no element in this case of any unreasonable excess in that regard, or the pursuit of any abnormal and extraordinary

method." The same can hardly be any abnormal and extraordinary method." The same can hardly be said of the transaction developed in the present case. The argument of the court draws a line between such ordinary means as are generally ⁵⁷³ necessary to carry out the purposes of the corporation, and such as are abnormal and extraordinary. We think the powers attempted to be exercised by the two corporations in this case, and now in question, fall within the latter class.

Section 6 of article 12 of our constitution provides that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void." The decisions of the courts upon like provisions in the constitutions of other states have been such as in most cases to practically destroy its effect. It may be that it was not intended to prohibit corporations from selling their bonds below par—provided the transaction be made in good faith.

In *Memphis etc. R. R. Co. v. Dow*, 120 U. S. 287, the court, in speaking of a similar provision in the constitution of Arkansas, say: "It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations—at least when acting with the approval of their stockholders, in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper; provided always, that the transaction be a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden."

While it may be that the purpose of the section was not to require that the corporation should receive a dollar in money or in value for every dollar of indebtedness created, we should be very reluctant to hold that it is not essential to the validity of the bonds, as to any excess, that the amount received should bear some reasonable and just approximation to the amount of the indebtedness. If it be said that there may be corporations whose business may demand that they should have power to sell their bonds greatly below par, the answer is, that it was most probably not the purpose of the framers of the constitution to foster corporate enterprise upon insufficient capital and credit. But that question is not before us. In this case, for example, the street railway company did not sell its bonds for thirty cents on the dollar; nor did the city company sell for seventy cents. They executed joint obligations and sold them at ninety-five cents, and divided the proceeds. Neither sold its bonds on their merits,

taking what they would bring upon the market. We think they are binding obligations against each of the corporations. The liability of each is in proportion to the amount received by it. For the excess, they received nothing, either in money, labor, or property.

Although the bonds, as we think, are not binding upon either company for so much of their amount as was properly chargeable in the first instance upon the other, it does not follow that they are void as a whole. There is no fraud in the transaction. A fair equivalent was given for the obligations. They were executed under the mistaken idea that, by reason of the benefits which would accrue to each corporation ⁵⁷⁴ from the concurrent prosecution of the two enterprises, each had the power to extend its credit in aid of the other. The companies bind themselves jointly and severally, and no reason is seen why each should not be held liable for so much of the indebtedness as it could legally have bound itself to pay: *Thomas v. Brownville etc. R. R. Co.*, 109 U. S. 522.

The determination of the questions already discussed leaves but little to say in reference to the claims of the Thompson-Houston Electric Light Company and of the Brownell Car Company. The claims of the former consist of certain promissory notes given by the street railway company for certain electric machinery sold it by the electric light company, and indorsed by the city company; those of the latter are certain joint and several notes executed by the street railway company and the city company for certain street-cars furnished the street railway company. It follows, from what has been said, that in our opinion those claims are valid debts against the street-car company, but not against the city company.

The judgment will be reversed and the cause remanded. Upon another trial, the plaintiff below should have judgment against each of the companies for such proportion of the indebtedness evidenced by the bonds held by him as the amount actually received by such company bears to the amount paid for the bonds, with a foreclosure of the mortgage upon the property of such company. The liability on the bonds held by the intervenors should be apportioned in the same manner. The Thompson-Houston Electric Light Company and the Brownell Car Company should each have judgment, with foreclosure on their respective claims against the street railway company, but not against the city company.

The judgment is reversed and the cause remanded.

Motion for rehearing submitted, and subsequently by consent granted. By consent the writ of error was dismissed.

CORPORATIONS—POWERS—EXPRESS AND IMPLIED.—Corporations possess such powers, and such only, as the law of their creation confers upon them: *Franklin Co. v. Lewiston Inst.*, 68 Me. 43; 28 Am. Rep. 9. The powers of a corporation are two-fold: 1. Those expressly granted; 2. Those incident and necessarily appertaining to it, whether expressed or not: *Leggett v. New Jersey Mfg. etc. Co.*, 1 N. J. Eq. 541; 23 Am. Dec. 728. The essential powers of a corporation may be inferred as well as expressed: *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84. A corporation, unless prohibited by its charter or by statute, has power to make all contracts requisite for the purposes for which it was created: *Deringer v. Deringer*, 5 Houst. 416; 1 Am. St. Rep. 150. A corporation has a right to conduct its legitimate business by all means necessary to effect its object, and, within its prescribed range, can do whatever a natural person could do: *Killingsworth v. Portland Trust Co.*, 18 Or. 351; 17 Am. St. Rep. 737. It may borrow money and bind itself by any form of obligation not forbidden: *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412. But, as a corporation has only such powers as are expressly granted, or are necessary to carry into effect the powers thus granted: *People v. River Raisin etc. R. R. Co.*, 12 Mich. 389; 86 Am. Dec. 64; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; 47 Am. Dec. 129; *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560; 13 Am. Dec. 100; *New Orleans etc. Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173; 26 Am. Rep. 90; *Caldwell v. Alton*, 33 Ill. 416; 55 Am. Dec. 282; it can make only such contracts as are connected with the purpose for which it was created, and which are necessary, either directly or incidentally, to answer that end: *Note to Abby v. Billups*, 72 Am. Dec. 148; *Rock River Bank v. Sherwood*, 10 Wis. 230; 78 Am. Dec. 669; *People v. River Raisin etc. R. R. Co.*, 12 Mich. 389; 86 Am. Dec. 64. It cannot contract in reference to objects differing essentially from those specified in its charter: *Pennsylvania etc. Nav. Co. v. Dandridge*, 8 Gill & J. 248; 29 Am. Dec. 543. If a corporation is confined to one kind of business, it cannot lawfully engage in enterprises foreign to that business. Thus, a banking business is entirely foreign to the charter of a corporation formed for the purpose of building and maintaining a railroad: *People v. River Raisin etc. R. R. Co.*, 12 Mich. 389; 86 Am. Dec. 64. So, as the owning and navigating of steamships is a distinct business from the docking and repairing of such vessels, a corporation formed solely for the latter business cannot lawfully engage in the former: *New Orleans etc. Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173; 26 Am. Rep. 90. And a company incorporated to engage "in whale fishing and in the manufacture of oil and spermaceti candles" has no power to purchase or deal in state bonds, though there are circumstances under which it cannot avoid its obligation given for such bonds: *State v. Woram*, 6 Ill. 33; 40 Am. Dec. 378. An incidental power of a corporation is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it: *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319. Contracts of corporations are ultra vires when they involve adventures or undertakings outside of the scope of the powers given by their charters: *Note to Kadish v. Garden City etc. Assn.*, 42 Am. St. Rep. 262.

ORIENTAL HOTEL COMPANY v. GRIFFITHS.

[88 TEXAS, 574.]

MECHANIC'S LIEN—CONSTRUCTION OF STATUTE.—Under a statute providing that "all liens for work and labor done or things furnished, as specified in this act, shall be upon an equal footing, without reference to the date of filing the account or lien; and in all cases where a sale shall be ordered and the property sold, which may be described in any account or lien, the proceeds arising from such sale, if not sufficient to discharge all the liens against the same, without reference to the date of filing the account or lien, shall be paid pro rata on the respective liens," each lienholder is entitled, under foreclosure proceedings and a sale thereunder, to share pro rata in the proceeds of the sale, if there is not enough to satisfy the several claims.

MECHANIC'S LIEN—DISPLACEMENT OF, BY CONTRACT LIEN.—An express statement in a deed of trust, given to secure the payment of certain mortgage bonds issued and sold by a hotel company, that it is to constitute a first and paramount lien on the property covered, does not affect mechanic's lienholders who were not parties to the agreement, where the deed discloses that the money obtained from the sale of such bonds was for the purpose of completing buildings to be erected upon the mortgaged property, and where work on such buildings had commenced before the execution of the deed of trust. A mechanic's lien given by statute cannot be displaced by the assertion of a lien created by contract.

MECHANIC'S LIEN—CONTRACTS—NOTICE—INTERVENING MORTGAGE.—Persons contract with reference to, and in view of, the laws in force, and are chargeable with notice of rights that may arise under such laws. Hence, an intervening mortgage, though in form a deed of trust, will not be allowed to destroy the statutory right to a mechanic's lien that may be acquired after the execution of the mortgage and during the completion of the building, which is covered by the mortgage, and upon which work had commenced prior to the execution of the instrument.

MECHANIC'S LIEN—PRIORITY OF, OVER MORTGAGE.—A lien or mortgage existing at "the inception" of a mechanic's lien is protected, but a contract lien created after "the inception" of the mechanic's lien is subordinate thereto.

MECHANIC'S LIEN—EQUALITY OF RIGHT—INTERVENING MORTGAGE.—If, after work has commenced on a building, and after mechanics' liens have attached, a mortgage is executed thereon, those who perform labor or furnish materials subsequent to the execution of the mortgage are also entitled to a lien under statutes placing every holder of a mechanic's lien upon an equal footing, and extending the lien in favor of each from the beginning to the completion of the work.

DEFINITIONS.—THE WORD "INCEPTION" means "initial stage." It does not refer to a state of actual existence, but to a condition of things or circumstances from which the thing may develop, as where a building has been projected and its construction commenced.

STATUTES—CONSTRUCTION OF, WHEN AMBIGUOUS.—If a statute is ambiguous in its terms or susceptible of two constructions, the evil results and hardships which may follow one construction may be properly considered by the court, and it is right that the court shall place upon the statute that interpretation of which it is fairly susceptible, which will attain the just solution of the questions involved and protect the rights of all the parties.

MECHANIC'S LIEN—CONSTRUCTION OF STATUTES.—The construction placed upon mechanic's lien statutes, that when the erection of any building is begun, that this constitutes the "inception" of all subsequent liens, is consistent with the entire body of the statute laws of this state on the subject. It preserves the rights of all those who contribute to the construction of the building, and affords an easy solution and just result in case of intervening liens.

MECHANIC'S LIEN—INTERVENING MORTGAGE—PRIORITY—FORECLOSURE AND DISTRIBUTION OF PROCEEDS.—If, after work has been commenced upon a hotel building, to be erected under contract, and after mechanics' liens have attached, a mortgage is executed on the lot and building, to secure an issue of bonds to raise money for the completion of the building, and other contractors and materialmen perform labor and furnish materials for the completion of the building subsequent to the recording of such mortgage, the mechanics' liens all have priority over the mortgage, though it is declared on its face to be a first lien; and the holders thereof are entitled to a decree ordering the sale of the lot and building as a whole, the proceeds to be applied to the discharge of their several claims, if sufficient, the surplus going to cancel the mortgage, but if insufficient, the proceeds to be paid pro rata to the mechanic's lien holders.

Watts, Aldridge & Eckford and Barry & Ethridge, for the appellants.

Coke & Coke, for the appellees, John Griffiths, Baker & Smith, and Eaton & Prince Company.

Cobb & Avery, for the appellee, Wallace De Wolfe.

576 BROWN, A. J. The Oriental Hotel Company, a corporation organized under the laws of Texas, owned a block of ground in the city of Dallas, and had entered upon the work of excavating and putting in the basement of a hotel building thereon. On the 6th of February, 1890, the said hotel company submitted a proposition, in writing, to the St. Louis Trust Company, of St. Louis, Missouri, in which it was stated that the said hotel company proposed to issue two hundred and fifty thousand dollars first mortgage bonds on the hotel building and ground, to raise money for the purpose of completing the said building. Accompanying the proposition were the specifications and plans, prepared by the architect, for the building then in course of erection, and thereafter to be completed. The bonds were to be issued May 1, 1890, at a rate of interest to be agreed upon. The trust company was to receive and sell the bonds, and act as trustee under the deed of trust or mortgage to be given to secure the bonds.

On the fifteenth day of February, 1890, Adolphus Busch, F. Herrold, Marquard Forster, Augustus Gehner, and Mrs. Joseph Schneider submitted to the trust company a written proposition to take the bonds, which proposition was in these words: "We, undersigned, agree to take bonds of Oriental Hotel Company, of

Dallas, Texas, on proposition as made, provided we get a bond, as suggested, making them beyond all controversy a first lien upon property when fully completed in all details; such bonds to bear seven per cent interest, payable semi-annually at St. Louis, Missouri; amount of issue to be two hundred and fifty thousand dollars, and stockholders to expend, with realty, at least two hundred and fifty thousand dollars before any of our money is used." The bonds were sold to the parties making the proposition, and thereafter, on May 1, 1890, they were delivered, and the deed of trust given in accordance with the proposition, which was duly recorded, May 20, 1890, in the records of Dallas county. The deed of trust was in the usual form of such instruments, and conveyed to the St. Louis Trust Company all the franchises, rights, and privileges of the Oriental Hotel Company, the lot or block of land upon ⁵⁷⁷ which the building was to be erected, "together with all the improvements thereon, or that thereafter may be placed thereon." And the said deed of trust contained a provision binding the said hotel company to pay and discharge all taxes and assessments of every kind and description imposed upon the property mortgaged, free and clear of any lien or encumbrance by reason thereof. In the resolution adopted by the stockholders authorizing the board of directors to make such mortgage, which resolution is copied into the deed of trust, it is provided that "said mortgage to constitute a first and paramount lien on said property."

On the thirtieth day of April, 1890, the Oriental Hotel Company entered into a written contract with the trustee aforesaid, in which it was recited that the bonds of the said company were subscribed for with the understanding that the building should be completed in accordance with the plans and specifications mentioned and described in the proposition made by the company to the trustee, and that the bonds should be lawfully authorized and issued ready for delivery, secured by mortgage or deed of trust, to the satisfaction of the proposed purchasers, and properly recorded, and abstract of title furnished, showing the said deed of trust to be the first and only lien; the money for the bonds to be paid by the subscribers to the said trust company; the money so paid not to be paid out by the trustee on said building until the Oriental Hotel Company shall have expended as much as two hundred and fifty thousand dollars, upon said hotel, including the cost of the real estate on which said hotel is located, and the amount already expended; the building and premises to be kept free and clear from any and all liens whatsoever, except the lien under the said deed of trust, in which case

the trust company was to pay out the money paid in for the bonds for the completion of the said building, as the work progressed, upon the estimates of the architect and superintendent of construction of the said building.

On the same day, the 30th of April, 1890, the Oriental Hotel Company, as principal, and Thomas Field and Frank Field, as sureties, entered into a bond, payable to the St. Louis Trust Company, conditioned that if the Oriental Hotel, then in the course of construction in the city of Dallas, should not be in all respects fully completed and ready for occupancy, free from all liens and charges whatsoever, except the deed of trust to secure the said bonds, that they, the said principal and sureties, would, within sixty days after the expenditure of the two hundred and fifty thousand dollars obtained by the sale of the bonds, pay to the said St. Louis Trust Company, for the benefit of the bondholders, a sum of money which would be sufficient to complete the hotel building and discharge the same from all liens and charges, except the deed of trust.

During the time of the negotiations between the Oriental Hotel Company and the St. Louis Trust Company for the sale of the bonds, John Griffiths was negotiating with the hotel company a contract for ⁵⁷⁸ the erection of the hotel building. Griffiths knew of the proposition to sell the bonds through the trust company, and, before closing his contract with the Oriental Hotel Company, inquired of the trust company as to the probability of completing the sale. Upon being informed that the bonds had been subscribed for by responsible parties, he entered into a contract with the hotel company, on the twenty-eighth day of February, 1890, to erect and construct the said building, in accordance with the plans and specifications, for the sum of three hundred and fifteen thousand dollars, and soon thereafter entered upon the work of constructing the said building, in accordance with the contract. The building was accepted by the architect and by the hotel company as having been completed in accordance with the contract. The hotel company failed to make the last payment due upon the said building, amounting to ——. Griffiths filed his contract in due time and form to secure a mechanic's lien upon the said building and grounds.

At different dates, which are not material the Western Electric Company (which transferred its claim to defendant in error De Wolfe), Baker & Smith Company, Eaton & Prince Company, and W. H. Spellman, each furnished material and performed labor in the construction of the said hotel building of the Oriental Hotel Company, after the execution and record of the deed

of trust given by the said hotel company to the St. Louis Trust Company. The claim of each of the said parties was duly filed and recorded within the proper time and manner to secure a lien upon the said building and premises.

W. H. Spellman brought suit against the Oriental Hotel Company upon his claim, and foreclosed his mechanic's lien upon the premises, including the building. Under the judgment of the district court in that case the property was sold, and W. G. Neiman purchased it for two hundred and fifty dollars. None of the other claimants of liens were made parties to this proceeding.

The St. Louis Trust Company sold the property under the deed of trust given to it by the Oriental Hotel Company, and it was brought in by the Oriental Investment Company. Both of these sales were made after the liens in favor of the defendants in error had been fixed according to law. The sale under the judgment in favor of Spellman, and under the deed of trust, were regular, and sufficient to convey title as against the hotel company.

The Oriental Investment Company, by special answer, claimed title to the property under the sale by virtue of the judgment in favor of Spellman; and also under the sale made by the St. Louis Trust Company under the deed of trust. The plaintiffs excepted to this portion of the answer, which exceptions were sustained by the court.

Separate suits were brought in the district court against the Oriental Hotel Company in favor of the different plaintiffs in this suit, to recover their debts and foreclose the mechanic's liens. All of these suits were consolidated in the district court, and, thus consolidated, constitute the case now before us.

570 There was a trial in the district court, and judgment in favor of the plaintiffs for their several amounts, with foreclosure of their liens and order of sale, from which judgment the defendants appealed to the court of civil appeals of the fifth district, which affirmed the judgment of the district court.

The plaintiffs in error assigned the following grounds, in substance, upon which they seek a review and reversal of the judgment of the court of civil appeals: 1. That the court erred in sustaining exceptions to the defendant's answer, setting up title under the judgment rendered in favor of Spellman, and sale thereunder; 2. That the court erred in sustaining exceptions to that portion of the defendant's answer which set up title acquired under the sale by the St. Louis Trust Company, by virtue of the deed of trust given by the Oriental Hotel Company; 3. That the judgment of the court foreclosing the lien of the plain-

tiffs, except Griffiths, upon a part of the building, situated upon the lots described, is erroneous; 4. That by the terms of the mortgage it had a first and paramount lien upon the property, and the court erred in decreeing priority of lien in favor of the plaintiffs, over the claim of the Oriental Investment Company, the purchaser under said deed of trust; 5. That the court erred in refusing the special charge asked by the defendant, submitting to the jury the question as to whether or not Griffiths was estopped to assert his claim of priority of lien against the deed of trust to the St. Louis Trust Company; 6. That the court erred in excluding evidence offered by the defendant to show that Griffiths had not completed his work according to the contract; 7. Upon the trial, the defendants tendered to John Griffiths, in open court, five thousand dollars of the capital stock of the Oriental Hotel Company, which he declined to receive, and the court refused to compel him to accept, but instructed the jury to find for Griffiths for the amount of his claim, without deducting the five thousand dollars in stock so tendered. This action of the court was assigned as error.

We have carefully examined the record in this cause, and find no error in the judgment of the court of civil appeals upon any points set up in the petition for writ of error, except that specified in the third ground. We shall, therefore, not discuss any other question in the case, as the opinion of the court of civil appeals, as we think, clearly expresses the law applicable to the rights of the parties.

By the judgment of the district court, which was affirmed by the court of civil appeals, the mechanic's lien of John Griffiths was foreclosed on all of the property described in the petition, including the lands and improvements thereon, and the mechanics' liens of Eaton & Prince Company, Baker & Smith Company, Wallace L. De Wolfe, and W. G. Neiman were foreclosed on all of said property, "save and ⁵⁸⁰ except the land and basement and foundation of the said hotel building," which liens were declared to be superior and paramount to the lien of any other party to the suit. The judgment directed that the clerk issue an order of sale to the sheriff or any constable of Dallas county, commanding him to sell the property in satisfaction of the judgment, and that he sell the lands and the basement and foundation of said hotel building separately from the balance of said hotel building, applying the proceeds arising from the sale of "the land and basement and foundation of the building" to the satisfaction of the judgment in favor of John Griffiths; if any surplus remain after paying the judgment of John Griffiths,

that it be paid to the Oriental Investment Company; and that he apply the proceeds arising from the sale of the balance of the said hotel building in satisfaction of the judgments in favor of the Eaton & Prince Company, the Baker & Smith Company, Wallace L. De Wolfe, and W. G. Neiman, and to payment of any balance which may remain unpaid on said judgment in favor of John Griffiths, in case his judgment had not been satisfied out of the proceeds of the "sale of the land and the basement and foundation of the said building"; and if the proceeds realized from the sale of said property, except "the land and basement and foundation," be not sufficient to pay and discharge all said judgments, including the balance due on said Griffiths judgment, then said judgments and the balance of said Griffiths judgment shall be paid pro rata; if any surplus remain after paying all of the said judgments in full, the same to be paid to the Oriental Investment Company. In case the proceeds arising from said sale shall not be sufficient to pay all of said judgments in full, the respective plaintiffs to have execution against the defendant, the Oriental Hotel Company, for the collection of such balance.

Article 3179 of the Revised Statutes provides: "All liens for work and labor done or things furnished, as specified in this act, shall be upon an equal footing, without reference to the date of filing the account or lien; and in all cases where a sale shall be ordered and the property sold, which may be described in any account or lien, the proceeds arising from such sale, if not sufficient to discharge all the liens against the same, without reference to the date of filing the account or lien, shall be paid pro rata on the respective liens." It will be seen that if we disregard the deed of trust made by the hotel company to the St. Louis Trust Company, all of the plaintiffs in this case would have participated equally with John Griffiths in the proceeds of the sale of the land, the foundation, and the basement of the hotel building. By the judgment entered, the plaintiffs, except John Griffiths, were denied the right of participation in the proceeds of the sale of such land, foundation, and basement, which could only be affected in case some superior right had intervened between the right of John Griffiths and the other plaintiffs.

⁵⁸¹ In order, therefore, for us to decide upon the correctness of the judgment entered, we must determine as to the priority of the deed of trust over the liens of those plaintiffs who did work or furnished material under contracts entered into with the hotel company subsequent to the date of the deed of trust. It is claimed by the Oriental Investment Company, the purchaser under the deed of trust, that the said deed of trust held a prior and

first lien upon the land and building, so far as then constructed and as it was to be thereafter completed, from the date of the making and recording of the said deed of trust, as against all claims arising thereafter out of the construction of the said building. This claim is based upon the language of a resolution of the board of directors of the hotel company, embodied in and made a part of the deed of trust. If the legal effect of the deed of trust would have been to give such prior lien, without expressing it in the instrument, then the use of the language was wholly unnecessary, and conferred no right that would not have existed. If, on the other hand, the deed of trust, without the use of this language, would not have created such prior and paramount lien as against subsequent mechanics' liens, then the use of that language could not affect the rights of persons who were not parties thereto, and whose liens had their foundation in the laws of the state, and were not dependent upon contracts between the parties with reference thereto. It follows, therefore, that a proper consideration of the rights of the parties and the question involved demands that the language relied upon should be disregarded, and that the legal effect of the instrument should alone be considered.

The proposition made by the hotel company to the trust company, the deed of trust, and the bond given by the hotel company to the trust company, show that the erection of the hotel building had been begun, and its continuance to completion was fully contemplated by the parties. Specifications of the work to be done accompanied the proposition, and the proposition upon which the deed of trust itself was based provided that the money received from sale of the bonds should remain in the hands of the trust company, to be paid out by it to persons who might furnish material or perform labor in the prosecution of the work; and the bond given by the hotel company to the trust company provided that in case any liens created upon the said building should not be discharged within sixty days after the expenditure of the two hundred and fifty thousand dollars procured by the sale of the bonds, then the hotel company should furnish sufficient funds to discharge such liens. The facts clearly indicate that the parties, at the time of making the trust deed, understood that liens superior to the lien of that instrument might accrue thereafter, and carefully provided for protection against them. The law in force in Texas at that time gave to all persons who might furnish material, fixtures, or tools, or who might labor in the construction of the said building, a lien upon the lands and the building to secure payment therefor. The par-

ties contracted with reference ⁵⁸² to and in view of the law as it then existed, and must be charged with notice of such rights as might accrue in the course of constructing the building, even if they had not been actually contemplated by the parties: *Brooks v. Railway Co.*, 101 U. S. 451.

When a building or other improvement is in course of construction, and any person takes a mortgage on the land upon which such building or improvement is situated, or on the improvement itself, he does so with the knowledge that it may be necessary for the completion of the building that other contracts should be made for labor and material, and it is clearly the policy of this state, as shown by its statute law, that an intervening mortgage shall not destroy the statutory rights of persons that may be acquired thereafter in the course of constructing such building. The deed of trust in this case expressly reserved a lien upon the building thereafter to be constructed; and it is evident from the facts that the principal security for the bonds which were being sold was to be created by the completion of the contemplated hotel building. If the position taken by the counsel for the Oriental Investment Company be correct, then an intervening mortgagee could arrest the progress of such work, destroy the statutory rights and liens of all persons who might be engaged in the work, and assert a lien by contract, which would be superior to that given by the law under which the contract was made. This, we believe, cannot be maintained.

It is claimed, however, that the lien given by the statute, article 3171, does not give priority to mechanics' liens over mortgages and encumbrances existing upon the land or improvements at the time that the work is done or material furnished for which the statutory lien is claimed. To sustain this position reference is made to *Trammell v. Mount*, 68 Tex. 210, 2 Am. St. Rep. 479, in which Judge Willie, in delivering the opinion of the court, uses this language: "The lien of a mechanic, though not fixed before the record of the contract or bill of particulars, when it is fixed relates back to the time when the work was performed or the material furnished, and hence takes precedence of all claims to the property improved which have been fastened upon it since that time." In that case, the question was as to priority between the lien of a materialman and an attaching creditor. The only question before the court was, whether or not the materialman's lien was prior to that of the attachment, the material having been furnished before levy of the attachment. It did not involve the question now before this court. Besides, that decision was made under the act of 1885, article 3171, of Sayles' Re-

vised Statutes, which reads as follows: "The lien herein provided for shall attach to the buildings, erections, or improvements for which they were furnished, or the work was done, in preference to any prior lien or encumbrance or mortgage upon the land on which said buildings, erections, improvements, or machinery have been put or labor performed, and the person enforcing the same may have such buildings, erections, or improvements sold separately; provided, any lien, encumbrance, or mortgage existing on the land or ⁵⁸³ improvements at the time of the accrual of the lien herein provided for, shall not be affected thereby." In 1889, the legislature re-enacted article 3171, as above quoted, there being no material difference in the language used in the first clause of that section as amended, from that used in the original article. The proviso in the article as re-enacted in 1889 reads thus: "Provided, any lien, encumbrance, or mortgage on the land or improvement at the time of the inception of the lien herein provided for shall not be affected thereby, and holders of such liens need not be made parties in suits to foreclose liens herein provided for." The language of this proviso differs from that embraced in the original article only in the omission of the word "existing," which does not change the meaning of the law, and in the use of the word "inception" in lieu of the word "accrual." In view of the fact that the former act had been by the supreme court of this state construed as fixing the time when the lien began at the date when the work was done or material furnished, and the further fact that the word "accrual," as used in the former statute, and upon which that decision must have been based, is replaced by the word "inception," we must conclude that the legislature intended to make a change as to the time at which the lien given by the statute should begin, otherwise the change would have been useless.

What is meant by the "inception of the lien," as used in the statute, we must determine from a consideration of the language of the proviso, in connection with other provisions of the law. The constitution of this state secures to mechanics, artisans and materialmen a lien upon the buildings and articles made or repaired by them, for the value of their labor done thereon, or the material furnished therefor, and commands the legislature to provide by law for the speedy and efficient enforcement of said liens: Const., art. 16, sec. 37. In obedience to this mandate, the legislature has enacted the law referred to, which will be liberally construed in order to secure the rights guaranteed by the constitution. By article 3179 of the Revised Statutes, hereinbefore quoted, all liens are put upon an equal footing, and each mechanic, materialman, or laborer participates in the lien created

by the statute, from the foundation to the final completion of the structure. The man who lays the foundation has an equal claim upon the whole structure with all others, and the man who completes the work has an equal claim upon the foundation with him who does the work thereon or furnishes the material therefor. The lien, then, which is secured by statute, extends in favor of each from the beginning to the completion of the work; and if it so extends and embraces all that has been done from the beginning to the completion, its "inception" must be the time to which it is made to relate in giving it effect. The word "inception" means "initial stage": Century Dictionary. It does not refer to a state of actual existence, but to a condition of things or circumstances from which the thing may develop. When the building has been projected and construction of it entered upon that is contracted ⁵⁸⁴ for, the circumstances exist out of which all future contracts for labor and material necessary to its completion may arise, and for all such labor and material a common lien is given by the statute; and in this state of circumstances the lien to secure each has its "inception."

Under a statute in the state of Iowa by which "the mechanic's lien is made to attach from the commencement of the buildings, erections, or other improvement," it has been held that "all persons furnishing material or labor in the construction and completion of any building, erection, or improvement acquire a lien upon the entire building or improvement, superior to the lien of any mortgage which may be given by the owner upon the lands or improvements subsequent to the beginning of the work on such building or improvement": Neilson v. Iowa etc. Ry. Co., 44 Iowa, 73; Brooks v. Railway Co., 101 U. S. 443. In Brooks v. Railway Co., 101 U. S. 443, it was held that where a railroad was built by sections, and after the completion of one section of the road a mortgage was given and bonds issued, constituting a first mortgage lien upon the entire road built and to be constructed, contractors and laborers who furnished material and labor in the construction of the subsequent sections of the road, and after the record of the mortgage and issue of the bonds, had a lien upon the entire road for the work so done. The reasoning in that case is very conclusive as to the right and justice of this construction of the statute. It is true that the language of the statute of Iowa is more definite in its terms than the statute of this state, but we believe that a proper construction of our statute, as above shown, gives to it the effect that was given to the Iowa statutes in the cases cited.

If the construction claimed by the plaintiffs in error be given

to the statute of this state, it would result in many absurd and unjust consequences. For example, let us suppose that Griffiths' contract called for the completion of the hotel building, except the portions for which the other plaintiffs furnished material or upon which they performed labor, and that Griffiths' contract had been complied with and the building completed, except the portions last named; and that after this was done, Griffiths' claim remaining unpaid, the deed of trust had been executed, as it was in this case, before the contracts were made under which the other plaintiffs acquired their rights. Now, by the construction claimed, Griffiths would have a prior lien as to the mortgage upon the entire building, including all that the other plaintiffs had furnished, either in material or labor, and yet they who furnished the material or labor would have only a second lien thereon, for the reason that the mortgage intervening would take precedence over them.

If we adopt the construction of the statute which seems to have been applied by the district court and approved by the court of civil appeals, the result will be, in such case as that stated above, that Griffiths would have his lien upon all the work completed by him, and would be allowed to participate in the proceeds of that which had been added by the other plaintiffs, while they would be denied their ⁵⁸⁵ statutory right to participate with him in the portion completed before the mortgage was given. Suppose that Griffiths had the entire contract for building the house except the plastering and painting, and that before the plastering and painting was done the mortgage had been given, then the result would be, that Griffiths would have his lien upon the entire building, plastered and painted; while the other parties, who did the plastering and painting and furnished the material therefor, would have a lien equally with Griffiths only upon the plastering and painting as it might be upon the walls, woodwork, or other parts of the house. Would it be practicable to separate these in case of a foreclosure of the lien and sale, so as to adjust the rights of the parties in the proceeds of that portion consisting of the plastering and painting? In fact, it would be almost impossible to construct a house of any considerable value, except upon cash payments, without making such complications between the parties as would render it impracticable, if not impossible, to adjust their equities under any such rule of construction as that upon which this judgment is based.

When a statute is plain and unambiguous in its terms and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom, but

must enforce the law as they find it. But when a statute is ambiguous in its terms or susceptible of two constructions, then the evil results and hardships which may follow one construction may be properly considered by the court, and it is right that the court shall place upon the statute that interpretation of which it is fairly susceptible, which will attain the just solution of the questions involved and protect the rights of all parties: Sutherland on Statutory Construction, sec. 324. The construction that we place upon the statutes of this state, to the effect that when the erection of any building or construction of any improvement is begun that constitutes the inception of all subsequent liens, is consistent with the entire body of the statute laws of this state on the subject, preserves the rights of all those who contribute to the construction of the building, and affords an easy solution and just result in case of intervening liens; for it is but just that he who acquires a lien upon property under such circumstances, and seeks to derive to himself the benefits of the improvement to be made, enhancing in value the security thus obtained, should be charged with notice that those who thereafter perform labor upon or furnish material for the completion of such improvement will be protected under the law in the liens created by the statute: Brooks v. Railway Co., 101 U. S. 443.

We therefore hold that, under the facts in this case, John Griffiths, Eaton & Prince Company, Baker & Smith Company, Wallace L. De Wolfe, and W. G. Neiman, as assignee of W. H. Spellman, were entitled to have their liens foreclosed upon the lot upon which the building was situated and the entire building, and that the same should have been sold as a whole and the proceeds applied to the discharge of their several claims, if sufficient; and, if not sufficient, that they ⁵⁸⁶ then be paid pro rata; and if there should be any surplus of such proceeds after payment of all of the said liens, then such surplus to be paid to the Oriental Investment Company; but in case the proceeds of such sale should not discharge the claims of the said parties, then that execution should issue against the Oriental Hotel Company for the balance remaining unpaid.

The district court erred in ordering the sale of the land, foundation, and basement separately from the balance of the building, and in ordering the proceeds of such sale to be applied to the payment of Griffiths' claim, to the exclusion of the other lienholders; and also in ordering the building other than the land, foundation, and basement to be sold separately and the proceeds distributed among the several lienholders; and the court of civil appeals erred in affirming the said judgment for that rea-

son. It is therefore ordered that the judgments of the district court and of the court of civil appeals be reversed, and that judgment be here rendered in favor of the plaintiffs below and W. G. Neiman for the several amounts for which judgment was rendered by the district court, and that the liens of all the said parties be foreclosed upon the land and the entire building, and the proceeds distributed in accordance with this opinion. It is further ordered that the plaintiffs in error recover from the defendants in error all costs of the court of civil appeals and of this court, and that the defendants in error recover of the plaintiffs in error the costs of the district court.

Reversed and rendered.

STATUTES—CONSTRUCTION—HARDSHIP.—If a statute is fairly susceptible of two different meanings, that construction should be preferred which excludes and prevents consequences that are mischievous and unjust: Note to *Ex parte Maier*, 42 Am. St. Rep. 144.

MECHANIC'S LIEN—ATTACHES WHEN—INTERVENING MORTGAGE.—A lien for labor or material is paramount to the lien of a mortgage executed after the building was commenced, but before such labor or material was furnished: *Haxtun Steam Heater Co. v. Gordon*, 2 N. Dak. 246; 33 Am. St. Rep. 776, and note. Such lien is prior and paramount to any other lien originating subsequently to the commencement of the construction of the building. The lien begins when the work is commenced or the materials furnished, and has precedence over a mortgage executed subsequently to that time: *Vilas v. McDonough Mfg. Co.*, 91 Wis. 607; 51 Am. St. Rep. 925, and note.

CASES
IN THE
SUPREME COURT
OF
VIRGINIA.

PILLOW v. SOUTHWESTERN VIRGINIA IMPROVEMENT CO.

[92 VIRGINIA, 144.]

WITNESS — PRACTICE. — OBJECTION TO THE COMPETENCY of a witness must be made, if it is known, before his examination in chief, or, at least, cannot be made after his cross-examination.

PARTITION—ADVERSE POSSESSION.—The fact that the defendant is in adverse possession of property sought to be partitioned, claiming title thereto in severalty, does not prevent a court of equity from proceeding with the suit for partition, and determining all the questions which may arise therein, if he claims under one who was a joint heir with the complainant, or with those under whom the complainant claims.

CONSTITUTIONAL LAW—PARTITION—JURY TRIAL.—A statute authorizing courts of equity, in suits for partition, to settle all questions of law which may arise in the case, and which is construed as permitting them to proceed though the defendant holds adversely and in severalty, is not unconstitutional, though it may result in denying the defendant the right to try his title before a jury.

JURY TRIAL, RIGHT TO.—A constitutional provision, whether state or federal, guaranteeing the right to trial by jury does not apply to cases in which the right to a jury trial did not exist prior to its adoption.

COTENANCY—ADVERSE POSSESSION.—As between coparceners and others claiming in privity, the entry and possession of one is always to be presumed to be in maintenance of the right of all; and this presumption must prevail in favor of all, unless some notorious act of ouster or adverse possession is brought home to the knowledge of the others, or it is clearly shown that he has become the owner by purchase.

ADVERSE POSSESSION BY ONE COTENANT is not sufficient to create a title by prescription against the others, unless there is a clear, positive, and continued disclaimer of title, and the assertion of an adverse right brought home to the knowledge of the others, although great lapse of time with other circumstances may warrant the presumption of a disseisin or ouster by one cotenant or other joint owner.

PARTITION—LACHES.—A complainant in a suit for partition is not guilty of such laches in asserting his rights that a court of equity should deny him relief, where he has commenced his suit before the statute of limitations has extinguished his title, and it is of record.

NOTICE, CONSTRUCTIVE.—EVERY PURCHASER OF REAL PROPERTY is deemed to have constructive notice of all conveyances of record made by any of the persons from whom he derives title.

COPARCENERS, ESTOPPEL TO ASSERT ADVERSE TITLE.—Where the rights of an ancestor in possession of land descend to his heirs, each of them is estopped, whether his title was good or bad, from acquiring and asserting any adverse title to the property, and, if either acquires any paramount title, he holds it for the benefit of all.

COTENANTS, RIGHT OF TO SHARE IN PURCHASE OF ADVERSE TITLE.—If one cotenant purchases an adverse title without informing the others of the purchase, and in the conveyance which he takes has the consideration falsely stated, they cannot be regarded as in default in not offering to pay their proportion of the expense of the purchase, and he cannot rely upon mere lapse of time to defeat their right to share in the purchase.

PARTITION OF LANDS IN ANOTHER STATE cannot be made by a court of equity by compelling the parties to execute conveyances to one another in pursuance of the partition, though they are cotenants under the same source of title to a whole tract, a part only of which lies in the state wherein the suit is pending.

Two suits by parties claiming to be the heirs of Thomas Turner, deceased. In one of the suits the defense was interposed and established that the decedent had sold the land in his lifetime, giving a bond to make title, and had received the full purchase price. The other suit was for the partition of a tract lying partly in Virginia and partly in West Virginia, and the questions of law and fact involved sufficiently appear from the opinion of the court.

Harman, Blair & Blair, S. B. Coulling, and J. H. Fulton, for the appellants.

J. S. Clark and A. J. & S. D. May, for the appellees.

146 BUCHANAN, J. The record in the second-named case shows that Thomas Turner, deceased, whose heirs brought the suit for partition, had some years before his death sold the land to Emanuel Church, and executed a title bond to him therefor; that the purchase money had been fully paid; and that his heirs held merely the legal title, without any beneficial interest in the land. The title bond was not produced, but the evidence shows that search for it was made among the papers of the **147 Flat-Top Land and Coal Association**, in whose possession it ought to have been, and it could not be found. The proof of its existence, however, is clear and satisfactory, if the depositions of the witnesses who testify upon that point can be read.

The objection is made that neither Church, to whom the title bond was executed, nor any other claimant of the land under the title bond, by assignment or transfer, are competent witnesses, upon the ground that Thomas Turner, who executed the title bond, is dead, and that they are parties to the contract or transaction which is the subject matter of investigation. Whether they are parties to the contract or transaction, within the meaning of the statute (Code, sec. 3346), it is unnecessary to decide, as no objection to their competency on that ground was made when their depositions were taken. Objection to the competency of a witness ought to be made, where his incompetency is known, before he is examined in chief; at least, it cannot be made after cross-examination. The complainants in this case objected to certain questions and answers of the witnesses upon other grounds, and then cross-examined them. It was too late afterward to make the objection relied on: *Hord v. Colbert*, 28 Gratt. 49, 55; *Smith v. Proffitt*, 82 Va. 832; 1 *Greenleaf on Evidence*, sec. 421. The complainants in this case, having no beneficial interest in the one hundred acres of land which they sought to have partitioned, the circuit court properly dismissed their bill, and its action must be affirmed.

It appears in the other case, which is substantially between the same parties, that Thomas Turner purchased the one hundred and twenty acre tract of land from Rufus K. Hill and Elizabeth, his wife, took a conveyance from them, went into possession of the land, and remained in possession until his death, in the year 1875 or 1876. He left a widow and certain heirs, named in the bill. His widow and one of the heirs, Rice D. M. Turner, continued to live upon the land until the spring of 1882. In ¹⁴⁸ March, 1880, Rice D. M. Turner obtained a conveyance to himself, from Rufus K. Hill and wife and Melvina Hamel, for the land, at the nominal consideration of one hundred and seventy-five dollars, but in fact for the consideration of thirty-seven dollars and fifty cents. In October, in the year 1881, R. D. M. Turner and wife, together with John Graham, Jr., who seems to have acquired some mineral interests therein from R. D. M. Turner, conveyed the land to Joseph I. Doran, who conveyed it to the southwest Virginia Improvement Company, and that company conveyed it to the trustees of the Flat-Top Land Trust, who are now in possession of the land, claiming the whole of it adversely to the complainants, and denying their right to partition.

The defendants insist that our statute (Code 1887, sec. 2562), which authorizes a court of equity in a partition suit to settle all

questions of law which may arise in the case, does not authorize such suit where a defendant to the suit in possession of the land asserts an adverse claim, and denies the right of the claimants to partition. They base their contention upon two grounds: 1. That the statute was not intended to provide for such a case; 2. That if it did, it would be unconstitutional, in this, that it deprives the adverse claimant of the right of trial by jury, which is guaranteed to him by section 13, article 1, of the constitution.

Before the enactment of the statute in question, great delay and many difficulties frequently arose in suits for partition where questions of title were involved, and, to obviate these delays and difficulties, the statute was passed which authorizes a court of equity in suits for partition to decide all questions of law which may arise in such cases. Of course, a partition suit cannot be made a substitute for an action of ejectment; and if the defendant in such suit does not claim under any one who was a joint owner, such as a coparcener, joint tenant, ¹⁴⁹ or tenant in common with the complainant, or those under whom he claims, then it is clear that such suit would not be proper; but if the defendant does claim under one who was a joint owner with the complainant, or those under whom he claims, the defendant cannot defeat the right of the complainants to have their legal rights settled in a suit for partition by merely alleging and proving that he denies the rights of the complainant, and holds adversely to him. If the jurisdiction of the circuit court could be defeated in this manner, the statute would be of little value, and would fail to attain the chief object for which it was passed: 2 *Minor's Institutes*, last ed., 485; *Currin v. Spraul*, 10 Gratt. 147, 148; *Davis v. Tebbs*, 81 Va. 600; *Bradley v. Zehmer*, 82 Va. 685; *Fry v. Payne*, 82 Va. 759.

As to the other ground, that the statute is unconstitutional, because it deprives the defendant of the right of trial by jury, which is guaranteed to him, little need be said. The provision in any constitution, whether state or federal, which guarantees the right of trial by jury, must be read in the light of the circumstances under which it is adopted. Unless the right of trial by jury existed at the time of its adoption, in the particular case, it could hardly be contended that such a right was to be given by the constitution, unless it expressly so provided or it was necessarily implied. The statute in question was in the code of 1849. Since then the people of the state have adopted the constitution of 1851 and the present constitution, and, it must be presumed, with full knowledge of such statute, and with the

further knowledge that with that statute in force a trial by jury in such cases could only be had when a court of equity in its discretion desired it, and not as a matter of right. The constitutionality of the statute, as well as its wisdom, seems to have been concurred in by the profession, as, during the long period it has been in force—now nearly fifty years—its constitutionality has ¹⁵⁰ never, so far as we know, been heretofore questioned in this court. The statute is, in our opinion, clearly constitutional.

The defendants also claim that they, and those under whom they claim, have been in the adverse possession of the land, claiming it as their own, for more than ten years prior to the institution of this suit. Whether this contention is true or not depends upon the character of the possession of R. D. M. Turner, one of the heirs of Thomas Turner, deceased. If his holding prior to his conveyance of the land to Joseph I. Doran be construed to be adverse to the other heirs of Thomas Turner, and not as a coparcener with them, then the adverse holding of the defendants and those under whom they claim has been more than ten years, and the statute of limitations would bar the right of the complainants to partition, except in the case of the married woman and infants. But if R. D. M. Turner's possession was not adverse, then the statute does not apply. It becomes material, therefore, to inquire into and to determine the character of his holding.

In the year 1875 or 1876, when Thomas Turner died, R. D. M. Turner was upon the land, and continued upon it until after his sale to Doran, in October, 1881. R. D. M. Turner claims that soon after his father's death he made a parol contract with all his heirs, except one of his brothers and the children of a sister, by which he purchased the land in consideration of his paying the debts of his father and taking care of his widow during the remainder of her life. There is no evidence in writing of any such contract, and the parol evidence of its existence, except with one sister and nephew, is altogether unsatisfactory. The burden of proving that R. M. D. Turner had made such contract, if relied on to show that he was not holding the land for the other heirs of Thomas Turner, and as a coparcener with them, was upon the defendants, and ought to have been established by clear and satisfactory proof. As between coparceners and others ¹⁵¹ claiming in privity, the entry and possession of one is always presumed to be in maintenance of the right of all; and this presumption will prevail in favor of all until some notorious act of ouster or adverse possession is brought home to

the knowledge of others, or it be clearly shown that he has become the owner by purchase. A clear, positive, and continued disclaimer of title, and the assertion of an adverse right, brought home to the knowledge of the other coparceners, are indispensable, although great lapse of time, with other circumstances, may warrant the presumption of a disseisin or ouster by one coparcener or other joint owner: *Stonestreet v. Doyle*, 75 Va. 356, 379; 40 Am. Rep. 731; *Freeman on Cotenancy and Partition*, sec. 166.

We do not think that the facts and circumstances of this case show any such disseisin or ouster of his coparceners by R. D. M. Turner as is required in such cases, prior to his sale of the whole land to Joseph I. Doran, in October in the year 1881. From that time until the institution of this suit less than ten years have elapsed. The complainants are, therefore, not barred by the statute of limitations from maintaining their suit for partition.

Neither have the complainants been guilty of such laches in asserting their rights as would justify a court of equity in refusing to entertain and enforce them. The defendants had knowledge, actual or constructive, of complainant's rights in that portion of the land which lies in this state when they purchased it. The deed of Thomas Turner from Rufus K. Hill and wife was upon record in the clerk's office of the county court of Tazewell county. The defendants trace their title from the same vendor, and it was their duty to examine the records and ascertain whether or not their vendors, Hill and wife, had made a conveyance of the land to any other person before they conveyed to R. D. M. Turner. If they had done this, they would have ascertained that Thomas Turner had a conveyance for the land prior to that made to R. D. M. Turner.

¹⁵² The contention of the defendants, that, when they were examining the record, they were not required to look beyond the conveyance of Hill and wife to R. D. M. Turner, is wholly untenable. They claim through Hill and wife, and it was their duty to examine the records to see if Hill and wife had made a prior conveyance. If the doctrine which controlled this court in the case of *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280, is still the rule in this state, as counsel for defendants insist, and as to which we express no opinion, it would have no application to this case. The chief object of our statutes requiring title papers to be registered was for the benefit of creditors and subsequent purchasers, by enabling them to know whom they may credit, and from whom they could safely purchase. Every man is presumed to know the law, particularly a law which was made

for his special benefit. Every prudent man about to purchase land searches the records to see whether the property has been previously conveyed or encumbered. It is gross negligence not to do so. Whether the defendants knew in fact that Hill and wife had made a conveyance to Thomas Turner or not, before they conveyed to R. D. M. Turner, is immaterial, as they had constructive notice of such conveyance, and in neither view can they be considered as purchasers for value without notice.

The defendants insist that the conveyance of Hill and wife to Thomas Turner passed no interest in the land, because the land was then held by a trustee for the benefit of Mrs. Hill, and she was a minor; and that since Thomas Turner took no interest in the land by that conveyance, he had no interest in it when he died which could pass to his children; and that they did not occupy the relation of coparceners or joint owners. Even if it were true that the deed of Hill and wife to Thomas Turner was insufficient to convey their interest in the land, he took possession under the conveyance, and died in such possession; and his rights in the land, whatever they were, ¹⁵³ and possession of it, descended to his heirs; and as to such rights and possession his heirs occupied the same relation of trust and confidence to each other as they would if their ancestor's title had been good. The relation of trust and confidence which coparceners sustain to each other is the same whether the title of the ancestor to the property in question be good or bad. To hold otherwise would greatly impair the value of the rule, and render its application very difficult. If a distinction were to be taken in regard to the duties of coparceners to each other, and the restraints imposed upon them, based upon a difference between want of title and defective title, an embarrassing question might arise as to the point when a defective title becomes so defective that it may be considered as no title at all. In all cases where the outstanding title is paramount to the title of the coparceners, their title, though it may be termed "defective" only, is in fact no title whatever. To hold that coparceners are bound by this relation of trust and confidence only when their ancestor had title would be, in effect, to hold that they are freed from all the restraints of the doctrine, except where neither can injure the other.

When R. D. M. Turner took a conveyance to himself from Hill and wife for the same land which they had conveyed, or attempted to convey, to his father, the conveyance was for the common benefit of all his coparceners. The legal title acquired by him was held in trust for the others, if they chose within a reasonable time to claim the benefit of the purchase, by contributing, or

offering to contribute, their proportion of the purchase money: 2 Minor's Institutes, 194, 195; Freeman on Cotenancy and Partition, sec. 154; Buchanan v. King, 22 Gratt. 414.

The record does not show that R. D. M. Turner, after his conveyance from Hill and wife, ever informed his coparceners of his purchase, or what he had paid for the land, nor does it show that they knew of such conveyance. In fact, his conduct ¹⁵⁴ in stating the consideration in the conveyance at nearly five times as much as it really was, and his reluctance when on the witness stand to state what the real consideration was, are strongly persuasive of the fact that he wished to conceal, rather than to disclose, his purchase and the consideration paid. It does not appear that the complainants were in default in not offering to pay their share of the costs of the outstanding title when they instituted their suit. A coparcener cannot purchase an outstanding title, falsely state the consideration in his deed, and not communicate the facts connected with his purchase to his coparceners, and then rely upon mere lapse of time to defeat their right to get the benefit of such purchase by paying their share of the actual consideration paid.

A portion of the one hundred and twenty acre tract of land sought to be partitioned in this cause is situated in the state of West Virginia, and, while it is conceded by the counsel of the complainants that the courts of this state have no jurisdiction to partition lands lying in another state, yet they insist that, since the court has jurisdiction of all the parties in interest, it can compel the defendants to make such conveyance of the land in that state as will protect their rights in it.

It is true that the jurisdiction of a court of equity has been sustained in cases of fraud, of trust, or of contract, wherever the parties interested may be found, although lands not within the jurisdiction of the court may be affected by the decree: Davis v. Morriss, 76 Va. 21. There is a charge in the bill that the defendants acquired their conveyances to the land with knowledge of the complainant's rights therein, and for the purpose of defrauding them. The deed of Hill and wife to Thomas Turner was recorded in the clerk's office of the county court of Tazewell county; and the defendants, in taking their conveyances for the land, so far as lies in this state, had constructive notice, at least, of the rights of the complainants. But the deed to Thomas Turner was never recorded, ¹⁵⁵ so far as the record shows, in the state of West Virginia, so as to give constructive notice of his rights, or the rights of the parties who claim under him, to the land which lies in that state. Neither is it proved

that the defendants had actual notice of such rights. The evidence fails to show a case of fraud, actual or constructive, or to show any relation of trust or contract between the parties which would bring this case within that class of cases where courts of equity in one state will compel parties within their jurisdiction to make conveyances of lands within a foreign jurisdiction, in order to do justice between the parties.

The complainants, except Elizabeth Janney and Crockett Mitchell, are entitled to have partition made of so much of the said one hundred and twenty acre tract of land as lies in this state, but as to that portion of the land which lies in the state of West Virginia their bill must be dismissed for want of jurisdiction, but without prejudice to their rights.

We are of opinion that the decree appealed from must be reversed, and the cause remanded to the circuit court of Tazewell county, to be there proceeded in, in accordance with the views expressed in this opinion.

Decree in case No. 1 reversed; decree in case No. 2 affirmed.

WITNESSES.—OBJECTIONS TO COMPETENCY of a witness on account of interest must be taken at the time of testifying, if the fact of interest was known, as if, by evidence afterward offered in the case, the interest of the witness should be apparent, the court should be asked to rule the evidence out: *Inglebright v. Hammond*, 19 Ohio, 337; 53 Am. Dec. 430. To the same effect, see *Town v. Needham*, 3 Paige, 545; 24 Am. Dec. 246. The testimony of a witness should be excepted to, as a general rule, as soon as a party is made aware of the witness' incompetency: *Andre v. Bodman*, 13 Md. 241; 71 Am. Dec. 628.

PARTITION—ADVERSE POSSESSION AS A DEFENSE.—Lands adversely held may be partitioned by a court of equity if the complainant has an immediate right of entry: *Gore v. Dickinson*, 98 Ala. 363; 39 Am. St. Rep. 67, and note. See, also, the note to *Peden v. Cavins*, 30 Am. St. Rep. 283, and the extended note to *Nichols v. Nichols*, 67 Am. Dec. 704, 707.

COTENANCY—ADVERSE POSSESSION.—The possession of one cotenant is the possession of all until he does some act of ouster to notify the others that his possession is exclusive: *Cocks v. Simons*, 55 Ark. 104; 29 Am. St. Rep. 28, and note. Possession of one cotenant is the possession of all, and each has the present right to enter upon the whole land, and upon every part of it, and occupy and enjoy the whole: *Metcalf v. Miller*, 96 Mich. 459; 35 Am. St. Rep. 617, and note.

COTENANCY—PURCHASE OF OUTSTANDING TITLE.—A cotenant, by the purchase of an outstanding title, acquires only the right to compel contribution to the expenses thereof, if he and his fellow-tenants hold joint possession or otherwise occupy relations presumed to be of trust and confidence: *Stevens v. Reynolds*, 143 Md. 467; 52 Am. St. Rep. 422, and note.

COTENANCY—WHAT CONSTITUTES ADVERSE POSSESSION BETWEEN COTENANTS.—To constitute an adverse possession between cotenants, there must be an actual ouster, and an exclusion of the other cotenants by the one in possession; *Mansfield v. McGin-*

ness, 86 Me. 118; 41 Am. St. Rep. 532, and note. A cotenant who, under color of title, enters into possession of the land held in common, claiming the whole to himself, thereby acquires an adverse possession, and sets the statute of limitations in motion: King v. Carmichael, 136 Ind. 20; 43 Am. St. Rep. 303, and note.

JURY TRIAL.—The provision that trial by jury, "as heretofore used, shall remain inviolate," in the Georgia constitution, applies to that right as it existed in 1798, and does not require a jury trial in all cases: Flint River Steamboat Co. v. Foster, 5 Ga. 194; 48 Am. Dec. 248. See on this subject the extended notes to Flint River Steamboat Co. v. Roberts, 48 Am. Dec. 185, and Inhabitants v. Wentworth, 58 Am. Dec. 791.

JAMMISON v. CHESAPEAKE & OHIO RAILWAY CO.

[92 VIRGINIA, 327.]

PROXIMATE CAUSE, WHAT IS NOT.—The failure of a railway corporation to stop its train at the station to which it sold one of its passengers a ticket is not the proximate cause of an injury subsequently received by him from going out of the car in which he was riding in search of a conductor, and, while standing on the platform, being thrown therefrom by the jerking motion of the train in passing around a curve. Had he remained in his seat, he would have received no other injury than the inconvenience resulting from his being carried beyond his station and the expense of returning thereto.

RAILWAY CORPORATIONS.—PASSENGERS cannot recover if they voluntarily assume a position of peril from which injury results to them.

EVIDENCE.—DECLARATIONS OF AGENTS are not admissible against their principal as part of the *res gestae*, when made after the occurrence of an accident to which they relate. Nor can they be regarded as his admissions, unless the agent was authorized by the principal to make them.

Action by Elizabeth Jammison, an infant, by her next friend to recover for injuries claimed to have been received from the wrongful and negligent act of the defendant.

Henley & Hubbard and B. D. Peachy, for the plaintiff in error.

Henry T. Wickham, William J. Robertson, A. S. Segar, and Henry Taylor, Jr., for the defendant in error.

328 KEITH, P. On the first day of December, 1890, the appellant purchased a ticket over the Chesapeake and Ohio railway from Newport News to Ewell's station. The train passed Ewell's station without stopping so as to enable the appellant to get off. It slowed up, however, to enable a witness for the appellant, one E. M. Canady, to alight safely, though not without some risk of injury. When it became evident that the train would not stop at Ewell's station, appellant, after conferring with a fellow-passenger, passed out of the

front end of the coach in which she was sitting, seeking the conductor of the train, for the purpose of inducing him to halt, in order that she might get off. The proof is, that when the train passed Ewell's station it had slowed down to a speed of about eight miles an hour, that upon passing the station it began gradually to accelerate its movement, and as the plaintiff in error passed out of the door at the front of the car, with a large bundle under one arm and a small package under the other, and had reached the platform, the train being at that time in the act of passing around a curve, its speed was suddenly accelerated to such a degree as to cause a jerking motion, whereby the appellant was thrown from the car and injured. For this injury she sued by her next friend, and the jury having found a verdict in her favor for three thousand dollars, subject to the defendant's demurrer to the evidence, the court entered a judgment sustaining the demurrer and dismissing the plaintiff's suit, and to that judgment a writ of error was awarded by one of the judges of this court.

329 Without doubt, the defendant in error was guilty of negligence in failing to stop the train at Ewell's station. For whatever loss or inconvenience plaintiff may have sustained by reason of this neglect upon the part of the defendant in error, she had an ample remedy, and would have been entitled to full compensation in damages. The injury, however, for which she sues is not the loss or inconvenience consequent upon that act, but for the damage she suffered by falling from the train, and the injuries she then sustained. The failure of the defendant in error to stop its train at Ewell's station was not the proximate cause of the injury for which the suit was brought, but, on the contrary, her injury was directly attributable to causes wholly independent of that act of negligence. Had she retained her seat she would have been safe, and, leaving the train at the next station, could have maintained an action for whatever loss or injury had been inflicted upon her. Instead of so doing, upon the advice of a fellow-passenger, she, after encumbering herself with bundles under each arm, passed out upon the platform, knowing, as she must or ought to have known, that the speed of the train was being accelerated; that the platform was in a position of danger, and there, "by a jerk," incident to the increase of speed from the slow rate at which the train had been moving when it passed the station, she was thrown from the platform, and injured.

Not only did her negligent conduct so far contribute to the accident as to preclude a recovery on her part, even though the evidence disclosed negligence upon the part of the company, but

I am at a loss to discover in the record of this case any evidence whatever of negligence upon the part of the company, save and except its failure to halt its train at Ewell's station; but that act, as we have seen, was the remote and not the proximate cause of the injury, and cannot be taken into consideration as constituting an element of decision in this case.

³³⁰ Railroad corporations owe a high degree of duty to their passengers. They must do all for their safety that human skill and foresight may suggest, and are responsible for any, even the slightest, neglect; but that the passenger may hold the company to this high degree of responsibility, it is incumbent upon him to occupy the position upon the train assigned to passengers, and if he voluntarily assumes a position of peril, and injury results from it, he cannot recover.

In this case the plaintiff in error voluntarily placed herself in a position of peril, without justification or excuse, when, encumbered with bundles which incapacitated her for self-protection, she walked out upon the platform of a moving train.

The principles relied upon in this opinion have been so fully and so frequently enforced by the decisions of this court that they may be considered as established law: See *Farish v. Riegler*, 11 Gratt. 697; 62 Am. Dec. 666; *Richmond etc. R. R. Co. v. Morris*, 31 Gratt. 200; *Richmond etc. R. R. Co. v. Anderson*, 31 Gratt. 812; 31 Am. Rep. 750; *Dun v. Seaboard etc. R. R. Co.*, 78 Va. 645; 49 Am. Rep. 388.

A bill of exceptions was taken during the trial to the ruling of the circuit court upon the admissibility of evidence. A question was asked of H. D. Cole, the object of which was to elicit from him proof of the declarations of Captain Berkeley, conductor upon the train when the accident occurred, upon the ground that the declaration, having been made shortly after the accident, constituted a part of the *res gestae*. It was, of course, not pretended that it is admissible as an admission upon the part of the conductor. He is not an agent of the company for any such purpose, nor do we think it admissible as part of the *res gestae*. Mr. Cole, being asked by counsel for plaintiff in error whether he saw anything of the conductor or brakeman at or about the time of the accident, replied that there was no officer of the train in ³³¹ the coach at all; that the station was not called out, but that, shortly after the accident occurred, the porter for the chair-car, in the rear of the ladies' car, came through the coach in which he was sitting; that the witness said to the porter that a passenger had fallen or jumped off, to which the porter made some reply, which is not given; that the porter then

went forward, and came back presently, the witness thought, with Captain Berkeley, but of that he was not certain; at any rate, soon after the porter came back, Captain Berkeley came into the coach, and witness said something to him about a passenger having jumped or fallen off the train, and witness was asked to give the conductor's reply. To this question counsel for defendant in error objected, and the court sustained the objection.

After the cross-examination was over, counsel for plaintiff, upon the renewed examination of Mr. Cole, returned to this subject, and, in answer to a question, the witness said: "I don't know where Captain Berkeley was when the accident happened. I saw Captain Berkeley directly afterward; I know where he was then, because he came through the coach." And thereupon counsel for the plaintiff in error asked this question: "I want to know if you afterward ascertained from him, by a conversation, where he was when the accident happened?" Defendant objected to the question, objection sustained, and the plaintiff excepted.

It seems from every point of view that the ruling of the court was correct. It was not admissible as an admission, because Captain Berkeley was not the agent of the defendant in error in the sense that he could bind it by his admission. It was not a part of the *res gestae*, because not sufficiently connected with it in point of time and circumstance, and its exclusion is in no event reversible error, because the declarations sought to be offered in evidence are not given, so that the court may be enabled to judge of their relevancy and ³³² value: See *Gray v. Commonwealth*, 92 Va. 772, and authorities there cited.

Upon the whole case, we are of opinion that there is no error in the judgment, and the same must be affirmed.

CARRIERS.—A PASSENGER TAKES ON HIMSELF RISK OF THE MODE OF TRAVEL HE ADOPTS: *Galena etc. R.R. Co. v. Fay*, 16 Ill. 558; 63 Am. Dec. 323, and note. The liability of passengers for taking positions of danger is discussed in the notes to the following cases: *Nolan v. Brooklyn etc. R. R. Co.*, 41 Am. Rep. 347; *Peninsular R. R. Co. v. Gary*, 1 Am. St. Rep. 200; *Ingalls v. Bills*, 43 Am. Dec. 364; *Cartwright v. Chicago etc. Ry. Co.*, 50 Am. Rep. 277.

RAILROADS.—NEGLIGENCE OF PASSENGER JUMPING FROM TRAIN.—A passenger who jumps from a running train to avoid being carried beyond his place of destination cannot recover for injuries thereby suffered: *Pennsylvania R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323. To attempt to get off while railroad cars are in motion is an act of negligence: *Detroit etc. R. R. Co. v. Curtis*, 23 Wis. 152; 99 Am. Dec. 141; *Bardwell v. Mobile etc. R. R. Co.*, 63 Miss. 574; 56 Am. Rep. 842.

AGENCY.—DECLARATIONS OF AGENT AS TO PAST TRANSACTIONS.—The declaration of an agent, to the effect that his principal had been negligent with respect to a past transaction, is not ad-

missible, because it is a mere expression of his opinion: *Plymouth County Bank v. Gilman*, 3 S. Dak. 170; 44 Am. St. Rep. 782, and note; *Giberson v. Patterson Mills Co.*, 174 Pa. St. 369; 52 Am. St. Rep. 823, and note.

GOODE v. GEORGIA HOME INSURANCE COMPANY.

[92 VIRGINIA, 392.]

INSURANCE—CLERKS OF AGENTS.—An insurer is responsible for the acts of, and is affected by notice given to, the clerks and employes of his general agents, who are known to assist such general agents in the discharge of their duties.

INSURANCE—CLERKS OF AGENTS.—General agents of insurance corporations authorized to contract for risks, receive, and collect premiums, and deliver policies may confer upon a clerk or other subordinate authority to exercise the same powers.

INSURANCE—GENERAL AGENTS, WHO ARE.—One constituted the agent of an insurance corporation to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as a general agent.

INSURANCE, WAIVER OF CONDITIONS.—If an insurer pleads as a defense that the plaintiff, in making out the application for insurance, falsely stated that there was no lien and no other insurance on the property insured, the plaintiff should be permitted to prove that a clerk of a general agent of the insurer solicited the insurance, and was truly informed respecting the lien and the other insurance, and that it was by his advice that the applicant did not disclose these facts.

Assumpsit upon a policy of insurance.

Jeffries & White, for the plaintiffs in error.

Eppa Hunton, Jr., and W. W. & B. T. Crump, for the defendant in error.

³⁹² BUCHANAN, J. Upon the trial of this cause, which is an action of assumpsit ³⁹³ upon a fire insurance policy, the court excluded from the jury certain evidence offered by the plaintiffs in error. The court also gave judgment in favor of the defendant upon its demurrer to the evidence.

The action of the court, both in excluding evidence and in giving judgment in favor of the defendant, is assigned as error in this court.

The propriety of the rulings of the court in refusing to allow the rejected evidence to go to the jury depends upon the question whether the defendant company was affected by the knowledge of certain material facts which came to the subagent, or employé of the agents, of the company, through whom the insurance was effected.

The defense relied on by the defendant was, that the plain-

tiffs, in making out their application for insurance, had stated that there was no lien and no other insurance upon the property insured, when in fact there was a deed of trust upon it for three hundred and ninety dollars, and insurance in another company to the extent of twelve hundred dollars; and that by reason of these false statements the policy was void.

The plaintiff sought to show that Robert E. Harris, through whom their insurance was effected, had full knowledge of both the deed of trust and the other insurance upon the property, and that it was by his advice that their application did not disclose these facts, and that the defendant was estopped from relying on such facts to avoid the policy. The defendant denied that Robert E. Harris was its agent, or that it was affected by his knowledge.

The plaintiffs' evidence showed that Thomas B. Harris & Son were the agents of the defendant company for Culpeper and its vicinity, and that they were authorized "to receive proposals for insurance against loss or damage by fire, fix rates of premium, receive moneys, countersign, issue, and renew policies duly signed by the president and secretary, ³⁹⁴ and grant permission of transfer of policies on behalf of said company, subject to the rules and regulations of the company." It also tended to show that, whilst the plaintiffs were taking an inventory of their goods in order to have them insured, Robert E. Harris came to their store, "representing himself to be the son of T. B. Harris, of Culpeper, Virginia, who were the agents" both of the defendant company and the Virginia Fire and Marine Insurance Company; that this was the first time they had ever seen him; that after three trips to their store, soliciting their insurance, they insured their property in both of the companies; that their applications for insurance were signed "by the hand of Robert E. Harris, signing the firm name of Thomas B. Harris & Son, and that the measurement of the storehouse was made, and diagrams drawn, by him."

Thomas B. Harris was called by the plaintiffs, and testified that Robert E. Harris was his son, but was not a member of the firm of Thomas B. Harris & Son, and was not at any time the agent of the defendant; that the son who was a member of his firm was at Richmond College, Virginia, when the insurance of the plaintiffs was taken; that he often had more than one of his sons working for him in the insurance business; that Robert E. Harris had solicited a great deal of business for the firm of Thomas B. Harris & Son; that he (Robert) solicited, with his knowledge, the insurance of the plaintiffs, took the applications

therefor, and in pursuance thereof the two policies were issued through himself, T. B. Harris, as a member of the firm of Thomas B. Harris & Son, agents of the defendant, but that he had no knowledge of the facts and circumstances attending the soliciting and placing of the insurance, except what appeared in the application and policy of insurance, until after the loss occurred; that the special agent and adjuster of the defendant had frequently been in his insurance office at Culpeper, Virginia, and had there seen his several sons at work.

³⁹⁵ The trial court was of opinion that the evidence introduced by the plaintiffs did not show that Robert E. Harris occupied such a relation to the defendant company that it could be affected by knowledge acquired or declarations made by him whilst engaged in soliciting and taking the applications for the insurance in controversy, and refused to allow such evidence to go to the jury.

In this we are of opinion the trial court erred.

This question has been much discussed, but the better view now seems to be that the insurer is not only responsible for the acts of its general agents, but also for the acts of the clerks or employés of the agents, to whom they delegate authority to discharge their functions, within the scope of their agency.

Insurance companies know, or ought to know, when they appoint general agents, that, according to the ordinary course of business they have clerks and other persons to assist them, and that their agents in many instances could not transact the business intrusted to them if they were required to give their personal attention to all of its details. It being necessary, therefore, and according to the usual course of business, for their agents to employ others to aid them in doing the work, it is just and reasonable that insurance companies should be held responsible, not only for the acts of their agents, but also for the acts of their agents' employés, within the scope of the agents' authority.

It is no sufficient answer to this view to say that the insurers did not authorize their agents to delegate their authority to others. It may be that they did not do so expressly, but they appointed agents whom they knew, or ought to have known, would, according to the usages or the necessities of the business, engage the services of others in doing the work intrusted to them; and, having this knowledge, they will be held to have impliedly authorized their agents to do what was usual or necessary in the business.

³⁹⁶ The general rule, it is true, is that, when it is intended

that agents shall have power to delegate their authority, it should be given them by express terms; but there are cases in which such authority may be implied, as where it is indispensable by the laws to accomplish the end, or it is the ordinary custom of trade, or it is understood by the parties to be the mode in which the particular business would or might be done: Story on Agency, 9th ed. sec. 14.

"Generally," says May, in his work on Insurance, "agents of insurance companies authorized to contract for risks, receive and collect premiums, and deliver policies, may confer upon a clerk, or subordinate, authority to exercise the same powers. The service is not of such a personal nature as to come under the maxim, *Delegatus non potest delegare*: 1 May on Insurance, 3d ed., sec. 154, 154 a.

Wood, in his work on Insurance, says: "Not only is the insurer responsible for the acts of its agent, but also for the acts of its agent's clerks, or any person to whom he delegates authority to discharge his functions for him. Of course, the act must be done by some person authorized expressly or impliedly by the agent, and under such circumstances that the insurer knew, or ought to have known, that other persons would be employed by and to act for the agent": 2 Wood on Insurance, 2d ed., sec. 433.

It was held in the case of *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566, that an insurance agent can employ a clerk and authorize him to contract for risks, to deliver policies and renewals, to collect premiums, and to give credit therefor, and the act of the clerk in such cases is the act of the agent, and binds the company. In that case the clerk of the agent waived the prepayment of a premium, and the company was held bound by it, although there was a condition in the policy of insurance that no insurance, whether original or continued, should be considered as binding until the premium was actually paid.

³⁹⁷ In the case of *Arff v. Star Fire Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721, the court of appeals of New York, Judge Peckham delivering the opinion of the court, held that "an ordinary agent of a fire insurance company has the power to employ such clerks as may be necessary to discharge the usual business of his agency, and any waiver which the agent himself could make is to be attributed to him when made by his clerk."

In that case a policy of insurance issued by the company required the insured to notify the company of any other insurance upon the property, and declared the policy void in case of neglect to comply with that condition.

It also provided that "only such persons as shall hold the commission of this company shall be considered as its agents in any transaction relating to this insurance."

The plaintiff, having obtained other insurance on the property, informed the person upon whose solicitation he made the application for the policy, and he said it was all right. That person, at whose solicitation he applied for the policy, was employed to solicit insurance by a firm who were commissioned agents of the defendant company, having authority to give permits for further insurance. He had a desk in their office, and was paid for his services by a commission on the business he procured. He testified that he worked for no one except the defendant's agents. The plaintiff was nonsuited. The court held that to be error, and said that, if he was exclusively employed by the agents of the company, he was not an ordinary insurance broker, but one of the clerks or employés of the company's agents, and, as such, was authorized to receive notice and to consent to other insurance; and the testimony as to his exclusive employment being contradictory, the case should have been submitted to the jury.

In a later case decided by the same court, the two cases above referred to were cited with approval, and the doctrine ³⁹⁸ laid down in them reaffirmed. In the last case the policy of fire insurance in question contained a condition that if the insured were not the sole owners of the property insured, or did not have title to the land on which it was situated in fee simple, and this fact was not expressed in the policy, it should be void. The assured held the land under an agreement to purchase. This fact was not expressed in the policy, but had been communicated to the clerk of the general agent of the insurer, who had been sent to make an examination of the premises preparatory to the risk. In an action on the policy, it was held that notice to the sub-agent, while so engaged in soliciting the insurance, was notice to the company, and bound it to the same extent as though it had been given directly to the agent himself; and, this being so, the policy was not avoided by the condition in the policy: *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298. See *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121; *Hartford Fire Ins. Co. v. Josey*, 6 Tex. Civ. App. 290; *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 81; 4 Am. St. Rep. 744.

The authority conferred upon the firm of Thomas B. Harris & Son constituted them general agents of the defendant company, for it is settled that a person authorized to accept risks,

to agree upon and settle the terms of insurance and to carry them into effect by insuring and renewing policies, must be regarded as the general agent of the company: 1 May on Insurance, 3d ed., sec. 126; Manhattan Fire Ins. Co. v. Wiell, 28 Gratt. 389; 26 Am. Rep. 364; Continental Ins. Co. v. Ruckman, 127 Ill. 364; 11 Am. St. Rep. 121.

The evidence introduced by the plaintiffs tended to prove a state of facts which entitled the plaintiffs to prove any act or declaration of Robert E. Harris, whilst engaged in negotiating with the plaintiffs in reference to their insurance, which they would have had the right to prove if the act or declaration ³⁹⁹ had been made by Thomas B. Harris & Son, the agents, in person; and, if it appeared from the whole evidence that Robert E. Harris was the employé of Thomas B. Harris & Son, agents of the defendant, and was in the habit of soliciting insurance for them, and that he solicited the plaintiffs' insurance with the knowledge and assent, or by authority, of said agents, then his acts and declarations whilst negotiating the plaintiffs' insurance were the acts and declarations of the agents, and bound the defendant company to the same extent that they would if done or made by such agents in person.

It is unnecessary to consider in detail the several bills of exceptions taken by the plaintiffs to the action of the court in excluding evidence. It will be sufficient to say that any material evidence which tended to prove the acts or declarations of Robert E. Harris, whilst negotiating the plaintiffs' insurance, was admissible against the defendant to the same extent that the acts or declarations of Thomas B. Harris & Son, the commissioned agents of the defendant, would have been admissible if they had negotiated the insurance in person.

Neither is it necessary to consider whether the court erred in sustaining the defendant's demurrer to the evidence, as the judgment must be reversed, the verdict set aside, and a new trial awarded for the reasons hereinbefore stated.

Reversed.

INSURANCE—CLERKS OF AGENTS.—A mistake of a clerk of an agent of the insurer is a mistake of the agent himself, and the obligations of the insured are the same as if the agent had made the mistake: Deltz v. Providence etc. Ins. Co., 33 W. Va. 526; 25 Am. St. Rep. 908, and note.

INSURANCE—GENERAL AGENT—WHO IS.—An agent of an insurance company, who is given full power to receive proposals of insurance against loss and damage by fire, to fix rates of premium, receive moneys, and countersign, issue, and renew policies within a certain district within a state, is a general agent: Phoenix Ins. Co. v. Munger, 49 Kan. 178; 33 Am. St. Rep. 360. One who

is appointed by an insurance company in one state as its agent for the transaction of the business of insurance in another state during a designated year, and who is authorized to make contracts of insurance and to issue policies is a general agent: *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620; 19 Am. St. Rep. 326, and note.

CHAPMAN v. CHAPMAN.

[92 VIRGINIA, 537.]

DOWER.—IF LANDS ARE SOLD BY AN UNMARRIED MAN, his subsequent marriage does not create any right to dower therein, though they are not conveyed to the purchaser until after the vendor's marriage. His conveyance, therefore, passes a perfect title, notwithstanding his wife refuses to join therein. Nor is it material that the purchase money was not paid until after the marriage. This rule is not affected by a statute declaring that when a husband, or anyone to his use, shall have been entitled to a right of entry, or action in any land, and his widow would have been entitled to dower had the husband or such other recovered possession thereof, she shall be entitled to such dower, although there shall have been no such recovery.

Suit in chancery to recover dower in lands to which the complainant claimed to be entitled as the widow of T. W. Chapman.

John E. Roller, for the appellant.

James Hay and T. C. Gordon, for the appellees.

⁵³⁷ HARRISON, J. It appears from the record that in 1870 Thomas W. Chapman, ⁵³⁸ then unmarried, made a verbal contract with Thomas A. Chapman, by which he sold the latter a tract of five hundred and sixty acres of land. The purchaser paid in cash one hundred dollars, and was immediately put in possession.

Thomas W. Chapman, the vendor, married in 1878, without having made his vendee a deed. After his marriage, he executed and delivered to Thomas A. Chapman a deed conveying him this five hundred and sixty acres of land. In this conveyance his wife refused to unite. Thomas W. Chapman, the vendor, having died since making the deed, his widow now demands dower in the land conveyed to Thomas A. Chapman.

Irrespective of statute, a widow has no dower in lands sold by her husband prior to his marriage, although the husband may have died without conveying title; for, while he has the legal title, yet he is not beneficially seised during the coverture, as against the vendee: 2 Minor's Institutes, 147; *Waller v. Waller*, 33 Gratt. 83; *Lomax Digest*, ed. 1839, c. 4, sec. 3. p. 106.

It was contended, however, that Thomas A. Chapman was in default in the payment of the balance of the purchase money,

and that this gave his vendor a right of action to recover the land; and therefore that Mrs. Chapman is entitled to dower therein by virtue of section 2268 of the code, which provides that "when a husband, or any one to his use, shall have been entitled to a right of entry, or action in any land, and his widow would have been entitled to dower out of the same if the husband or such other had recovered possession thereof, she shall be entitled to such dower although there shall have been no such recovery of possession."

This proposition is based upon an erroneous assumption of facts. There is not one word in the record tending to show that Thomas A. Chapman was in default in the payment of his purchase money. If any thing is to be inferred from the facts appearing in the record, the contrary is true. His vendor ⁵³⁹ made him a deed of conveyance, from which we must presume that he had fully complied with all the terms of his contract. The fact that he did not get his deed until 1878 is no evidence of default on his part. The terms of the contract, as to time or price, do not appear. The balance of his purchase money, if any, may not have been due till then, or may have been paid long before that time, and his vendor been in default in not making the deed. Further, if the purchaser had been in default, that would not have given his vendor the right to re-enter and take possession, until he had reasonable notice, and an opportunity to redeem his default.

Section 2268 has no application to a case like this. It is clear that the claim of the appellant to dower in this land is unfounded, and the circuit court having so held, its decree must be affirmed.

DOWER.—TRANSFERS BY HUSBAND IN FRAUD OF WIFE is discussed in the extended note to *Thayer v. Thayer*, 39 Am. Dec. 218, 220. A husband secretly executed a deed to his sons immediately before his marriage; the court held that the deed was without consideration, and was not delivered until after the grantor's marriage, and that his widow was entitled to dower in the land upon two grounds: 1. Because the husband was seized of the land during coverture; 2. Because, had the deed been delivered at its date, its execution was fraudulent as to the widow, being executed secretly for the purpose of cutting off her dower: *Cranson v. Cranson*, 4 Mich. 230; 66 Am. Dec. 534, as to the last point; *Swaine v. Perine*, 5 Johns. Ch. 482; 9 Am. Dec. 318.

VIOLETT v. ALEXANDRIA.

[92 VIRGINIA, 561.]

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LOCAL ASSESSMENTS.—An assessment for local improvements cannot be enforced until the person of whom it is exacted shall have an opportunity to appear and contest its legality, justness, and correctness.

LOCAL ASSESSMENTS for street improvements are an exercise of the taxing power, and their enforcement, where the person whose property is assessed, has had no opportunity to appear and contest their legality, justness, and correctness, cannot be permitted without denying him the due process of law guaranteed by the constitution of the United States.

LOCAL ASSESSMENTS FOR STREET extensions and improvements may be imposed upon the real property benefited thereby.

MUNICIPAL CORPORATIONS CAN BIND TAXPAYERS ONLY in the mode prescribed by law, and cannot substitute any other.

STREET ASSESSMENTS IN PROPORTION TO FRONTAGE.—Under a statute authorizing a municipality to impose assessments for street improvements and extensions according to the benefit to the property assessed, such assessments cannot be required by an ordinance to be according to the frontage of the property upon the street improved or extended.

A. W. Armstrong, for the appellants.

E. B. Taylor and S. G. Brent, for the appellees.

562 **CARDWELL, J.** The thirty-third section of the charter of the city of Alexandria, as amended by an act of the legislature approved March 1, 1888, provides: "Whenever any street shall be laid out or extended, or any existing street graded, paved, or repaved, or culvert or sewer built, or curbing put down, two-thirds of the expenses thereof shall be paid by the owners of the real estate benefited thereby. Whenever any sidewalk shall be laid, the whole expense thereof shall be paid by the owners of the real estate benefited thereby."

563 The city council of Alexandria, by an ordinance approved May 12, 1886, provided that "whenever paving, graveling, or other improvements of the street shall be ordered to be done by the city council, whether of the sidewalk or carriageway, that it shall be the duty of the superintendent of police, immediately upon the completion of the same, to return to the clerk of the common council a statement of the total expense thereof, with a list of the proprietors of the ground in front of which said paving, graveling, or other improvements shall have been done, or curbing put down, showing the extent of the front ground of every such proprietor, and including the half of any joint alley running into the street paved, graveled, or otherwise improved, or upon which curbs have been put down, which statement shall

be filed and preserved by the said clerk, who shall also forthwith make out and deliver to the proper collector of taxes, for collection according to law, bills against every such proprietor for two-thirds of an amount which shall bear the same ratio to the cost of all the work done on that half of the street on which his lot fronts as the front of the proprietor's ground bears to the front of all the lots on the same side of and binding on that portion of the said street so paved, graveled, or otherwise improved. And the like proceedings and privileges shall be had by said collector in regard to such bills as in regard to bills for other taxes, assessments, or charges."

By virtue of the aforesaid thirty-third section of the charter, the city council of Alexandria passed the following ordinance:

"Be it ordained by the city council of Alexandria, Virginia, that the committee on streets are hereby authorized and directed to have the curbing set, gutters paved, and a six-foot brick sidewalk put down on both sides of Alfred street, from the south line of Duke street to the north line of Wilkes ⁵⁶⁴ street, and the said committee on streets shall advertise for ten days, in some newspaper published in the city of Alexandria, for proposals to do said work, and shall enter into contract with the lowest responsible bidder for said work, and require of the person or persons contracting to do said work, or furnishing the material therefor, to give bonds in the penalty of one thousand dollars, with surety or sureties to be approved by said committee, conditioned for the faithful performance of said contract.

"Be it further ordained, that an assessment shall be levied upon the property binding on said street, as described in this ordinance, to wit; two-thirds of the cost of such guttering and curbing to be paid by the owners of the real estate fronting on said street, and the whole of the cost of putting down said brick sidewalk to be paid by the owners of the real estate on said street.

"The committee on streets are authorized to employ a competent engineer to superintend said work, at a cost not to exceed five dollars (\$5.00) a day."

Pursuant to this ordinance the curbing was set, gutters paved, and a six-foot brick sidewalk put down on both sides of Alfred street from the south line of Duke street to the north line of Wilkes street, as provided for in the ordinance.

The total cost of this work amounted to one thousand nine hundred and eighty-nine dollars and thirty-six cents, and this was apportioned, according to frontage, among the owners of the lands abutting on Alfred street as to two-thirds of the costs

of curbing and paving the gutters, and as to the whole of the costs of the sidewalks, the city of Alexandria paying one-third of the cost of curbing and paving gutters. Of this frontage the heirs of Robert G. Violet, who are the appellants here, owned three hundred and fifty-three feet two inches, extending back with that width one hundred and twenty-three feet five inches, and were assessed with the sum of three hundred and ninety-six dollars and three cents as the proportion of the total costs of the improvements to Alfred street to be borne by their property abutting ⁵⁶⁵ on that street, this sum including two-thirds of the cost of the curbing and paving the gutters and the entire cost of the sidewalk, and apportioned according to frontage.

On the 29th of March, 1895, the city council of Alexandria filed its bill in the corporation court of the city of Alexandria against appellants, to enforce the lien claimed by the complainant on appellant's property on Alfred street for the amount assessed against the property as stated. The defendants demurred to and answered this bill. The answer admits that the work was done as set out in the bill, but denies that the lot of ground on which complainant claims a lien has been benefited by the improvements to Alfred street, and denies that complainant has a lien on the lot of ground as claimed.

Upon the hearing of the cause, on the bill and exhibits therewith, and the demurrer and answer thereto, the corporation court of Alexandria overruled the demurrer, and decreed a sale of the property to be made by commissioners appointed, unless the defendants paid to the complainant, the city council of Alexandria, within thirty days, the amount claimed in the bill, and the costs of this suit. From this decree an appeal and supersedeas was awarded by a judge of this court.

The facts in the case are few, and need not be considered, as they are in the main not controverted; but the grounds upon which appellants deny the validity of the claim asserted by appellee are as follows: 1. The ordinance under which the claim arises is contrary to the fourteenth amendment of the constitution of the United States, which declares that no state shall "deprive any person of life, liberty, or property without due process of law"; 2. The charter and ordinances of the city of Alexandria are in conflict with section 1, article 10, of the constitution of Virginia, in which it is provided: ⁵⁶⁶ "Taxation, except as hereinafter provided, whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of prop-

erty, from which a tax may be collected, shall be taxed higher than any other species of property of equal value"; 3. The city council of Alexandria did not have the authority, under the provisions of the thirty-third section of the charter, to pass the ordinances set forth in the bill of complaint, and said ordinances are in conflict with the charter, and null and void.

The first question to be considered may be stated in this form: Can an assessment for a local improvement be exacted by a municipal corporation until the person of whom it is exacted shall have had opportunity to appear and contest the legality, justice, and correctness of the proposed assessment?

It will be observed that the section of the charter of Alexandria, and the ordinance under which the controversy arises, quoted in full above, do not provide for any notice to the owners of the lots abutting on Alfred street, which gave them the opportunity to be heard before their property was assessed to meet the costs of the proposed improvements to the street. The earnest contention of counsel for appellee is, that the fourteenth amendment to the constitution of the United States does not apply to local assessments for improvements, but relates principally to the exercise of the right of eminent domain; while, on the other hand, it has been argued in the courts of some of the other states of the Union that it does not apply to the exercise of the right of eminent domain. This question, however, is reviewed by Lewis, in his work on Eminent Domain, section 365, where he shows, upon reason and authority, that the provisions cannot be restricted either to the exercise of the right of eminent domain or to other proceedings affecting liberty or the rights of property. He says that the provision that private property shall not be ⁵⁶⁷ taken for public use without just compensation is simply an additional guarantee to the provision that a citizen shall not be deprived of his liberty or property without due process of law; that "the one provision is not exclusive of the other. The one prevents the property of the citizen being taken under the power of eminent domain for any purpose except public use, and then only upon making just compensation; while the other prevents his property being taken for public use without due process of law." And he then adds: "Without attempting to answer this question [what is 'due process of law'] by a general definition, it is sufficient for the present inquiry to say that all the authorities agree that due process of law requires that a person shall have reasonable notice, and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be passed affecting his right to liberty or property." We need not

extend the discussion as to what is due process of law; for it is not pretended that there has been due process of law in the proceedings leading up to the assessment in the case at bar, but the claim is, that the provision does not apply.

That local assessments are made under the taxing power does not admit of a doubt, says Burroughs, in his excellent work on Taxation, page 461. See, also, Cooley on Taxation, pages 623, 624, where the author says: "That these assessments are an exercise of the taxing power has over and over again been affirmed, until the controversy must be regarded as closed": Citing numerous authorities.

J. Bedle, in the opinion of the supreme court of New Jersey, in the case of *State v. Fuller*, 34 N. J. L. 227, says: "This class of assessments is distinguishable from our general idea of a tax, but owes its origin to the same source of power; and this power to tax should exist in the discretion of the legislature, without the interference of the courts, unless some radical principle ⁵⁶⁸ is violated, or the guaranties of the constitution are disturbed under color of its exercise."

A clearer statement of the rule that should govern in considering the question arising in this case cannot be found, and brings us directly to the question whether the enforcement of a local assessment for improvements to a street, where the person of whom the assessment is exacted has had no opportunity to appear and contest the legality, justice, and correctness of the assessment before it is finally determined upon, and a lien fixed on his property, is the taking of his property "without due process of law," within the meaning of the provision of the federal constitution.

In every instance where the rights of property are involved, before the liability of the taxpayer is finally determined, he must have some kind of notice of the proceedings, and an opportunity to be heard with reference to the value of his property and the amount of the charge: 2 *Have's American Constitutional Law*, 871, and cases cited in note 3.

In *Cooper v. Board of Public Works*, 14 Com. B. N. S. 180; 108 Eng. Com. L. 181, involving the action of the board of public works in pursuance of a statute which did not require notice, Willis, J., said: "I apprehend that a tribunal which is, by law, invested with power to affect the property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds. And that rule is of universal application and founded upon the plainest principles of justice."

Judge Earl, in an elaborate opinion of the court of appeals of New York, in *Stuart v. Palmer*, 74 N. Y. 191, 30 Am. Rep. 289, said: "It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably better, as recently stated by Mr. Justice Miller, of the United States supreme court, 'to leave the meaning to be evolved by the ⁵⁶⁹ gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded': *Davidson v. New Orleans*, 96 U. S. 104. It may, however, be stated generally that due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. We cannot conceive of due process of law without this." And again: "It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceedings. That due process of law requires this has been quite uniformly recognized."

The case of *Stuart v. Palmer*, 74 N. Y. 191, 30 Am. Rep. 289, arose under the act of the general assembly of New York, passed in 1869, and amended in 1870, entitled, "An act to lay out, open, and grade Atlantic avenue, in the town of New Lots, Kings county."

The act provided for two assessments—one for the damages awarded to the owners of the land, under section 3 of the act of 1869, as amended, and another for the expense of regulating, grading, etc., under section 4, as amended. The former assessment was to be made and confirmed after proper notice to and hearing of the parties interested. The latter assessment could be made without any notice to or hearing of any person, and was, under the provisions of the act, made a lien upon the lands upon which they should be assessed, and to be levied and collected in the same manner as other taxes are required by law to be collected. *Stuart*, upon whose land an assessment had been made under this act, brought his action against *Palmer*, collector of the taxes of the town of New Lots, to vacate the assessment, as a cloud upon his title to the land, and to restrain the collector from collecting the tax, upon two grounds, one of which was, that the assessment had been made ⁵⁷⁰ without any notice to or hearing of him, or other property owners. The opinion of the court of appeals of New York, by Judge Earl, as stated, held the

act unconstitutional; that the assessment and lien thereof was void, and vacated and set it aside, because it was made, levied, and confirmed without any notice to plaintiff, or other property owners affected by it; and that, as the act required no notice, and a provision for notice could not be implied, it was in effect to deprive the owner of his property without due process of law. A great number of authorities are cited to sustain this conclusion.

Mr. Justice Field, in discussing this question, in the opinion of the circuit court of the United States, district of California, *Santa Clara Co. v. Southern Pac. Ry. Co.*, 18 Fed. Rep. 410, says: "The notice to which we refer need not be a personal citation; it is sufficient if it be given by a law designating the time and place where the parties may contest the justice of the valuation. As a general rule, only a statutory notice is given. The state may designate the kind of notice and the manner in which it shall be given. All that we assert, or have asserted, is, that there must be a notice of some kind, which will call the attention of the parties to the subject, and inform them when and where they will be permitted to expose any alleged wrong in the valuation of which they may complain. It was with reference to the class of cases where values are to be formed upon evidence that we said, in the *San Mateo* suit, that notice and opportunity to be heard were essential to the validity of the assessment, and without which the proceeding by which the taxpayer's property was taken from him would not be due process of law."

This eminent jurist goes so far as to say that to exclude the operation of this constitutional provision in matters of taxation would necessitate a limitation by implication upon the broad and comprehensive language used, so as to make it read: "Nor shall any state deprive any person of ⁵⁷¹ his property without due process of law, except it be in the form of taxation"; and adds that "the power of oppression by taxation is not thus permitted." He also says that "the contention that there is a difference in the law as to notice and opportunity to be heard when an assessment is made for local purposes, and where it is made under a statute providing revenue for the state, is without foundation"; that "nothing is better established, by weight of authority absolutely overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceeding." This case afterward went to the supreme court of the United States, and the decision of the lower court was affirmed, but Mr. Justice Harlan, in delivering the opinion, does not discuss the constitutional questions so elaborately argued by both Mr. Justice Field and Judge Sawyer in the lower court, saying that it was unrec-

essary to do so, as the judgment could be affirmed on another ground.

In discussing the question whether the right to be heard in tax cases is a right which is indefeasible, Judge Cooley, in his book on Taxation, first edition, pages 265, 266, says: "We should say that notice of the proceedings in such cases, and an opportunity for hearing of some description, were matters of right. It has been customary to provide for them as a part of what is 'due process of law' for these cases; and it is not to be presumed that constitutional provisions, carefully framed for the protection of property, were intended, or could be construed, to sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard; and it has also been justly observed of tax officers that 'it would be a dangerous precedent to hold that any absolute power resides ⁵⁷² in them to tax as they may choose, without giving any notice to the owner. It is a power liable to great abuse'; and, it might safely have been added, it is a power that under such circumstances would be certain to be abused. The general principles of law applicable to such tribunals oppose the exercise of any such power": See, also, authorities cited in notes 1 and 2, p. 266.

Due process of law requires that he (the landowner) shall have a chance to interpose objection to the validity of the tax, or to the contention that his land is liable for it, or to the manner of assessing or collecting it, at some stage of the proceedings, before his property is irrevocably gone, and before some authority competent to afford relief in case of invalidity or injustice: Black on Taxation, in note to case of Read v. Dingess, 8 Co. Ct. App. 398; 60 Fed. Rep. 21.

Counsel for appellee cite in support of their contention the case of Davidson v. New Orleans, 96 U. S. 104, quoting from the opinion of Mr. Justice Miller, in which he says substantially what is said by Mr. Dillon in his work on Municipal Corporations, sec. 760, pp. 930-932: "That whenever, by the laws of a state, or by state authority, a tax assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceedings in

regard to the property, as is appropriate in such proceedings, it cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. So the determination of the taxing district and the manner of the apportionment are all within the legislative power. And whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied." But it is clear to ⁵⁷³ my mind that this does not sustain appellee's contention, as the court there declares in plain language that whenever the laws there discussed provide a mode for contesting the charge imposed in a court of justice, with such notice to the person, or such proceedings in regard to the property as is appropriate to the nature of the case, then they do not deprive a person of his property without due process of law, thus clearly making the constitutionality of the law dependent upon its giving notice to the party to be affected, and an opportunity of contesting the charge. In every case that I have been able to examine which has gone to the supreme court of the United States, and in which the question under consideration was considered, that court has upheld the validity of the laws, upon the ground that notice and hearing had been provided for, or held the laws to be unconstitutional and void, because notice to the party to be affected, and an opportunity to be heard, were not provided for: *McMillen v. Anderson*, 95 U. S. 37; *Davidson v. New Orleans*, 96 U. S. 104; *Hagar v. Reclamation Dist.*, 111 U. S. 701; *Spencer v. Merchant*, 125 U. S. 345; *Walston v. Nevins*, 128 U. S. 578-582; *Lent v. Tillson*, 140 U. S. 316; *Paulsen v. Portland*, 149 U. S. 30; *Pittsburgh etc. Ry. Co. v. Backus*, 154 U. S. 421.

But for extending the discussion of this question to too great a length, if such is not already the case, numerous decisions of the courts of other states might be cited and reviewed wherein assessments for local improvements were held to be void, and were vacated because made, levied, and confirmed without any notice to property owners affected.

I come now to consider the cases that have been before this court since the adoption of the fourteenth amendment to the federal constitution, growing out of assessments for local purposes. They are: *Norfolk v. Ellis*, 26 Gratt. 224; *Sands v. Richmond*, 31 Gratt. 571; 31 Am. Rep. 742; *Richmond etc.* ⁵⁷⁴ *R. R. Co. v. Lynchburg*, 81 Va. 473; *Green v. Ward*, 82 Va. 324; *Davis v. Lynchburg*, 84 Va. 861-870; *Norfolk v. Chamberlain*, 89 Va. 196.

In neither of these cases was the question as to whether the

assessment was in conflict with the federal constitution raised or discussed, except in the case of *Davis v. Lynchburg*, 84 Va. 861. In that case Judge Lacy, delivering the opinion of the court, in discussing the question that no provision was made for the person to appear and contest the proceedings, and that this deprived him of his property without due process of law, admits that the cases cited by counsel (for Davis) held that the ordinance without such provision for notice was unconstitutional, but says: "As an original question, it is obvious that all possible notice is given by the progress of the work itself, and, under our system of laws, every citizen is held charged with the notice of the public law." In the abstract, this latter proposition is sound, but I do not think that the first can be maintained upon reason or authority. It is not enough that the owners of property affected by a local assessment may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them a right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice: *Stuart v. Palmer*, 74 N. Y. 188; 30 Am. Rep. 289.

The object of the constitution, in requiring notice and the opportunity to be heard, is that a man may be able to protect himself from wrong. What opportunity is afforded him of doing so by seeing work being done on the street in front of ⁵⁷⁵ his property, when neither before nor after the passage of the ordinance is he given an opportunity to be heard as to the legality of the ordinance, or the charge against and lien upon his property by the work being done? While he may be held charged with notice of a public law, he cannot be held so charged by a law that is unconstitutional.

In addition to the fact that the question of "due process of law" guaranteed by the federal constitution was not raised nor discussed when the case of *Norfolk v. Ellis*, 26 Gratt. 224, was decided by this court, the Fourteenth Amendment had been but a few years before adopted, and, so far as I have been able to find, no case had been decided by either a state or federal court at that time in which this question was raised, and the cases relied on as authority by Judge Staples for the decision in *Norfolk v. Ellis*, 26 Gratt. 224, were cases determined before the adoption of the

Fourteenth Amendment. At all events, none of them are decisive of the question.

Upon this question I am of opinion that where a statute, i. e., the charter of a municipal corporation, authorizes an assessment of any part of the costs and expenses of opening, extending, grading, or otherwise improving the streets or sidewalks of such corporation, upon the land or lots abutting on the street opened, extended, graded, or otherwise improved, without providing for a notice to the person whose property may be affected by the assessment, giving such person an opportunity to appear and contest the legality, justice, and correctness of the assessment at some stage in the proceedings before the assessment becomes final, such statute is in conflict with the Fourteenth Amendment to the constitution of the United States, and that an assessment made thereunder is void, and creates no lien upon his property.

The validity of assessments for local purposes, made under the charters and ordinances of the cities concerned, was fully considered and decided in the Virginia cases named above, in ⁵⁷⁶ each of which, with the exception of *Norfolk v. Chamberlain*, 89 Va. 196, the assessment was declared not to be in violation of section 1 of article 10 of the state constitution, the right to make the assessment being upheld upon the theory of benefits to the abutting lotowners.

Norfolk v. Chamberlain, 89 Va. 196, was typical of that class referred to by Judge Staples in the opinion of this court in *Norfolk v. Ellis*, 26 Gratt. 224, where he says: "I do not mean to say that cases may not occur of such gross oppression and injustice as to require judicial interference"; and the decision of the court, holding that the assessment on Chamberlain's land or lot was void, was on this ground. It may, therefore, be said that the decisions of this court uniformly hold that an assessment upon abutting lands or lots to meet the expense of improvements to the street in front of such land or lots, levied according to benefits to such land or lots, is not in violation of section 1 of article 10 of the state constitution.

The decisions of a majority of the courts of the other states of the Union having a similar constitutional provision are to the same effect. Among them are the states of New York, Ohio, Wisconsin, Missouri, California, Kansas, Connecticut, New Jersey, North Carolina, Louisiana, Tennessee, Iowa, Indiana, Vermont, and South Carolina: See, also, *Burroughs on Taxation*, 467, and pages following; *Elliott on Roads and Streets*, 369, 370, and citation in note 2; 2 *Dillon on Municipal Corporations*, 911, 912, 956. Mr. Burroughs says, on page 369: "It is but

just, it is well reasoned, to compel the landowner, who gains by the value added to his land by the improvement, to pay that value, rather than to exact it from those who receive no direct benefit. It detracts nothing from his gain that others profit by the improvement." So, as was said by Judge Lacy in *Davis v. Lynchburg*, 84 Va. 861, "we cannot be unmindful of the salutary principle *stare decisis*"; and it must, therefore, be said that it is well-settled ⁵⁷⁷ law in Virginia that an assessment for local improvement, such as is authorized by section 33 of the charter of Alexandria city, is not in conflict with section 1 of article 10 of the constitution of Virginia.

It remains, however, to be determined whether the city ordinances of Alexandria, under which the assessment was made, are in conflict with the charter of the city, and therefore void. As will be readily observed, the thirty-third section of the charter provides for an assessment upon the owners of the real estate benefited, i. e., according to the benefits to the property assessed by the improvements; while the ordinances of the city provided, and the assessment in this case was made, according to the proportion the front of appellants' ground bears to the front of all the lots on the same side of and binding on that portion of Alfred street improved; in other words, the assessment was authorized by the ordinances and actually made according to the frontage of appellants, and not according to the benefits to their ground by the improvements to Alfred street.

Municipalities having no inherent power in these cases, it is necessary to the validity of their action that they keep closely to the authority conferred. Their ordinances and resolutions must be adopted in due form of law, and they must keep within them afterward. They can bind the taxpayer only in the mode prescribed, and can substitute no other. This is the general proposition of law as laid down by Judge Cooley in his work on *Taxation*, second edition, 656.

In discussing this question, Mr. Burroughs, in his work on *Taxation*, sections 148, 472, 473, says: "It will be noticed that the questions discussed in this section are totally different from those in section 147. In that section the question was as to the power of the legislature to adopt one mode in preference to another; here the question is, when the legislature has delegated the authority to cities or towns to assess the expense ⁵⁷⁸ on the lots or property benefited, whether such a delegation of power limits the municipal authorities as to the mode of making the assessment, or whether, having such authority, they may select the mode of apportioning the expense, and impose it by the front

foot, square foot, or value, just as the legislature might have done. The weight of authority and of the analogies of the law are decidedly that such a delegation limits the municipal authorities to the mode of assessment according to the benefits conferred by the improvements. . . . No case can be found, it is believed, in which an assessment not according to the benefit conferred has been sustained, when the delegation of authority was to assess on the property benefited." He then adds: "The case of *Norfolk v. Ellis*, 26 Gratt. 224, which is seemingly opposed to this position, does not discuss this question. It merely discusses and decides the general question that an assessment by the front foot is not void, and even in that case it is said that there should be a remedy for cases of hardship by appeal to the council for abatement." In this section (148) the writer does say: "That in Pennsylvania, however, a general delegation of authority to make rules and regulations and keep streets in repair, and to collect a tax for that purpose, was considered sufficient to sustain an assessment by the front foot." Here the statute delegating the authority was considered broad enough to confer upon the city authorities the power to select the mode of assessment. It may also be said with reference to *Norfolk v. Ellis*, 26 Gratt. 224, that the assessment was made under a provision of the charter of Norfolk city which conferred upon the council of the city authority to raise annually, by taxes and assessments, such sums of money as they might deem necessary to defray the expenses of street improvements, and in such manner as they should deem expedient.

Whether an assessment by the front foot, i. e., according 570 to the frontage on the street improved, where the charter expressly authorizes this to be done, or is broad enough to plainly confer upon the city the power to select the mode of assessment, would be a valid assessment, I express no opinion, nor as to whether an assessment upon the land or lots abutting on the street improved, for the entire costs of improvements would be valid, as a decision of these questions is not necessary in this case. The question here is, as we have seen, whether the ordinance by which the assessment is per frontage is authorized by section 33 of the charter of Alexandria, which section authorizes an assessment on the property benefited, and clearly means, I think, that the assessment is to be made in accordance with the peculiar benefits accruing to the property assessed by reason of the improvements—certainly not in excess of such benefits.

Upon the theory of benefits rests all of the decisions of this court and of other courts upholding assessments of this charac-

ter, and upon this theory alone are they looked upon with favor by text-writers; nor can they, upon reason and sound principles of justice, be justified upon any other theory. All of the authorities maintain that when the power to levy such assessments is delegated by the legislature to a municipal corporation, the act must be strictly construed, and that the city authorities must keep closely within its provisions. To this effect are the decisions of the court in *Green v. Ward*, 82 Va. 324, and *Kirkham v. Russell*, 76 Va. 956. Strike out the element of benefit, and a special assessment loses its foundation: *Elliott on Roads and Streets*, 405; *Asberry v. Roanoke*, 91 Va. 562. It may be that the assessment upon the property of appellants per front foot does not exceed the peculiar benefits to their property. They deny that it has been benefited at all, and there is no proof on the subject; but this is immaterial to a decision of the question here. It is clear to my mind that where the statute confers this power, ⁵⁸⁰ and limits its exercise to the benefits by the improvements to the property assessed, or is not broad enough to be considered, by fair intendment, to confer upon the authorities of the city the power to select the mode of assessment, an assessment per frontage is an unwarranted assumption of benefits, and does not meet the requirements of the statute, but is in conflict therewith.

For the foregoing reasons, I am of opinion that the decree of the corporation court of the city of Alexandria, overruling appellants' demurrer to the bill filed in this cause, was erroneous, and should be reversed, and that this court should enter such decree as the corporation court ought to have entered, sustaining the demurrer and dismissing the bill.

Reversed.

The other judges concur in the opinion of Cardwell, J.

ASSESSMENT FOR LOCAL IMPROVEMENTS—NOTICE.—The provisions of an act providing for a special assessment on the property benefited by a change of street grade are not unconstitutional because they do not give the owners of such property a right to be heard as to who shall be appointed assessors, or a right to appeal from such appointment: *Kelly v. Minneapolis*, 57 Minn. 294; 47 Am. St. Rep. 605. Proceedings for street improvement require notice and hearing to warrant the imposition of a charge by "due process of law," where the cost of such improvement is to be apportioned among those benefited: *Garvin v. Daussman*, 114 Ind. 429; 5 Am. St. Rep. 637. See, also, the extended note to *People v. Mayor*, 55 Am. Dec. 286.

MUNICIPAL CORPORATIONS.—THE POWER TO TAX AND LEVY ASSESSMENTS may be delegated to municipal corporations: Note to *Murphy v. Mayor*, 22 Am. St. Rep. 357.

MUNICIPAL CORPORATIONS.—AN ASSESSMENT for street improvement, based upon the value of the lots fronting thereon, with-

out regard to the frontage or depth of the lots assessed, and which necessarily causes some of them to pay a much greater sum per front foot than others, is unconstitutional and void for want of equality: *Howell v. Tacoma*, 3 Wash. 711; 28 Am. St. Rep. 83, and note. See, also, the extended note to *People v. Mayor*, 55 Am. Dec. 288.

MUNICIPAL CORPORATIONS—TAXING POWER—MODE OF EXERCISING.—The power to tax or exempt from taxation is sovereign, and can be exercised by a municipality only in the manner delegated by the state: *Whiting v. West Point*, 88 Va. 905; 29 Am. St. Rep. 750, and note. Municipal corporations may be vested with the power of taxation, but such power can only be exercised according to charters and within the limits of the constitution of the state: *Mauldin v. City Council*, 42 S. C. 293; 46 Am. St. Rep. 723.

RICHMOND RAILWAY & ELECTRIC CO. v. GARTHRIGHT.

[92 VIRGINIA, 627.]

UPON DEMURRER TO THE EVIDENCE the court must accept as true all of the plaintiff's evidence and all just inferences which can be properly drawn from it by the jury, and reject all evidence of the defendant which conflicts with that of the plaintiff and all inferences which do not necessarily result from it.

NEGLIGENCE—NEW INVENTION, FAILURE TO USE.—It is incumbent upon a railway company, whose cars are propelled by steam or electricity, especially in a large and populous city, to use ordinary and reasonable care to avail itself of new inventions and improvements known to it, which will contribute to the safety of its passengers and prevent accidents to others, whenever the utility of such improvement has been tested and demonstrated; but it is not required to have in use the latest improvements which skill and ingenuity have devised to prevent accidents.

NEGLIGENCE, INSTRUCTION AS TO NEW INVENTIONS. It is error to instruct the jury that if an accident might have been avoided by the use of a Sprague motor on the street-car, then the defendant was guilty of negligence in not using it, if it had not been shown by the evidence that that motor was a better and safer appliance than the one in use, nor that it had been tested, and its superiority over the other demonstrated.

JURY TRIAL—NEGLIGENCE, INSTRUCTIONS, WHEN DO NOT REQUIRE A REVERSAL.—If the court can see from the whole record that even under correct instructions a different verdict could not have been rightfully rendered, or that the exceptant could not have been prejudiced by the erroneous instruction, it will not, for such error, reverse the judgment.

STREET RAILWAYS.—IF A COLLISION between a street-car and a truck is caused by the crowded and overloaded condition of the car, the railway corporation is answerable to a person injured thereby.

STREET RAILWAYS.—THE PEOPLE OF A CITY AND THEIR vehicles have the same right to pass along an intersecting street as a car has to cross it.

STREET RAILWAYS.—IT IS GROSS NEGLIGENCE in a street railway corporation to overcrowd and load down its cars with passengers beyond any reasonable limit, so that it is not able to control and readily stop its cars as they approach an intersecting street, and thereby to prevent an accident.

JURY TRIAL—VERDICT, EXCESSIVE.—In an action to recover for personal injuries suffered by the plaintiff, a verdict in his favor will not be set aside as excessive, unless the sum awarded is so great as to furnish ground for the belief that the jury were actuated by partiality or prejudice.

Action of trespass on the case to recover for personal injuries alleged to have been suffered by the defendant in error from the negligence of the plaintiff in error and its servants.

Wyndham R. Meredith, for the plaintiff in error.

Courtney & Patterson, for the defendant in error.

628 **RIELY, J.** The judgment to which the writ of error was awarded in this case was recovered for injuries received in a collision between a car of the Railway and Electric Company and a hook and ladder truck of the fire department of the city of Richmond.

Three grounds are assigned for the reversal of the judgment.

The first is, that the plaintiff in the suit was barred of the right to recover because of his own contributory negligence.

The case comes before us upon a certificate of the evidence, and, in considering it, we must apply the familiar rules applicable to a demurrer to evidence. These rules require us to accept as true all of the plaintiff's evidence and all just inferences which could be properly drawn from it by a jury, and to reject all of the evidence of the defendant which conflicts with that of the plaintiff and all inferences which do not necessarily result from it. Many witnesses were examined on both sides, and there was considerable conflict in much of the testimony. It is unnecessary to rehearse it, but sufficient to say that, testing it by the above rules, the evidence clearly establishes the negligence of the defendant company, ⁶²⁹ and does not justify the claim that the plaintiff was guilty of such contributory negligence that but for the same the accident would not have happened.

The second assignment of error relates to the instruction given by the court, numbered 2, which is as follows: "The jury are further instructed that if they believe from the evidence that, when the horses of the truck came in sight of persons on the defendant's car, the said car was at such a distance from the point of collision that the accident might have been averted but for the want of a Sprague motor on the car, or the crowding on the platform of passengers, preventing the motorman's use of his machinery, then the defendant company was guilty of negligence, and the jury must find for the plaintiff, even though they believe that the motorman on the car did all in his power to stop his car,

unless they believe that the negligence of plaintiff or tillerman contributed to the accident."

The objection made to this instruction is, that it pronounces the failure of the company to equip its car with a Sprague motor to be negligence, when there was no evidence before the jury tending to show that such motor was a necessary equipment of its car, or that the want of it caused the accident in which the plaintiff was injured. The evidence upon this point was very meager. Only three witnesses, all of whom were called by the defendant, testified in regard to the matter. One of them, Mr. Hill, who had worked in the shops of the company, and was a conductor on one of its cars at the time he testified, but had never been a motorman, stated that this particular car was the only one that was provided at the time of the accident with a Westinghouse motor, and that the others were equipped with Sprague motors. When questioned as to which was the best machine for stopping a car suddenly, he answered that the Westinghouse "reverses ⁶³⁰ slower," and that the Sprague "takes quicker than the other," whatever that may mean. Mr. Jackson, who was the conductor on the car, was asked by which motor could a car be stopped in the shortest distance, and replied that it was as easy to stop the car with the one as the other. Major Selden, the superintendent of the company, was the only other witness as to this matter. He stated that the company, at the time he testified, was using the Westinghouse motor almost entirely on its Main-street line, and the Sprague motor on its Clay-street line. When asked which was the best motor, he stated: "I think the Westinghouse a little better"; and when asked, further, if a car could be stopped quicker with the Westinghouse motor than with the Sprague, he replied: "The difference is so slight it is hardly appreciable." The foregoing is substantially all the evidence upon which the instruction complained of was based.

It thus appears that it was not testified to that the Sprague motor was a better appliance than the Westinghouse, or that at the time of the accident it had been tested and was in practical use by electric street railways, or had been adopted by them as a safer machine, or that the accident could have been averted if the car had been equipped with a Sprague motor.

It was the legal duty of the defendant company to provide its cars with suitable and safe machinery. It is incumbent upon a railway company, propelled by the powerful and dangerous agency of steam or electricity, especially in a large and populous city, to use ordinary and reasonable care to avail itself of all new inventions and improvements known to it which will contrib-

ute to the safety of its passengers and prevent accidents to others whenever the utility of such improvement has been tested and demonstrated, but it is not required to have in use the latest improvements which human skill and ingenuity have devised to prevent accidents: Patterson's ⁶³¹ Railway Law, secs. 245, 247; Elliott on Roads and Streets, 610.

The instruction was erroneous in singling out the Sprague motor, and making the liability of the railway company depend upon its failure to equip its car with such motor, if the jury believed that by its use the accident could have been averted, when it had not been shown in evidence that the Sprague motor was a better and safer appliance, or that it had been tested and its superiority over the Westinghouse demonstrated.

It does not follow, however, that the judgment for that reason must be reversed. It is the settled rule of this court, recognized and acted upon in numerous cases, that if the court can see from the whole record that even under correct instructions a different verdict could not have been rightly found, or that the exceptant could not have been prejudiced by the erroneous instruction, it will not for such error reverse it: *Preston v. Harvey*, 2 Hen. & M. 55; *Colvin v. Menefee*, 11 Gratt. 87; *Kincheloe v. Tracewells*, 11 Gratt. 587; *Bank of Danville v. Waddill*, 27 Gratt. 448; *Bright-hope Ry. Co. v. Rogers*, 76 Va. 443; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 46 Am. Rep. 715; *Snouffer v. Hansbrough*, 79 Va. 166; *Benn v. Hatcher*, 81 Va. 25; 59 Am. Rep. 645; *Baltimore etc. R. R. Co. v. McKenzie*, 81 Va. 71; *Payne v. Grant*, 81 Va. 164; *Richmond etc. R. R. Co. v. Norment*, 84 Va. 167; 10 Am. St. Rep. 827; *Commonwealth v. Lucas*, 84 Va. 303; *Wager v. Barbour*, 84 Va. 419; *Bernard v. Richmond etc. R. R. Co.*, 85 Va. 792; 17 Am. St. Rep. 103; *Richmond Granite Co. v. Bailey*, 92 Va. 554. See, also, *Sackett's Instructions to Juries*, 2d ed., 24.

The collision between the car and the truck took place at the intersection of Main and Third streets. The car was passing down Main street, and the truck was proceeding along Third street.

It appears from the evidence that the company had the ⁶³² right under the law to run its cars at as great a rate of speed as six miles an hour; that this car was capable of seating twenty-two persons, and could comfortably transport as many as fifty-persons; that the cars could be stopped within a distance equal to their length, or at most within a distance equal to a length and a half of a car, which was generally understood by the public; and that this particular car was about twenty-two feet long,

including its front and rear platforms. It also appears from the evidence that the car at the time of the collision was crowded with passengers to its utmost capacity, and that both platforms, and even the steps, were thronged, it being variously estimated that there were not less than from sixty to eighty people on the car. So crowded and jammed together were they that the conductor was unable to collect the fare from half of them, and the motorman unable, as testified to by some of the witnesses, to have free command of his brake. As to the foregoing facts there was no material, if any, conflict between the evidence of the plaintiff and that of the defendant.

There was very much conflict, however, in the evidence in other material respects. If we look to that of the plaintiff alone, it appears that the car was somewhere between fifty and ninety feet—these being the two extremes of the estimates of the witnesses—above Third street when the truck reached Main street, and started to go across the cartrack; and that it could have been easily stopped, and the collision prevented, if the car had not been overloaded with passengers, and running at the rate of eight to twelve miles an hour—much in excess of the speed allowed by law. Upon this evidence, it could but be held that the company was guilty of gross negligence, irrespective of the kind of motor with which it was equipped.

If we turn now to the evidence of the defendant, it appears that the witnesses estimated that the car was going slower ⁶³³ than usual—at a speed of only three to four and a half miles an hour—and that it was from forty to fifty feet from Third street when the truck was first seen by persons on the car, passing rapidly from Third street across the track of the railway. There was then ample distance within which the car could ordinarily have been brought to a stop with either the Westinghouse or Sprague motor, and the collision been averted. After the truck, which, together with the horses, measured fifty feet, was seen by the passengers, and was or should have been seen by the motorman, it had nearly time enough to clear the track of the railway before the car struck it, the car having struck the truck immediately in front of its hind wheels, about forty-two feet back from the heads of the horses drawing it. If the car, with a full complement of passengers, but not loaded beyond its proper capacity, was capable of being stopped within a distance equal to its own length, which was twenty-two feet, or at most within a space less than twice its length, when running at its maximum speed of six miles an hour, as the evidence shows, it follows that it could have been brought to a stop in a still shorter distance, if

going at a rate not exceeding four or four and a half miles an hour. The car had not less than fifty feet, and probably considerably more, within which to be stopped after the truck was seen about to cross the railway track, when ordinarily half of this distance would have sufficed. It is self-evident that the heavier the load the more unmanageable the car, and the greater the distance required within which to stop it. And this is fully confirmed by the testimony of Major Selden, an expert electrician and the superintendent of the company, than whom no witness was more competent to speak. In answer to the question, What would be a reasonable distance within which to stop the car? he replied: "From all accounts, they had a very heavy load, probably seventy or eighty passengers. I would estimate that ⁶³⁴ that car weighed at least fifteen thousand pounds, if it had eighty passengers, knowing the weight of the car and motor. . . . I don't think a car with the weight that that car had on could be stopped in less than fifty or sixty feet, going at any speed." This being so, it is manifest that the collision between the car and the truck was caused by the crowded and overloaded condition of the car, and not all due to the particular motor with which the car was equipped. Upon the whole evidence, therefore, the verdict was right, and the railway company could not have been prejudiced by the error contained in the instruction complained of.

The people of a city and vehicles have the same right to pass along an intersecting street as the car has to go across it. "The car has a right to cross, and must cross, the street; and vehicles and foot passengers have a right to cross, and must cross, the railroad track. Neither has a superior right to the other": *O'Neil v. Dry Dock etc. R. R. Co.*, 129 N. Y. 125; 26 Am. St. Rep. 512; *Buhrens v. Dry Dock etc. R. R. Co.*, 53 Hun, 571; affirmed, 125 N. Y. 702; *Chicago City Ry. Co. v. Young*, 62 Ill. 238; Booth on Street Railway Law, sec. 304, and cases there cited. And it is gross negligence in a street railway company to overcrowd and load down its cars with passengers beyond any reasonable and proper limit, and consequently not to be able to control and stop them readily as they approach an intersecting street, in case it may be necessary to do so to avert a collision or prevent an accident.

The third assignment of error is that the damages are excessive. It was proved by Dr. Ross, the surgeon who was summoned to attend the plaintiff at the time of the accident, that the plaintiff had a wound on the side of his face, and through his brow, which he had to close with stitches; that he was suffering from concussion, and insensible when he dressed his wounds;

and that he remained insensible until ⁶³⁵ the next morning. He also stated that the plaintiff was much bruised about his body, and that he attended him professionally for ten days or two weeks. The plaintiff himself testified that, besides the injuries mentioned by Dr. Ross, his teeth were broken; that his knee was so injured that he was lame for a long time; and that he was rendered unable to work efficiently at his trade for six or eight months.

No method has yet been devised, nor scales adjusted, by which to measure or weigh and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be, and we cannot say upon the evidence in this case that one thousand dollars was excessive damages. It was not so great, considering the injuries proved to have been sustained by the plaintiff, as to furnish ground for believing that the jury were actuated by partiality or prejudice; and unless this is the case, under the well-settled rule in this state, the court should not disturb the verdict: *Farish v. Reigle*, 11 Gratt. 697; 62 Am. Dec. 666; *Norfolk etc. R. R. Co. v. Shott*, 92 Va. 34.

There is no error in the judgment complained of for which it should be reversed, and the same is affirmed.

DEMURRER TO EVIDENCE.—When the trial court has forced the plaintiff to a nonsuit by an instruction in the nature of a demurrer to the evidence, he is entitled to the most favorable views of his case that the evidence warrants and to every reasonable inference therefrom: *Larson v. Metropolitan etc. Ry. Co.*, 110 Mo. 234; 33 Am. St. Rep. 439. A demurrer to the evidence admits all that may be reasonably inferred from the evidence given by the adverse party, and waives all evidence therewith or the credibility of which is impeached, and all inferences from the evidence of the party demurring which do not necessarily follow from it: *Williamson v. Newport News etc. Co.*, 34 W. Va. 657; 26 Am. St. Rep. 927.

INSTRUCTIONS—ERRONEOUS—REVERSAL. — An instruction to the jury, which could not have injured the party complaining thereof, is not ground for reversal: *Ingerman v. Moore*, 90 Cal. 410; 25 Am. St. Rep. 138. Error in giving instructions, if harmless, is not ground for reversal: *Macfarland v. Heim*, 127 Mo. 327; 48 Am. St. Rep. 629, and note; *Mexican Cent. Ry. Co. v. Lauricella*, 87 Tex. 277; 47 Am. St. Rep. 103.

TRIAL—EXCESSIVE VERDICT.—When a verdict for damages is for so large an amount that it can be accounted for only as the result of an improper sympathy or unreasonable prejudice, it will be set aside as excessive: *Louisville etc. R. R. Co. v. Minogue*, 90 Ky. 369; 29 Am. St. Rep. 378, and note.

STREET RAILROADS — NEGLIGENCE — OVERCROWDED CARS.—If the employes of a street railway company in charge of its cars undertake to carry a number of persons greatly in excess of the seating capacity of such cars, so that passengers are compelled to stand on the platforms and steps, and the injury complained of is the direct result of such overcrowded condition, that fact is evidence of negligence on the part of the company: *Pray v. Omaha etc. Ry. Co.*, 44 Neb. 167; 48 Am. St. Rep. 717, and note.

STREET RAILWAYS—RIGHTS ON ITS STREETS.—Street railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own tracks: *Thatcher v. Central Traction Co.*, 166 Pa. St. 66; 45 Am. St. Rep. 645, and note. To the same effect, see *O'Neill v. Dry Dock etc. Ry. Co.*, 129 N. Y., 125; 26 Am. St. Rep. 512, and note.

MOROTOCK INSURANCE COMPANY v. RODEFER.

[92 VIRGINIA, 747.]

INSURANCE, APPLICATION, ABSENCE OF.—If an insurer issues a policy without an application or any representation in regard to the title to the property upon which the insurance is effected, he cannot complain, after a loss, that the interest of the assured was not correctly stated or that an existing encumbrance was not disclosed.

INSURANCE—MORTGAGE.—A CONDITION in a policy of insurance that it shall be void if the interest of the assured is not the unconditional and sole ownership, is not violated by an encumbrance existing on the property when the insurance was effected.

FIXTURES.—WHERE MACHINERY IS PERMANENT in its character and essential to the purposes for which a building is occupied, it must be regarded as realty and as passing with the building; and whatever is essential to the purposes for which the building is used will be considered a fixture, although the connection between them is such that it can be severed without physical or lasting injury.

INSURANCE—CONDITION AGAINST CHATTEL MORTGAGE.—Whether certain machinery included in a mortgage of real estate is personal property, so that its mortgage constitutes a breach of the condition in the policy against personal property being or becoming encumbered by a chattel mortgage, is a question respecting which the insurer must assume the burden of proof, where the character of such machinery is such that it may be a part of the realty.

INSURANCE—MORTGAGE—CHANGE OF INTEREST.—A CONDITION in a policy of insurance against "any change in the interest, title, or possession of the subject of the insurance, whether by legal process or judgment, or voluntary act of the insured, or otherwise," is not violated by the existence of a mortgage on the property insured at the time the policy was issued. This condition refers to subsequent changes in the interest, title, or possession of the property.

Assumpsit on a policy of insurance, insuring against loss by fire certain buildings used as a glass manufactory and sundry articles of personal property contained therein and part of which was used in connection with the purposes of the manufactory. The policy was dated in August, 1891, and provided that it should not be valid until countersigned by the agent of the company at Danville, Virginia. It was, however, countersigned October 31, 1891. A mortgage on the real estate was recorded October 7, 1891, and was dated on the third day of the same

month, in which were included "all engines, machines, tools, appliances, connections, attachments, and contrivances of every kind now used in operating the glass factory on said premises" In February, 1892, the insured property was destroyed by fire. There was no evidence respecting the character of the property covered by the mortgage, except a deposition of one of the plaintiffs, in which he testified that the property in the mortgage was wholly real property, and was so considered by the plaintiff, and that no product of their plant or the personal effects embraced therein was mortgaged or in any wise encumbered. The defendant demurred to the evidence, but the court overruled the demurrer, and gave judgment for the plaintiff.

Green & Miller, for the plaintiff in error.

Berkley & Harrison, for the defendants in error.

749 RIELY, J. The policy sued on in this case was issued October 31, 1891, and contains, among other provisions, the following: "This entire policy shall be void, if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; . . . or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage; . . . or if any change, other than by death of an insured, take place in the interest, title, or possession of the subject of insurance, . . . whether by legal process or judgment, or voluntary act of insured, or otherwise."

The subject of the insurance was the glassworks of the insured, with all the apparatus for manufacturing glass, the machinery, fixtures, stock, and personal property. Prior to the issue of the policy, on October 3, 1891, the insured had executed a mortgage upon their glass plant, embracing three parcels of land, and including also "all engines, machinery, tools, appliances, connections, attachments, and contrivances of every kind now used in operating the glass factory on said premises."

750 The insurance was effected through an insurance broker, and the policy was issued without the usual printed or written application by or in behalf of the insured. No representation whatever was made by them, nor was any statement made by or required of them as to their title or interest in the property, or as to the existence of any encumbrance thereon. There is no

evidence of a fraudulent concealment of any matter, and it is not pretended that there was any.

The first contention on the part of the plaintiff in error is that it was the duty of the insured voluntarily to disclose to the company the existence of the mortgage, and that failure to do so rendered the policy void.

Applicants for insurance are not generally aware of the necessity of disclosures which long experience in the business of insurance has shown to underwriters to be necessary, or what disclosures it is important to make; while insurance companies cannot only protect themselves by making inquiries in regard to such things as they may regard to be material, but, as is well known, are in the habit of doing so. And such was the custom of this company. It was admitted on the trial, by its general agent, that the company had blank forms of application for insurance, which contained this question concerning the property to be insured: "If encumbered, to what amount"; but that such application was not sent in this instance to the insured, or to the broker through whom the insurance was effected, to obtain an answer to the foregoing or any other question. There is nothing in the policy which required a disclosure by the insured of the liens on the property, except the disclosure of any chattel mortgage, where personal property was the subject of insurance; and, if the company neglected to make the proper inquiry, it cannot now be permitted, after a loss has happened, to defeat a recovery because the insured did not voluntarily disclose the existence of the said mortgage. If an insurance company elects to ⁷⁵¹ issue its policy without an application or any representation in regard to the title to the property upon which the insurance is effected, the company cannot complain, after a loss has ensued, that the interest of the insured was not correctly stated in the policy, or that an existing encumbrance was not disclosed: *West Rockingham Mut. Ins. Co. v. Sheets*, 26 Gratt. 854, 869, 870; *Manhattan etc. Ins. Co. v. Weill*, 28 Gratt. 389; 26 Am. Rep. 364; *Wood on Fire Insurance*, sec. 233; *Gilmore's Notes on Smith's Mercantile Law*, 293.

The conditions of the policy in the case of *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389, 26 Am. Rep. 364, were almost identical with the provisions of the policy in the case at bar. Although it was provided in the policy in that case that "any omission to make known every fact material to the risk, . . . or if the interest of the assured in the property . . . be not truly stated in the policy," it should be void, the court held, in the case above cited, that the omission to disclose, in the absence of

any inquiry, an encumbrance in the form of a deed of trust subsisting on the property at the time the insurance was effected, did not vitiate the policy.

It was next claimed that the existence of the mortgage violated the condition of the policy, that the interest of the insured in the property shall be "unconditional and sole ownership." This condition did not have reference to the legal title, but to the interest of the insured in the property, and was not a warranty against liens and encumbrances. The interest of the insured in the property was and continued to be unconditional and sole ownership, notwithstanding the mortgage they had given upon it. The above condition was identical with that contained in the policy sued on in *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389, 26 Am. Rep. 364, and it was there held, as already stated above, that the existence of a deed of trust on the property did not violate the above condition or avoid the policy. And the like decision was made ⁷⁵² in *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732, where the policy of insurance contained a provision similar to that in the policy under consideration: See, also, *Clay etc. Ins. Co. v. Beck*, 43 Md. 358; *Carson v. Jersey City etc. Ins. Co.*, 43 N. J. L. 300; 39 Am. Rep. 584; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; 27 Am. Rep. 582.

It was also contended that the existence of the mortgage violated the further condition of the policy that, "if the subject of insurance be personal property," the policy shall be void, if the property "be or become encumbered by a chattel mortgage"; and, in support of this contention, it was claimed that the "engines, machines, tools, appliances, connections, attachments, and contrivances of every kind now used in operating the glass factory on said premises," which were conveyed in the mortgage, were personal property.

The record contains no evidence in regard to this property beyond what the mortgage itself discloses; and whether it was personalty, or what the law denominates "fixtures," and was therefore a part of the realty, and passed with it, depends not less upon its relation to the realty, and the use to which it was put than upon its nature.

In this age of marvelous development of industries and multiplication of manufactures, it is a matter of common knowledge that it is the machinery and apparatus necessary for the production of the particular manufacture which form the principal part of the manufactory, and that the building in which they are placed and to which they are affixed serves but to inclose and

protect them. They mainly constitute the manufactory, while the building is generally only the incident.

It was said by Judge Christian, speaking for the court in *Green v. Phillips*, 26 Gratt. 752, 762, 21 Am. Rep. 323, that the true rule for determining when the machinery and apparatus of a manufactory are fixtures is: "That where the machinery is ⁷⁵³ permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purpose for which the building is used will be considered as fixtures, although the connection between them is such that it may be severed without physical or lasting injury." And this rule was approved and followed in *Shelton v. Ficklin*, 32 Gratt. 727.

Consequently, the court cannot know merely from such general descriptive terms as "all engines, machines, tools, appliances, connections, attachments, and contrivances of every kind," when used in connection with a manufactory, whether they constitute in any particular case, like the one under consideration, what the law denominates fixtures, or retain their character as personalty. This can only be established by evidence. The existence of the mortgage was matter of defense, and it was incumbent on the company to show, by other evidence than the indefinite description contained in the mortgage, that the machinery, etc., therein mentioned, had not, by its use and connection with the manufactory, lost its character as personalty. This no effort was made to do. The company ought not to be allowed to defeat a recovery, in the absence of any fraud, unless it satisfactorily showed that the condition that its policy should be void "if the subject of the insurance be personal property, and be or become encumbered by a chattel mortgage," had been in reality violated.

The subject of the mortgage referred to was the National Glass Works of the insured, which included the buildings and the ground on which they were erected, and which was necessary to their use and operation. It also included all the machinery and apparatus which was of a permanent character and essential to the purposes of the business. The mortgage describes the machinery and apparatus embraced therein as that "used in operating the glass factory on the premises" ⁷⁵⁴ which were conveyed; and the insured testified on the trial that the said machinery and apparatus were considered by them as a part of the realty, and so conveyed.

In the entire absence of any evidence, except the mere descrip-

tive terms of the mortgage, showing that the machinery and apparatus embraced in it retained their character as personalty, and did not become fixtures in the eyes of the law, the defense that there was a chattel mortgage upon the personal property must fail.

The claim was also made that the existence of the mortgage violated the further condition of the policy which provided against "any change in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or voluntary act of insured, or otherwise." It is plain that this provision had reference to a subsequent change in the interest, title, or possession of the property after the issue of the policy, and was not intended to provide against an encumbrance subsisting on the property at the time the insurance was effected. It is substantially the same condition that was contained in the policy sued on in the case of *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389, 26 Am. Rep. 364, where it was held that a deed of trust upon the property at the time the policy was issued did not relieve the company from liability for the loss; and, although this particular question is not discussed in the opinion, it cannot be supposed for that reason it was not duly considered by the court.

The case of *Watertown Fire Ins. Co. v. Cherry*, 84 Va. 72, was much relied on by counsel for the plaintiff in error, but that case was wholly unlike this in the most essential particulars. The conditions of the policy in each case were much alike, but the alleged grounds of violation were very different. In that case the policy contained the following conditions, for the violation of which it was declared that it should become void, unless the consent thereto in writing of ⁷⁵⁵ the company be indorsed on the policy: "If any building intended to be insured stand on ground not owned in fee simple by the assured; if the insured property should be encumbered and the encumbrance be not disclosed in the application or written in the policy; if the policy be assigned or transferred before a loss; or if any building therein insured should become vacant or unoccupied," etc. The evidence on the trial showed that all these conditions had been violated. It was proved that the buildings which were insured stood, not on the ground owned in fee simple by the assured, but on leasehold property, for which she paid an annual rent to her landlord; that there was a deed of trust on the property; that she had assigned the policy as collateral security to a trustee to secure a note; and that she had vacated the dwelling and premises and suffered them to become unoccupied. This case can in no

wise serve as a precedent for the determination of the case at bar.

There is no error in the judgment of the corporation court, and the same must be affirmed.

INSURANCE—APPLICATION—ABSENCE OF.—Where an insurance policy is issued without any application or written request describing the interest of the insured in the property, and it does not appear that any actual representation of any kind was made by the assured, it will be presumed that the policy was written upon the knowledge of the insurer and was intended to cover in good faith the interest of the assured in the property: *Western etc. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346; 27 Am. St. Rep. 703, and note. An applicant for insurance is not required to show the exact condition of his title to the property sought to be insured, unless he is requested to do so, and if his application is oral and no deceit is practiced, his failure to mention encumbrances, where no inquiry concerning encumbrances is made, is immaterial: *Hall v. Niagara etc. Ins. Co.*, 93 Mich. 184; 32 Am. St. Rep. 497, and note.

INSURANCE—INTEREST OF INSURED—ENCUMBRANCES.—A condition in a policy of insurance that it shall be void in case the interest of the insured be other than unconditional and sole ownership, has reference only to the quality of the estate or interest, and is not avoided by any sort of an encumbrance: *Caplis v. American etc. Ins. Co.*, 60 Minn. 376; 51 Am. St. Rep. 535, and note.

INSURANCE — CONDITION AGAINST ENCUMBRANCES, WHEN NOT VIOLATED.—Where the insured when applying for the insurance, informs the insurer of the amount of encumbrances then existing upon the property, and the latter issues the policy with knowledge of such encumbrances, the condition against encumbrances is not violated if their amount never exceeds the amount stated: *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570; 19 Am. St. Rep. 717.

FIXTURES.—MACHINERY CONSTRUCTED and placed in a mill to be used in and as a part of it, and which would pass by a grant of the mill, is part of the real estate upon which the mill is situated and not personal property: *Havens v. Germania etc. Ins. Co.*, 123 Mo. 403; 45 Am. St. Rep. 570, and note. To the same effect see *Feder v. Van Winkle*, 53 N. J. Eq. 370; 51 Am. St. Rep. 628, and note. And see, also, the note to *Lansing Iron etc. Works v. Walker*, 30 Am. St. Rep. 491.

STROUTHER v. COMMONWEALTH

[92 VIRGINIA, 789.]

LARCENY—JURISDICTION.—IF GOODS ARE STOLEN IN ONE STATE OR COUNTRY, and taken by the thief into another the courts of the latter have not jurisdiction to try him for his offense, unless such jurisdiction has been expressly conferred by statute.

J. M. Steek, for the plaintiff in error.

Attorney General R. Taylor Scott, for the commonwealth.

⁷⁹⁰ **HARRISON, J.** The question raised in this case is, whether or not one who steals property at a place beyond the

jurisdiction of this state, and brings the same into this state, can be lawfully convicted of the larceny in our courts.

The attorney general relies on section 3890 of the code as furnishing legislative authority for taking jurisdiction in such cases. This section was only intended to define the jurisdiction of our courts to try the offenses arising under certain special statutes, and has no application here.

The case of *Commonwealth v. Gaines*, 2 Va. Cas. 172, is also relied on as a precedent to support this conviction. That case turned on the construction of a statute which disappeared from our laws in 1819, and, it may be fairly presumed, ⁷⁹¹ was repealed because the legislature preferred that the rule in Virginia should continue as at common law.

There being no statute in this state, and no decision of this court to which we can look for an answer to the question here raised, we must turn to the common law for the rule that is to govern us. It has been a settled principle of the common law, from an early day, in England, that where property is stolen in one county, and the thief has been found, with the stolen property in his possession, in another county, he may be tried in either. This practice prevailed notwithstanding the general rule that every prosecution for a criminal cause must be in the county where the crime was committed. The exception to the general rule grew out of a fiction of the law; that, where property has been feloniously taken, every act of removal or change of possession by the thief constituted a new taking and asportation; and, as the right of possession, as well as the right of property, continues in the owner, every such act is a new violation of the owner's right of property and possession. There is no principle, in respect of larceny, better settled than this, and it has received repeated sanction in this state: *Commonwealth v. Cousins*, 2 Leigh, 708.

This rule of the common law, however, was never extended farther than to counties. Where goods were stolen in one country and brought by the thief into another country, the latter country, by the English common law, has no jurisdiction: *Wharton's Criminal Law*, 9th ed., sec. 291; *Stanley v. State*, 24 Ohio St. 166; 15 Am. Rep. 604; *Commonwealth v. Uprichard*, 3 Gray, 434; 63 Am. Dec. 762.

This question has arisen in a number of the states. Some hold to the view that the states, being all under one general government, stand in the relation of counties, and that, therefore, the common law, by analogy, applies. We think, however, that the weight of authority sustains the view that the states are

separate and independent; that in the administration ⁷⁹² of criminal law, they are sovereign, and, in their respective jurisdictions and the laws which regulate their internal police, they are as foreign to each other as each state is to foreign governments; and, therefore, except in those states where statutory provision is made for the punishment of crimes committed in another jurisdiction, the common-law rule prevails, which, we have seen, furnishes no warrant for the conviction in this state of one who steals property in another state and brings it within our borders: *State v. Brown*, 1 Hayw. (N. C.) 100; 1 Am. Dec. 548; *Lee v. State*, 64 Ga. 203; 37 Am. Rep. 67, and other cases.

A perpetual extradition treaty exists between the states, it being provided in the constitution of the United States, article 4, section 2, that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and shall be found in another, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Under this provision of the constitution there is no need for the guilty to escape. We sustain no relation to the accused when arrested here, charged with stealing in a place beyond the jurisdiction of this state, except that of detaining him temporarily, as a fugitive from justice, until the requisition provided for can be secured to return him to the jurisdiction where his crime was committed.

A number of states have enacted laws for the punishment of crime in cases like this. Virginia has not, and the arguments for and against the policy of such laws may, with propriety, be addressed to the legislature. Courts must administer the law as it is.

For these reasons, we are of opinion that the corporation court of the city of Winchester was without jurisdiction to try the plaintiff in error for the crime charged in the indictment; ⁷⁹³ and its judgment is, therefore, reversed, annulled, and set aside.

LARCENY — TAKING STOLEN GOODS INTO ANOTHER STATE.—A person may be prosecuted and punished in Texas for larceny committed by stealing property beyond its boundaries and bringing it into that state: *McKenzie v. State*, 32 Tex. Crim. Rep. 795, and note with the cases collected.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

LA SELLE v. WOOLERY.

[14 WASHINGTON, 70.]

CONFLICT OF LAWS.—THE DOCTRINE OF COMITY, by which rights given as to property of a certain nature in one state are enforceable in another, does not extend to property subsequently acquired in this state, though of the same nature, and is totally inapplicable to real property.

CONFLICT OF LAWS.—REAL PROPERTY is exclusively subject to the laws of the country of which it is a part, and title therein can only be acquired or lost agreeable to those laws.

CONFLICT OF LAWS—COMMUNITY PROPERTY.—A debt incurred in another state, where it is the individual debt of the husband, and enforceable only against his separate estate, retains the same character after it is removed to this state, and therefore the community property of himself and his wife afterward acquired in this state cannot be taken for its satisfaction.

CONFLICT OF LAWS.—THE FORM OF REMEDIES and the order of judicial proceedings are to be according to the law of the state where the action is instituted, without regard to the domicile of the parties, the origin of the right, or the country of the act.

COMMUNITY PROPERTY, FOR WHAT DEBTS ANSWERABLE.—The community real property is not liable for the separate, or individual, debts of the husband, whether contracted in this state or elsewhere.

Suit to enjoin the sale of real property situate in the state of Washington, standing in the name of Marian E. La Selle, and conceded to be the community property of herself and her husband, William. The property had been levied upon under an execution based upon a judgment recovered in the same state against the husband. This judgment had been entered in an action brought upon another judgment rendered against the husband in the state of Wisconsin. He and his wife were then liv-

ing together as such in that state, and the indebtedness upon which the original judgment was founded consisted of a liability against him incurred in the prosecution of his business as a contractor and builder and as proprietor of a sash and door factory. It appeared from the statutes of Wisconsin, "set out in the answer, that in that state there is no such thing as community property as understood here, nor is there any such thing as separate property of the husband as defined by our laws. The wife alone could own separate property, and the provisions in relation to its acquisition were substantially the same as in this state. All other property was that of the husband, whether it was acquired in such a manner as to make it, under our laws, his separate property or that of the community. And all of his property under the laws of that state could be subject to the payment of debts incurred by him alone." The first decision of the supreme court in this case was rendered in March, 1895, and in it the court then held that as the debt, when incurred in the state of Wisconsin in a business prosecuted by the husband was for the benefit and support of his family, and was there enforceable against all property acquired by the joint labors of husband and wife, though such property might there be designated as separate property of the husband, such debt might be enforced in Washington against the community property. After this decision a rehearing was granted.

Shank & Smith, for the appellants.

Remington & Reynolds, for the respondents.

⁷⁰ GORDON, J. This cause was heard and decided by this court at the January term, 1895: *La Selle v. Woolery*, 11 Wash. 337. Respondents' petition for rehearing having been allowed and the cause reargued, a majority of the court are of the opinion that a wrong conclusion was reached at the former hearing.

The case is fully stated in the former opinion, in the course of which opinion the court said: "If a certain right is given in one state as to property of a certain nature, comity would require that those rights should be enforced in another state as to property of the same nature."

⁷¹ Upon further consideration, we think that this is extending the doctrine of comity too far. While comity might require that rights so acquired, against personal property merely, should be enforced in this state as against such property (*Harrison v. Sterry*, 5 Cranch, 289; *Wharton's Conflict of Laws*, sec. 324), we do not think it ought to be extended to property subsequently acquired in this state, although of the "same nature," and this

principle is wholly inapplicable to real property. The law of the place where the real property is situated must be held to control its disposition, whether by voluntary or forced sale: *McCormick v. Sullivan*, 10 Wheat. 192.

Upon this subject no less a writer than Story has said: "All the authorities in both countries [England and America], so far as they go, recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate": Story's *Conflict of Laws*, sec. 428. "Any title or interest in land or in other real estate can only be acquired or lost agreeably to the law of the place where the same is situate": Story's *Conflict of Laws*, sec. 365.

The character of the property, as regards the question of its being the separate property of either of the spouses, or the property of the community consisting of both spouses or otherwise, is fixed by the law of the state where such property, if real property, is situated. So, too, the character of the debt is determined by the law of the place where it arose. If, by the law of Wisconsin, it was the sole individual debt of the husband, it retained that character here. Its status was fixed by the law of the place of its creation. The debt which the appellants are here seeking to enforce ⁷² being by the law of Wisconsin, where it arose, merely the separate individual debt of the husband, enforceable only against his separate individual property, it follows that the judgment rendered upon that debt cannot be satisfied out of the real property of the community acquired in this state long after the debt arose and judgment was rendered upon it.

The doctrine of the common law is that: "In regard to the merits and rights involved in actions, the law of the place where they originated is to govern. . . . But the form of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act": Story's *Conflict of Laws*, 8th ed., sec. 558.

The settled rule is, that the law of the place where the contract was made must govern in determining the character, construction, and validity of such contract; while the law of the place where suit is instituted upon the contract governs as to "the nature, extent, and form of the remedy, . . . whether arrest of the person or attachment of the property may be allowed; whether a debt is or is not discharged by operation of law, as insolvent laws, or barred by statutes of limitation; rights of set-off; the admissibility and effect of evidence; the modes of pro-

ceeding and the forms of judgment and execution": 2 Abbott's Law Dictionary, 36.

In the case of *Blanchard v. Russell*, 13 Mass. 1, 7 Am. Dec. 106, the supreme court of Massachusetts, speaking by Chief Justice Parker, say: "But the courtesy, comity, or mutual convenience of nations, among which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts; so ⁷³ that it is now a principle generally received, that contracts are to be construed and interpreted according to the laws of the state in which they are made, unless, from their tenor, it is perceived that they were entered into with a view to the laws of some other state. . . .

The rule does not apply, however, to the process by which a creditor shall attempt to enforce his demand in the courts of a state other than that in which the contract was made. For the remedy must be pursuant to the laws of the state where it is sought; otherwise, great irregularity and confusion would be introduced into the form of judicial proceedings."

The rule has long been established in this court that the community real property is not liable for the separate or individual debt of the husband: *Brotton v. Langert*, 1 Wash. 73; *Stockand v. Bartlett*, 4 Wash. 730. And it would be productive merely of confusion and disorder to limit the application of this rule to those debts only which are contracted within this state.

One result of such limitation would be that the court would be required in every case to resort to the law of the state where the debt arose in order to determine what property in that state would be liable for such debt, and then to permit such judgment creditor to have his judgment satisfied out of like property of the judgment debtor in this state, without regard to our own law upon the subject. And it would follow logically from such a rule that property of a judgment debtor which is by our law exempt from levy and sale on execution could be subjected to the payment of a judgment for a debt incurred in some sister state where the exemption laws were different from our own. All these questions relate to the character and extent of the remedy, and not to the construction or validity of the contract, and they are governed and ⁷⁴ controlled by the *lex fori*, and not by the *lex loci contractus*; and to avoid interminable confusion the distinction must be observed.

For these reasons, the order and judgment of the superior court will be affirmed.

Scott, Dunbar, and Anders, JJ., concur.

HOYT, C. J., dissenting. The results which will flow from the rule announced in the foregoing opinion are such as to satisfy me that it cannot be the one required by comity. A husband residing in a sister state, possessed of ever so much property which, though the title is vested in him, is held for the benefit of himself and wife, and would from the manner of its acquisition be here held to be community property, and was there subject to debts for the benefit of the family, which would here be held to be community debts, can escape the payment of all the debts which may have been contracted on the faith of the property which he owned by converting such property into cash and removing to this state and investing it in real estate. That the laws of one state should be so construed as to allow a debtor in another, possessed of abundant means with which to pay all of his creditors, to evade the payment of just debts in this way, does not correspond with my ideas of comity. In my opinion, the conclusion reached upon the former hearing was the correct one and should be adhered to.

REAL PROPERTY—CONFLICT OF LAWS.—The courts of each state have exclusive jurisdiction over questions relating to the rights, titles, and interests in and to land within its limits: *Note to Sentenis v. Ladew*, 37 Am. St. Rep. 572. If a contract for the sale of lands is valid by the laws of the state where such lands are situated, it will be enforced in another state, even though prohibited by the statute of frauds in force there: *Miller v. Wilson*, 146 Ill. 523; 37 Am. St. Rep. 186, and note. See, also, the extended notes to *Alley v. Caspari*, 6 Am. St. Rep. 182; *Molyneux v. Seymour*, 76 Am. Dec. 686, and *Newton v. Bronson*, 67 Am. Dec. 95.

CONFLICT OF LAWS—FORM OF REMEDY.—In the matter of procedure, the *lex fori* controls. Procedure applies to the nature of the action, as whether it shall be covenant, assumpsit, debt, etc., to the rules of pleading and evidence, the order and manner of trial, the nature and effect of process, and perhaps to all other matters of remedy only which are not incorporated into the contract as affecting its nature and obligatory character: *Cochran v. Ward*, 5 Ind. App. 89; 51 Am. St. Rep. 229, and note.

CASS v. DICKS.

[14 WASHINGTON, 75.]

WATERS. RIGHT OF LANDOWNERS TO PROTECT THEIR PROPERTY FROM.—Surface water caused by the falling of rain or the melting of snow, and that escaping from running streams, is regarded as a common enemy, against which anyone may defend himself, though in so doing he inflicts injury upon another.

WATERS. EMBANKMENTS TO PREVENT DRAINAGE OR FLOW OF.—A landowner may lawfully construct upon his land embankments to prevent the flow thereon or thereto of surface waters,

though in so doing he deprives another landowner of the right to drain seepage and other surface water accumulating on the lands of the latter, and thereby inflicts upon him serious injury.

S. H. Piles, for the appellants.

George A. Joiner and Million & Houser, for the respondent.

⁷⁵ ANDERS, J. The appellants are owners of a farm in Skagit county, situated in the upper or northerly end of the delta lying between the north fork of Skagit river and an offshoot or branch thereof known as Dry slough. Their land is bounded on the north and west by the river and on the east by the slough. All the land lying between these streams is fertile and productive agricultural land, but, being low, is liable to inundation at times of high water, unless protected from overflow by means of dikes or embankments. Respondents, or at least a majority of them, own land below that of appellants. From the northern extremity of appellant's land the general surface of the ground gradually descends towards the south, so that the water which escapes over the banks of the streams naturally flows in that direction. Before this controversy arose, ⁷⁶ the whole country between the two streams was protected, though imperfectly, by dykes erected along the margin of the river and that of Dry slough, which is itself a considerable stream. Appellant's land is somewhat lower in the center than on either side, and when the water in the streams is higher than the ordinary stage, a portion of it percolates through the banks and soil and finds its way to the lower ground, where it remains until the water in the river and slough falls, after which it passes off through the soil or sinks beneath the surface. Prior to the commencement of this action, defendants, pursuant to an act of the legislature concerning public dikes and dams, approved February 2, 1888, and the amendments thereto, organized a diking district, including the land south of that of appellants. Upon the organization of the district, the respondent, Charles Johnson, was appointed dyke supervisor by the county commissioners, and was proceeding to erect a large and permanent dyke and roadway from the river to Dry slough, upon and along the northern boundary of Hansen's farm, and parallel with the south line of appellant's land, for the purpose of preventing their lands from being flooded and damaged by the overflow of the streams during extraordinary freshets, when appellants instituted this action to enjoin the erection thereof. A temporary injunction was asked for, and, after a hearing, was denied, and thereupon the work was resumed and continued until practically completed. Appellants then filed a supplemental complaint, setting up the fact that the

dike had been completed after the filing of their original complaint, and alleging that, as constructed, it would prevent the seepage, surface water and overflow from flowing south from their premises as it was accustomed to do, and thereby destroy their ⁷⁷ crops, pasture, and fruit trees, and render their farm valueless for the purposes for which it was used, and praying for a mandatory injunction compelling the removal of the dike. Upon the final hearing, the court found as a fact that no damage has or will result to appellants, or their property, by reason of the construction or maintenance of the dike, and, as a conclusion of law, that appellants were not entitled to an injunction, and thereupon entered judgment dismissing the complaint at the costs of appellants.

Several errors are assigned by appellants which it is unnecessary to discuss in detail, for the reason that the correctness and propriety of the judgment depend wholly upon the question whether or not the respondents, either as individuals or as an association or as a quasi corporation, have a right to protect their lands from damage caused by water flowing over the same from the premises of appellants, either as surface water or water escaping over the banks of the surrounding streams, if, by so doing, the lands of appellants may be injured to a greater or less degree. Of course, if it be true, as the court found, that the dike in controversy will cause no damage to their land, it necessarily follows that appellants are not entitled to the relief demanded, and that the judgment of the trial court must be affirmed.

It must be borne in mind that the water, the flow of which will be obstructed by the dike, is not the current of a natural stream, and therefore the law determinative of the rights of riparian proprietors is not at all applicable to the case in hand. The water which passes from the premises of appellants does not flow in a defined channel, having a bed and banks, and, consequently, is, to all intents and purposes, surface water, and the rights of the respective parties in regard ⁷⁸ thereto must be determined by the law relating solely to surface water. And as to these rights, the decisions of the courts in the various states are far from uniform. The courts of some of the states have adopted the rule of the civil law, by virtue of which a lower estate is held subject to the easement or servitude of receiving the flow of surface water from the upper estate. Under that rule, it is clear that the flow of mere surface water from the premises of an upper proprietor to those of a lower may not be obstructed or diverted to the damage of the latter. But the contrary rule of the common law has been adopted in many of the states and must be followed

in this case, because it is neither inconsistent with the constitution and laws of the United States nor of this state, nor incompatible with the institutions and condition of society in this state: Code Proc., sec. 108.

By that law, surface water, caused by the falling of rain or the melting of snow, and that escaping from running streams and rivers, is regarded as an outlaw and a common enemy, against which anyone may defend himself, even though, by so doing, injury may result to others. The rule is based upon the principle that such water is a part of the land upon which it lies, or over which it temporarily flows, and that an owner of lands has a right to the free and unrestrained use of it, above, upon, and beneath the surface: 24 Am. & Eng. Ency. of Law, 906, 917; Angell on Watercourses, 7th ed., sec. 108 o.

If one in the lawful exercise of his right to control, manage, or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and, if damage thereby results to another, it is *damnum absque injuria*. Mr. Angell, after ⁷⁹ quoting from a leading Massachusetts decision, observes: "It makes no difference in the application of this rule that land is naturally wet and swampy. A coterminous proprietor may change the situation or surface of his land by raising or filling it to a higher grade, by the construction of dikes, the erection of structures, or by other improvements which cause water to accumulate from natural causes on adjacent land and prevent it from passing off over the surface. Such consequences are the necessary result of the lawful appropriation of land, whatever may be its nature, and although they may cause detriment and loss to others."

And Mr. Gould, in section 263 of his excellent work on Waters, second edition, says: "By the common law, no rights can be claimed *jure naturae* in the flow of surface water, and its detention, expulsion, or diversion is not an actionable injury, even when injury results to others."

And in section 275, he further says: "The owner of land may erect barriers upon it to prevent the influx of surface water, whether collected in artificial channels or not, and, if such water is set back or turned aside upon the land of another, to his injury, it affords no cause of action."

Mr. Weeks lays down the law on this subject as follows: "If a landowner whose lands are exposed to inroads of the sea, or to inundations from adjacent creeks or rivers, erects seawalls or dams, for the protection of his land, and by so doing causes the tide, the current, or the waves to flow against the land of his

neighbor, and wash it away, or cover it with water, the land-owner so causing an injury to his neighbor is not responsible in damages to the latter, as he has done no wrong, having acted in self-defense and having a right to protect his land and his crops from inundation": Weeks on Damnum Absque Injuria, 3, 4.

⁸⁰ The same doctrine is maintained in the following cases: Missouri Pac. Ry. Co. v. Keys, 55 Kan. 205; 49 Am. St. Rep. 249; Hoard v. Des Moines, 62 Iowa, 326; Shelbyville etc. Co. v. Green, 99 Ind. 205; Cairo etc. R. R. Co. v. Stevens, 73 Ind. 278; 38 Am. Rep. 139; Taylor v. Fickas, 64 Ind. 167; 31 Am. Rep. 114; Mailhot v. Pugh, 30 La. Ann. 1359; Schneider v. Missouri Pac. Ry. Co., 29 Mo. App. 68; Burke v. Missouri Pac. Ry. Co., 29 Mo. App. 370; Bates v. Smith, 100 Mass. 181; Goodale v. Tuttle, 29 N. Y. 459; Hoyt v. Hudson, 27 Wis. 656; 9 Am. Rep. 473; Jones v. Hannovan, 55 Mo. 462; Imler v. Springfield, 55 Mo. 119; 17 Am. Rep. 645; McCormick v. Kansas City etc. R. R. Co., 57 Mo. 433; Abbott v. Kansas City etc. R. R. Co., 83 Mo. 271; 53 Am. Rep. 581; Bowlsby v. Speer, 31 N. J. L. 351; 86 Am. Dec. 216; Gannon v. Hargadon, 10 Allen, 106; 87 Am. Dec. 625; Dickinson v. Worcester, 7 Allen, 19; Bangor v. Lansil, 51 Me. 521; Parks v. Newburyport, 10 Gray, 28.

The supreme court of California, while holding that a lower proprietor has no right to obstruct the passage over his land of surface water resulting from rain, snow, or springs, declares that a proprietor of higher land bordering on a river cannot enjoin the erection of a levee or embankment by the proprietor of the lower land adjoining his in the rear, the design of which is to prevent the overflow of the river from flooding the lower land, though such embankment may increase the accumulation of flood water on the higher land, the owner of the higher land having like means of protecting his own land: McDaniel v. Cummings, 83 Cal. 515. See, also, Lamb v. Reclamation Dist., 73 Cal. 125; 2 Am. St. Rep. 775; Gray v. ⁸¹ McWilliams, 98 Cal. 157; 35 Am. St. Rep. 163.

Now, it clearly appears from the evidence in this case that the appellants can protect their land from overflow by repairing and raising the dikes which they have hitherto depended upon for their protection against floods and freshets. If they refuse to do so, they, and not others, must suffer the consequences. They have a perfect right to permit their own land to be flooded, and the respondents have no right to prevent them from doing so, but we think they have no legal right to prevent the respondents from resorting to any proper means of self-protection.

We have thus far proceeded upon the theory that the dike

complained of will set back the water upon appellant's land, and that injury will thereby result. The trial court, however, as we have already observed, found the facts to be otherwise, and although the evidence upon that point is conflicting, we are unable to say that the conclusion of the court is not fairly sustained by the evidence. It appears from the undisputed proofs that the land included within the diking district has not hitherto been drained directly into the sea, but into the contiguous streams, and especially into Dry slough, the bed of which is lower than the adjoining land. It further appears that a ditch has been excavated along the north side of the dike from Dry slough to the river, in which boxes have been or will be placed to carry off all surplus water. And, according to the testimony of several of the witnesses, this ditch will convey away all surface water and seepage which will ordinarily flow from appellant's land; and, if that is so, they have no cause of complaint, so far as ordinary surface water is concerned. For protection ⁸² against floods and sudden freshets they must rely upon their own exertions. The respondents have done no illegal act, and therefore ought not to be compelled to undo what they have done at great expense and as a means of self-protection.

The judgment must be affirmed.

Hoyt, C. J., and Gordon and Scott, JJ., concur.

Dunbar, J., dissents.

WATERS—SURFACE—RIGHT OF LANDOWNER TO PROTECT HIMSELF AGAINST.—The rule that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, without liability to an adjoining owner, is subject to the rule that every proprietor must so use his property as not to unnecessarily and negligently injure his neighbor: *Beatrice v. Leary*, 45 Neb. 146; 50 Am. St. Rep. 546, and note. See, especially, the note to *Kansas City etc. R. R. Co. v. Smith*, 48 Am. St. Rep. 588, where the cases on this subject are collected.

LARSEN v. WINDER.

[14 WASHINGTON, 109.]

AN INJUNCTION GRANTED WITHOUT NOTICE, except in case of emergency shown in the complaint, is by the statute of Washington void, but the courts may grant a restraining order to be operative to keep things in statu quo until notice can be given and the application for an injunction properly presented.

RECEIVER, NOTICE OF APPLICATION FOR.—The appointment of a receiver of the property of a person, made without notice to him of the application therefor, is void, though the statute

of the state wherein the appointment is made is silent upon the subject of such notice. Perhaps where imperative necessity exists for immediate action, a temporary receiver may be appointed to act as such until notice can be given of the application.

Hogan & McGerry, for the appellant.

J. C. Cross, for the respondent.

¹⁰⁹ GORDON, J. Respondent filed his complaint in this action with the clerk of the superior court on the twenty-second day of January, 1895, which complaint alleged in substance that appellant and respondent were partners engaged in the grocery business within the county of Chehalis, and set out what purported to be a copy of the articles of copartnership. It also alleged appellant's failure to keep and perform certain agreements which the articles required him to keep and perform, and asked for an accounting, for the appointment of a receiver for the property, and an injunction restraining the appellant from interfering therewith.

Upon the filing of the complaint, and without any notice thereof to the appellant (defendant in said action), the court made an order granting an injunction prohibiting and restraining appellant "from in any ¹¹⁰ way disposing of, changing the possession of, or otherwise interfering with the property of the said partnership, save and except to keep and maintain the same securely and subject to the order of the court." The court, further proceeding upon respondent's application and without any notice whatever to the appellant, made an order appointing a receiver, and commanding and directing him to possess himself of the property and moneys (described in the order) and fixing his bond. Said order further directed the appellant Winder "to deliver possession of the said property and the whole of the said property to the said receiver upon production by the said receiver of a certified copy of this order." Thereafter, and within the time allowed by statute, an appeal was taken from each of said orders.

1. We think that the action of the court in granting an injunctive order in form as made, without notice to the appellant, and without containing any provision limiting it to a day certain, fixed by the court, upon which a hearing should be had and an opportunity afforded the appellant to show cause why it should not thereafter be continued in force, was without jurisdiction and void.

Section 270 of the Code of Procedure is as follows: "No injunction shall be granted until it shall appear to the court or judge granting it that some one or more of the opposite party

concerned had had reasonable notice of the time and place of making application, except that in cases of emergency, to be shown in the complaint, the court may grant a restraining order until notice can be given and hearing had thereon."

And this court, in *State ex rel. Miller v. Lichtenberg*, 4 Wash. 407, referring to this section, said: ¹¹¹ "The provisions of section 270 show a clear intent on the part of the legislature that no injunction shall be granted without notice to the adverse party. The only power that is conferred upon the court by said section is to grant an order to remain in force long enough to enable the required notice to be given. . . . The only purpose of such restraining order is to keep things in statu quo until the matter can be brought regularly before the court. And whether such order terminates by its own force or is terminated by order of the court, the clear intent of the legislature appears in said section to protect the rights of a party from other than a temporary interference without first giving him an opportunity to be heard. The court gets no jurisdiction in the matter for the purpose of interfering with the rights of either party until the giving of notice as required by statute."

We may add that in this case the allegations of the complaint were, in our opinion, wholly insufficient to show the existence of any emergency or other reason for proceeding without notice in the first instance.

2. As to the order appointing a receiver, many of the reasons which exist requiring that notice should be given to the adverse party of an application for an injunction are equally applicable to this branch of the case. The main point in difference, however, is that the statute in the one case requires notice, while in the other it is entirely silent concerning the subject, and resort must be had for guidance to the general principles and rules of equity. Mr. High, in his work on Receivers, third edition, section 111, says: "It may be stated as the settled practice, both in England and in America, to require the moving party to give due notice of the application to defendant, over whose effects he seeks the appointment of a receiver, in order that he may have an opportunity of being heard in defense."

¹¹² And in section 112, he further says: "The rule of practice thus stated, requiring notice to defendant before an application for a receiver will be entertained, would seem to be not a matter of discretion with the court, but an inflexible rule which the courts are not at liberty to disregard. And it is held to be error for the court to entertain the application, and to appoint a receiver without notice to the adverse party."

These propositions are abundantly supported by the authorities: *French v. Gifford*, 30 Iowa, 148; *Bisson v. Curry*, 35 Iowa, 72; *Railway Co. v. Jewett*, 37 Ohio St. 649; *Rogers v. Dougherty*, 20 Ga. 271; *Arnold v. Bright*, 41 Mich. 207; *Salling v. Johnson*, 25 Mich. 489. In the case last cited the court say: "It is not necessary to explain that such a proceeding [the appointment of a receiver without notice] is not within the judicial power of anyone, and is a pure usurpation. The order cannot be lawfully enforced, and should be expunged, as soon as possible, as made without proper consideration." In *Arnold v. Bright*, 41 Mich. 207, it is said: "The court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it. . . . A similar prejudgment of controversies by the appointment of receivers has been held in several cases to be wholly unwarranted by law."

Subdivision 5 of section 1 of the act of March 8, 1893 (Laws, p. 119), relating to appeals, provides that an appeal may be taken to this court from an order appointing a receiver. It is not to be presumed that the legislature intended such an absurdity as that a party might appeal from an order against the making of ¹¹³ which he had no right to be heard in the lower court upon either the law or the facts.

In *Brundage v. Home Sav. etc. Assn.*, 11 Wash. 278, this court held that, upon an application for the appointment of a receiver, the moving party had no right to read affidavits which had not been served upon the adverse party. We are not required in this case to go so far as to hold that where it is made to appear by the circumstances in a given case that an imperative necessity exists for the appointment of a temporary receiver, the court might not afford relief pending a hearing upon proper notice. But in such case "the particular facts and circumstances which render such a proceeding proper should be set forth in the bill": *French v. Gifford*, 30 Iowa, 148.

The court, in the absence of any notice to the appellant, could not assume that he would be unable to show any sufficient reason why a receiver should not be appointed. The complaint herein shows that the business was being conducted in the name of the appellant, and, ostensibly, the respondent was not interested in it. All of the allegations set out in the respondent's complaint and relied upon for the appointment of the receiver were issuable merely, and the appellant would in nowise be concluded by them. At all events, the appellant was entitled to an opportunity to be heard as to the propriety of appointing a receiver, and the fitness of the person so nominated.

In *Roberts v. Washington Nat. Bank*, 9 Wash. 12, this court has said: "The right to appoint receivers vested in the courts should only be exercised when it is clearly shown to be necessary to prevent the defeat of justice. There has been a tendency in recent years among courts to appoint receivers almost as a matter of course, if the ¹¹⁴ case as made by the plaintiff's complaint seems to warrant such action. This tendency has advanced at least as far as the proper administration of justice will allow, and, in our opinion, it is the duty of the courts rather to restrict than extend this growing tendency."

The orders appealed from will be reversed.

Hoyt, C. J., and Anders, Dunbar, and Scott, JJ., concur.

INJUNCTION—NOTICE.—No notice to the defendants of an application for a special injunction ought to be required in cases where the injury may be immediate and destructive, and thus irreparable, or where the giving of the notice might precipitate the act sought to be enjoined: *Ex parte Martin*, 13 Ark. 198; 58 Am. Dec. 321.

RECEIVERS—NOTICE.—The opposite party is, as a rule, entitled to notice of application for a receiver and to a hearing thereon: *Extended note to Cortleyeu v. Hathaway*, 64 Am. Dec. 483.

JOLLIFFE v. BROWN.

[14 WASHINGTON, 155.]

CONSTITUTIONAL LAW—TITLE OF STATUTE.—If the title of a statute is sufficiently comprehensive to embrace all its provisions, it cannot be rendered insufficient by the striking out or disregarding of certain sections as unconstitutional, though, had those sections not been incorporated in the act as passed, the title would have been insufficient.

CONSTITUTIONAL LAW—DAMAGES.—A statute imposing on a railway corporation for all stock injured by collision with a train or engine the penalty of double its value, if within forty-eight hours the engineer and brakeman do not report the accident to the division superintendent, with the name of the owner of the stock, if known, and the superintendent does not immediately thereafter transmit such report to the owner, when known, and when not known, then to the agent of the corporation nearest the place of the accident, to be by him kept in a conspicuous place in his office for the inspection of the public, is unconstitutional, because the penalty is imposed whether the failure to give notice is willful or not, and although the corporation may not have been in fault in killing the stock, and such killing may have been due to the fault of its owner, and he may have had full knowledge thereof at the time of the occurrence.

RAILWAY CORPORATION—DUTY TO FENCE RIGHT OF WAY.—A statute imposing on railway corporations a penalty for stock killed by collision with an engine or train does not impose on such corporations the duty of fencing their rights of way.

CONSTITUTIONAL LAW—ATTORNEYS' FEES, STATUTE GRANTING.—A statute granting to a certain class of litigants the right to recover attorneys' fees as part of their costs of suit is unconstitutional, as class legislation, unless the right to recover such fees is restricted to cases in which the unsuccessful litigant has been wrongfully acting, and the attorneys' fees may be regarded as a penalty imposed upon him therefor.

CONSTITUTIONAL LAW—EVIDENCE—BURDEN OF PROOF.—A statute declaring that, in all actions against railway corporations for injuries to stock by collision with moving trains, it should be prima facie evidence on the part of the defendant to show that the track was not fenced so as to turn stock therefrom, is not unconstitutional, though such corporations are not required to fence their tracks. It merely establishes a prima facie rule of evidence.

Wilshire & De Steiguer, for the appellant.

Carr & Preston and W. R. Bell, for the respondents.

156 SCOTT, J. This was an action to recover for the value of a cow killed by the defendant's train, and is brought under the provisions of the act approved March 15, 1893 (Laws 1893, p. 418), making railway companies operating unfenced lines of railroad liable for double the value of stock killed, and double damages are sought in this case and also an attorney's fee. The first, third, and fourth sections of the act are involved in this controversy. The lower court held the act unconstitutional and rendered a judgment against the plaintiff, whereupon this appeal was taken. A number of questions have been argued relating to the constitutionality of the sections specified, and as to whether, if one or more of them are unconstitutional, any part of the act can be considered sufficiently independent thereof to stand. The respondents first attack section 3. This section is as follows:

"Sec. 3. When any stock shall be killed or injured by collision with a railroad train or with a railroad engine, it shall be the duty of the engineer and fireman of the engine, within forty-eight hours thereafter, to report the accident to the division superintendent of the road, stating the manner of the accident, place of its occurrence, and the name of the owner of the stock, killed or injured, if known, and, immediately upon the receipt of such report, it shall be the duty of such division superintendent to transmit the same to the owner of the stock, if known, and if not known to cause the said report to be filed with the agent of the company nearest the place of the accident, to be by him kept at his office for the inspection of the public. Failure on the part of the officers or agents in this section mentioned to comply with the requirements of this section shall subject the person or corporation owning or operating the railway to a penalty of double the market value of the stock injured or killed,

to be recovered ¹⁵⁷ by the owner thereof in an action in the superior court of the county."

It is first contended that this section is void on the ground that it is not embraced within the title of the act, which is as follows: "An act to protect the owners of stock from injury thereto by moving railway trains, declaring the law of negligence and providing for a reasonable attorney's fee in all actions for such injury."

It is practically conceded, however, that if the act is considered as a whole, the title is comprehensive enough to embrace all its provisions, but if, as contended by the respondents, the other sections should be stricken out as unconstitutional, it is argued that there would be no reference in the title of the act sufficiently broad to include the provisions of section 3. It is conceded that the principal purpose of the title is to advise legislators of the nature of the legislation contained in the bill, and it seems to us that if the title was comprehensive enough to embrace the provisions of section 3, conceding the entire act constitutional, this purpose has been fully served, although certain sections should thereafter be held unconstitutional, and we are of the opinion that this objection is not tenable.

Other objections urged against the constitutionality of this section are, that it enables the plaintiff to recover double the market value of the stock killed, and fixes an absolute responsibility where the notice is not given, and it also assumes that the company would have knowledge of such killing in all cases.

It will be observed that this section, standing alone, imposes an obligation upon the railroad company, in case notice is not given, to pay double the value of the stock injured or killed, whether the right of way is fenced ¹⁵⁸ or unfenced, and it makes no exception of cases where the owner of the stock has knowledge of such killing at the time, although the notice is not given. The sole duty imposed upon the company under this section is the giving of the notice specified, and, in case of a failure to do so, willfully or otherwise, it is mulcted in damages in double the value of the stock killed, regardless of whether the company was at fault or not in killing it, or how much at fault the owner of the stock may have been. We think the weight of authority is against the constitutionality of such legislation. A somewhat similar question was decided by this court in *Oregon Ry. & Nav. Co. v. Smalley*, 1 Wash. 206; 22 Am. St. Rep. 143. See, also, *Zeigler v. South & North Ala. R. R. Co.*, 58 Ala. 594, and *Denver etc. Ry. Co. v. Outcalt*, 2 Colo. App. 395.

Legislation requiring railroad companies to fence their tracks has been generally sustained as a legitimate exercise of the police power of the state, on the ground that it tends to promote the safe operation of trains and to the safety of the traveling public. It has been said that the police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state, and to that end persons and property are subjected to many restraints and burdens in order to secure general comfort, health, and prosperity. But it is difficult to see how the giving of the notice specified would legitimately fulfill any of these purposes. If it does, the penalty should be limited to cases where the company has knowledge of the killing. It cannot be assumed that the company would have such knowledge in all instances, and it would seem, also, that it should be limited to cases where the owner of the stock killed or injured did not have ¹⁵⁹ knowledge of the fact, and was not himself at fault in the premises.

It is further contended that section 3 cannot be construed with reference to section 1 so as to limit its operation to cases where the railroad company has failed to fence its track, and the specified notice is not given, for the reason that there is no law in this state requiring railroad companies to fence, and consequently there is no basis for the imposition of a penalty for a failure to do so. A question very like this was also decided by this court in *Oregon Ry. & Nav. Co. v. Smalley*, 1 Wash. 206, 22 Am. St. Rep. 143, where a majority of the court held that the act which fixed a liability for killing stock where the right of way was not fenced imposed no duty upon the company to fence. The authorities are not uniform upon this proposition, and it has been held that legislation subjecting unfenced roads to liabilities and penalties from which roads which were fenced were exonerated, was indirectly intended to compel railroad companies to fence their right of way. The decision rendered in *Oregon Ry. & Nav. Co. v. Smalley*, 1 Wash. 206, 22 Am. St. Rep. 143, was by a divided court, and the writer hereof was one of the dissenting judges, but sufficient grounds have not been presented in this case to warrant overruling it, and, construing this act in the light of that decision, it must be conceded that no obligation is imposed upon railway companies to fence their rights of way, and section 3 cannot be sustained upon that ground.

It is next contended that section 4 of the act, which is as follows: "In all actions for injury to stock by collision with moving railway trains where the plaintiff shall recover, and in actions to recover a penalty under this act in which the plaintiff

shall recover judgment, the judge shall allow a reasonable attorney's fee to be taxed as a part of the costs," ¹⁶⁰ is invalid, on the ground of its being an attempt to grant special privileges and advantages to one class of litigants at the expense and to the detriment of another. Legislation requiring railroad companies to pay an attorney's fee in case of litigating such claims, unsuccessfully, where none was imposed upon the plaintiff if unsuccessful, has been sustained in some instances, and generally upon the ground that it was in the nature of a penalty for failure to perform a duty imposed by statute: See *Illinois Cent. Ry. Co. v. Crider*, 91 Tenn. 489; *Gulf etc. Ry. Co. v. Ellis* (Tex.), 18 S. W. Rep. 723; *Jacksonville etc. Ry. Co. v. Prior*, 34 Fla. 271.

It cannot be sustained here as a penalty, for, as has been said, there was no duty to fence imposed by statute, and the provision requiring the notice to be given cannot be sustained in the unlimited manner in which the power was sought to be exercised as expressed in the section. There is a broad distinction to be recognized between legislation requiring a party to pay actual damages occasioned, and that which would impose a penalty in addition thereto. Such legislation can be sustained only where the party on whom the penalty is imposed is in fault or guilty of a wrong. Considered as an attorney's fee purely and simply, it distinguishes between classes of persons and not as to subjects of litigation or classes of controversies, and by the weight of authority has been held to be unconstitutional: *Denver etc. Ry. Co. v. Outcalt*, 2 Col. App. 395; *St. Louis etc. Ry. Co. v. Williams*, 49 Ark. 492; *South & North Ala. R. R. Co. v. Morris*, 65 Ala. 193; *Wilder v. Chicago etc. Ry. Co.*, 70 Mich. 382; *Chicago etc. R. R. Co. v. Moss*, 60 Miss. 641.

¹⁶¹ The first section of the act is as follows: "That in all actions against persons or corporations owning or operating steam railways in the state of Washington, for injuries to stock of any kind, except hogs, by collision with moving trains, it shall be prima facie evidence of negligence on the part of the defendant to show that the railroad track was not fenced so as to turn said stock from the track," and it is contended that it is so connected with sections 3 and 4 that it should not be permitted to stand independently of them, and also that its provisions operate as a penalty where there is no violation of a duty, but it seems to us that this is not well founded. This section relates to a matter entirely independent of the others, and establishes a rule of evidence only. Where the fact of the killing has been proven, it shifts the burden of proof as to negligence upon the defendant. The facts of the case are usually peculiarly within the knowledge

of the railroad company, and it is not an unwarranted exercise of legislative power to impose upon such parties the burden of showing that they are not at fault. It establishes only a *prima facie* rule of evidence, and legislation of this kind has been so universally sustained that it is needless to refer to any of the numerous cases cited thereon. No evidence was introduced upon the trial of this action of the circumstances relating to the killing of the cow, the court below basing its decision upon the proposition that all the sections involved were unconstitutional. In arriving at a different conclusion and holding section 1 to be in force, a *prima facie* case of negligence was made out and the burden of proof was placed upon the railroad company.

For this reason the judgment is reversed, and the cause remanded for trial.

Hoyt, C. J., and Dunbar, Anders, and Gordon, JJ., concur.

STATUTES--ATTORNEYS' FEES.—A statute which permits the plaintiff, in an action against a railway company for a violation of its provisions, to recover, in addition to the damages therein provided for, an attorney's fee, confers no special privilege prohibited by the constitution, nor can it be regarded as imposing a penalty for exercising the right of defense: *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312; 31 Am. St. Rep. 477. The constitutionality of a similar statute is discussed in the case of *Coal Co. v. Rosser*, 53 Ohio St. 12; ante, p. 622.

COMMERCIAL BANK v. CHILBERG.

[14 WASHINGTON, 247.]

BANKING—CHECK AND GARNISHMENT, CONFLICT BETWEEN.—A check drawn on a bank does not, until accepted, operate as a transfer of the funds of the drawer therein, and therefore is subject to a garnishment served after the drawing and delivery of the check and before its payment or acceptance by the bank.

Thomas Carroll and Hagerman & Carroll, for the appellant.

F. Campbell, for the respondent.

247 SCOTT, J. The Commercial Bank of Tacoma obtained a judgment against the defendant, Chilberg, and caused a writ of garnishment to be served upon the Pacific National Bank, and at that time said last-named **248** bank was indebted to Chilberg in the sum of two hundred and thirty-seven dollars and sixty-one cents, on a general deposit. Prior to the service of said writ, Chilberg had given checks against said amount aggregating two hundred and twenty-three dollars and twenty-one cents, and he appeals from the judgment of the lower court holding that the plaintiff was entitled under its garnishment to said moneys on deposit at the time the writ was served.

Appellant attacks the finding of the lower court that the Pacific National Bank had no notice of the issuing of said checks prior to the time the writ of garnishment was served on it. It is conceded that such notice was given and the checks were presented for payment prior to the time of the answer in the garnishment proceedings.

After an examination of the testimony, we are satisfied with the findings of the court on the questions of fact, and the judgment of the court thereon is correct in law. The issuing of these checks by the appellant did not constitute a transfer of the funds. The relation between a banker and a general depositor is one of debtor and creditor, and there is no privity of contract between a bank and a holder of a check given by a depositor until such check is accepted by the bank. Prior to its presentment even the drawer could countermand its payment: *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; 7 Am. Rep. 314; *Bank of the Republic v. Millard*, 10 Wall. 152; *Carr v. National Security Bank*, 107 Mass. 45; 9 Am. Rep. 6.

Affirmed.

Hoyt, C. J., and Anders, Dunbar, and Gordon, JJ., concur.

CHECKS—ACCEPTANCE.—A check drawn by a depositor on the bank, unless it has been accepted, does not constitute an assignment so as to vest the fund or credit against which it is drawn, or any part thereof, in the payee or holder: *Bank v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St. 151; 40 Am. St. Rep. 660, and note. The giving of a check by a bank depositor operates, at least after presentment, as an assignment to the holder of a sufficient amount of the deposit to pay the check, and is, therefore, a definite appropriation of that sum to its payment, binding upon all the parties to the check: *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634; 31 Am. St. Rep. 403. This subject is fully treated in the extended notes to *Hemphill v. Yerkes*, 19 Am. St. Rep. 609, and *Sowden v. Craig*, 96 Am. Dec. 132.

HATHAWAY v. YAKIMA WATER, LIGHT & POWER CO.

[14 WASHINGTON, 469.]

LICENSE, RIGHT TO REVOKE.—An oral license to enjoy a permanent privilege on the land of another, as to maintain a ditch thereon intended for permanent use, is revocable by the licensor, although money has been expended thereon by the licensee.

Whitson & Parker and Reavis & Englehart, for the appellant.

F. H. Rudkin and Jones & Newman, for the respondent.

469 GORDON, J. The respondent brought this action for the purpose of enjoining appellant from keeping and maintain-

ing a waterway or waste ditch across certain lands. The controlling facts in the case can best be stated by setting forth the findings of the lower court. They are as follows: "1. That at all times mentioned in the complaint herein, the plaintiff was and now is the owner in fee simple of all those certain lots, tracts, or parcels of land situate, lying, and being in the county of Yakima, state of Washington, and particularly described as follows [then follows description]; 2. That the defendant is a corporation organized and existing under the laws of the state of Washington; 3. That for more than one year last past the defendant has unlawfully and wrongfully kept and maintained a large waste ditch upon, through, over, and across the above-described lands of plaintiff commencing ⁴⁷⁰ at a point in the southeast corner of lot 28 above described, thence in an easterly direction along and across the southerly portion of lots 29, 31, and 32, above described: 4. That said defendant has no right of way for said waste ditch across the above-described lands of plaintiff, and has no interest or easement therein, but the plaintiff is the sole and absolute owner in fee of the above-described lands and every part thereof; 5. That the defendant has made no compensation to plaintiff for or on account of the use and occupation of said above-described lands by said waste ditch or for any easement or interest in said lands, and said defendant refused and still refuses so to do; 6. That the defendant threatens to and will continue so to use and occupy said above-described lands of plaintiff by said waste ditch, and is attempting to deprive the plaintiff herein of his said property, without paying or making any compensation therefor and without due process of law, and, if said use and occupation by the defendant of plaintiff's said land for said waste ditch is continued, such use and occupation will ripen into an easement, and the plaintiff will be wholly deprived of his said property without compensation, to his great and irreparable damage and injury, and plaintiff has no plain, speedy, or adequate remedy at law."

The following finding was specially requested by the appellant, viz: "That said defendant entered upon the premises described in the complaint and constructed said ditch with the knowledge and consent of the plaintiff, and plaintiff granted verbally the right of way therefor prior to said entry, and has continuously occupied and used the same ever since as a right of way for its canal, and same is necessary for the operation of its works, and cannot be operated without the same."

Thereupon the court struck therefrom the words, ⁴⁷¹ "and plaintiff granted verbally the right of way therefor prior to said

entry," and made the finding as requested. The appellant further proposed and requested the court to adopt the following as a conclusion of law from the findings so made, viz: "That the plaintiff granted a license for said right of way which is irrevocable, and defendant is entitled to the use thereof and remain in possession, and this action should be dismissed."

This conclusion the court refused to adopt and entered a decree enjoining and restraining appellant from keeping or maintaining said waste ditch upon the lands of the plaintiff (respondent), and from in any manner interfering with the free use and occupation by the respondent of the said land, but incorporated the following provision therein, viz: "Provided, however, if the said defendant [appellant] shall, within thirty days from the date hereof, file an additional answer in this cause praying for the condemnation and appropriation of a right of way across plaintiff's said lands for said waste ditch, upon making compensation therefor, or shall, within said period of thirty days from date hereof, commence an independent action for the purpose of condemning and appropriating a right of way as aforesaid, then this decree shall be of no force or effect, but otherwise the same shall be of full force and effect from and after thirty days from the date hereof."

The cause comes here upon appeal from this decree, and notwithstanding the court refused to find that "plaintiff [respondent] granted verbally the right of way therefor prior to said entry," the argument has proceeded upon the assumption that such consent was given, and we will dispose of the case upon that assumption.

The question mainly argued, and the only one necessary ⁴⁷² to be considered, may be stated as follows: Is a verbal license to enjoy a permanent privilege on the land of another revocable at the will of the licensor, after money has been expended thereupon by the licensee? The authorities bearing upon this question are so conflicting as to render a review of them of little importance, and we indorse what is said by the learned editor of the American State Reports, in an able note to Lawrence v. Springer, found on page 712 of volume 31, viz: "The authorities upon this branch of the law have ever been, and still remain, so conflicting as to make their reconciliation totally impossible upon any conceivable theory." Continuing this subject, the learned writer, at page 715, says: "At common law, a parol license to be exercised upon the land of another creates an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or

not the licensee has exercised acts under the license, or expended money in reliance thereon. In many of the states this rule prevails, while in others the licensor is deemed to be equitably estopped from revoking the license, after allowing the licensee to perform acts thereunder, or to make expenditures in reliance thereon. These two lines of cases cannot be reconciled; for one of them holds that an interest in land cannot be created by force of a mere parol license, whether executed or not, while the other declares that where the licensee has gone to expense, relying upon the license, the licensor may be estopped from revoking it, and thus an easement may be created. The former line of cases, it seems to us, is founded upon the better reason."

Counsel for the parties to this litigation have cited many authorities in support of the respective positions assumed by the "two lines of cases" referred to, but, in our opinion, have added nothing new to the question. ⁴⁷³ Nor will we attempt to do so, and, after a laborious examination of the authorities, we think that the decree must be affirmed. The court of appeals of New York, in *Crosdale v. Lanigan*, 129 N. Y. 604, 26 Am. St. Rep. 551, announces the doctrine: "That a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is nevertheless revocable at the option of the licensor, and this although the intention was to confer a continuing right and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements, easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments." We think the principle so announced is supported by the great weight of authority bearing upon the question.

Section 1422 of the General Statutes provides that: "All conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate, shall be by deed."

The waste ditch in question is from forty to sixty feet wide and from four to six feet in depth, and was designed by appellant for permanent use. In *Hodgkins v. Farrington*, 150 Mass. 19, 15 Am. St. Rep. 168, it is said that: "A paramount right to hold another's land, subject to a particular purpose, to enter upon it, or to maintain structures upon it without the consent

of the owner, is an important interest in the land, which cannot pass without the formalities required by the statute."

474 On page 550 of volume 13 of the American and English Encyclopaedia of Law, it is said that "in most of the states it has been held that even where money has been expended by the licensee on the faith of the license, the licensor may yet exercise his power of revocation."

The cases cited by appellant from New Hampshire and Arkansas are, we think, expressly overruled by later decisions in said states: *Batchelder v. Hibbard*, 58 N. H. 269; *Houston v. Laffee*, 46 N. H. 505; *Walker v. Shackelford*, 49 Ark. 503; 4 Am. St. Rep. 61. Other cases cited by appellant are based upon the earlier English decisions which have since been overruled.

The statute invests the appellant and like corporations with power to condemn land for corporate purposes, and the decree in this case only requires that appellant shall proceed to exercise that power or surrender possession of respondent's premises.

We think that the lower court did not err in its conclusions, and its decree is affirmed.

Anders and Scott, JJ., concur.

Dunbar, J., dissents.

LICENSE—PAROL—POWER TO REVOKE.—A parol license to ditch and divert water for irrigation purposes cannot be revoked by the licensor or his grantee with notice after labor and money have been expended in pursuance thereof by the licensee: *McBroom v. Thompson*, 25 Or. 559; 42 Am. St. Rep. 806, and note. A parol license to drain water over the land of another is revocable, in the absence of proof that its revocation will work irreparable damage to the licensee: *Lawrence v. Springer*, 49 N. J. Eq. 289; 31 Am. St. Rep. 702, and extended note. See, also, the extended notes to the following cases: *Johnson v. Skillman*, 43 Am. Rep. 195; *Hazelton v. Putnam*, 54 Am. Dec. 166; *Rerick v. Kern*, 16 Am. Dec. 501, and *Ricker v. Kelly*, 10 Am. Dec. 40.

STATE v. TYLER.

[14 WASHINGTON, 495.]

GARNISHMENT.—COUNTIES are not subject to garnishment.

JUDGMENT, VOID.—A JUDGMENT AGAINST A COUNTY AS GARNISHEE is void, because there is no authority to serve garnishment process upon it.

GARNISHMENT.—COUNTIES AND OTHER MUNICIPAL CORPORATIONS are not made subject to garnishment by the fact that the statute names corporations as among those upon whom process in garnishment may be served.

Samuel R. Stern, for the appellant

J. W. Feighan, for the respondent.

⁴⁹⁵ HOYT, C. J. By this proceeding relator sought to compel the payment of a judgment against Spokane county. Such proceedings were had and such a showing made as to entitle relator to the relief sought if the judgment was such that it could be enforced against the county. Such judgment was rendered more than a year before the commencement of this proceeding, and was so rendered in the superior court for Spokane county, and no appeal had been prosecuted therefrom. It follows that any error which may have been committed by the court in which such judgment was rendered in the action would constitute no defense to this proceeding, unless the error was of such a nature ⁴⁹⁶ as to render the judgment void. Appellant might safely concede that error was committed in the rendition of the judgment, and yet be entitled to the relief prayed for. The only ground on which the respondent could successfully defend was, that the judgment was absolutely void for want of jurisdiction.

It is not claimed but that process was regularly served in the action in which such judgment was rendered. Hence, if the complaint was such as to give the court jurisdiction of subject matter which under any circumstances could be the foundation of a judgment against the county, it must follow that jurisdiction of the subject matter and of the person of the defendant had been obtained in the action in which the judgment was rendered, and that for that reason it was not void, but, at most, simply voidable.

It appeared from the papers, as well as from the process served upon the county in the action in which the judgment was rendered, that it was sought to charge the county by garnishee process as a debtor of the principal defendant in the action, and it is claimed on the part of the respondent that there is no power in any court to render a judgment against a county as garnishee defendant. The appellant contends that a county is subject to garnishment the same as a private corporation, and that, if it is not, the judgment rendered against it was only erroneous and not void; that the subject of garnishment being within the jurisdiction of the superior court, it had jurisdiction of the subject matter, and, having obtained jurisdiction of the person of the county by the service of process, had such jurisdiction of the subject matter and of the person of the respondent as to authorize it to enter a judgment.

It is familiar law that a judgment rendered in an ⁴⁹⁷ action

in which a court has jurisdiction of the person upon a complaint which does not state a cause of action is not void but simply erroneous, and it is upon this principle that the contention of the appellant, that the judgment in question is not void, is founded. But, in our opinion, if the county was not subject to garnishee process, the complaint in the action in which the judgment in question was rendered not only failed to state a cause of action, but affirmatively showed that no judgment could be rendered thereon against the county. It must be conceded that if, under the legislation of the state, the county could not be sued at all, a judgment rendered against it would be absolutely void, and, in our opinion, a judgment will be equally void which was rendered in a proceeding to which the county could not, under the law, be made a party. If the process served upon the county was one which was not authorized by the statute, no rights could be obtained by such service. If it commanded the county to do that which, under the statute, it had no right to do, it was without force. It follows that, in our opinion, the court had no jurisdiction of any subject matter which could authorize a judgment against the county, and likewise had no such jurisdiction of the person of the county as to authorize the entry of judgment against it if the county was not subject to garnishment. If, on the other hand, it was subject to garnishment, the claim that the judgment was void by reason of the fact that the particular debt which was sought to be reached was not subject to garnishment cannot be sustained. Such a fact might be sufficient to show that the court committed error in the rendition of the judgment, but would not be sufficient to show that it acted without jurisdiction in so doing. It follows that the material ⁴⁹⁸ question is as to whether or not a county is, under our statute, subject to garnishment.

This is an important question and has been elaborately argued by counsel. The authorities upon the subject are not entirely uniform, but, from the cases cited in the briefs and from such other cases as we have been enabled to examine, we are satisfied that an overwhelming weight of authority is in favor of the proposition that counties are not subject to garnishment. It is held that a county is organized for public purposes, and should not be made the instrument by the aid of which to obtain private ends; that public policy will not permit the business of such a corporation to be interfered with by private parties in the pursuit of their own private objects; that for these and other reasons such corporations are not subject to this process, unless the legislature has, by express enactment, so provided; that the inten-

tion of the legislature to so provide will not be inferred from the fact that it has authorized such corporations to be sued, nor from the fact that it is provided in the act relating to garnishment that corporations are subject thereto.

The reasons above outlined were well stated by Mr. Justice Lawrence in delivering the opinion of the court in the case of *Merwin v. Chicago*, 45 Ill. 133, 92 Am. Dec. 204, in which that learned judge made use of the following language: "A large and growing city like Chicago must constantly have hundreds of persons in its employment, and if the city cannot, at short intervals, make a settlement of these multitudinous accounts, but is liable to be drawn into court at the suit of every creditor of its numerous employes, it will not only be engaged in much expensive and vexatious litigation, in which it has no interest; but, if unable to safely pay its employes ⁴⁰⁰ and contractors, it may lose the services of persons that may be of much value. We understand, however, the counsel for the appellant to concede that money due municipal officers, agents, or contractors is not liable to garnishment, but, it is insisted, if the city had been required to answer, the alleged indebtedness in the present case would not have fallen in either of these classes. But, in our opinion, the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits, in order that one private individual may the better collect a demand due from another. A private corporation must assume the same duties and liabilities as private individuals, since it is created for private purposes. But a municipal corporation is a part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should not be subjected to duties, liabilities, or expenditures, merely to promote private interest or private convenience."

If what was said in this case was true as to a strictly municipal corporation like a city, it is much more true as to a quasi

municipal corporation, such as a county, for the reason that the latter is an involuntary corporation organized exclusively in the interest of the public and as an agency of the state, while the former may be held to be organized in some sense for the private benefit of its inhabitants.

500 To a like effect and founded upon substantially the same course of reasoning are the following cases: *Switzer v. Wellington*, 40 Kan. 250; 10 Am. St. Rep. 196; *Wallace v. Lawyer*, 54 Ind. 501; 23 Am. Rep. 661; *McDougal v. Hennepin County*, 4 Minn. 184; *State v. Eberly*, 12 Neb. 616; *Hawthorn v. St. Louis*, 11 Mo. 59; 47 Am. Dec. 141; *Erie v. Knapp*, 29 Pa. St. 173; *Mayor etc. of Mobile v. Rowland*, 26 Ala. 498; *Mayor of Baltimore v. Root*, 8 Md. 95; 63 Am. Dec. 692; *Burnham v. Fond du Lac*, 15 Wis. 193; 82 Am. Dec. 668; *Buffham v. Racine*, 26 Wis. 449; *School Dist. v. Gage*, 39 Mich. 484; 33 Am. Rep. 421; *McLellan v. Young*, 54 Ga. 399; 21 Am. Rep. 276; *Merrell v. Campbell*, 49 Wis. 535; 35 Am. Rep. 785.

In his reply brief, counsel for appellant has sought to show that some of these cases are not in point, by reason of the fact that they were decided upon appeal from judgments holding municipal corporations liable, and were, therefore, rightfully decided, even though the lower court had jurisdiction to render the judgments, if such judgments were erroneous. But the language of the opinions in the cases thus referred to clearly shows that such corporations were not subject to garnishment at all, and that, by reason of this fact, they were under no obligation to answer when served with garnishee process.

The case of *Merwin v. Chicago*, 45 Ill. 133, 92 Am. Dec. 204, is a fair representative of this class, for while the questions therein were raised upon appeal, the action of the lower court in dismissing the city without requiring it to answer was sustained, and this could only have been done upon the theory that the fact that it was such city was sufficient to excuse it from answering, and this could only have been so by reason of the fact **501** that under no circumstances was it liable in such a proceeding; for, if it was liable at all, it would have been necessary for it to have made a showing before it was entitled to be discharged.

Appellant has attempted to show that other cases are not in point, by reason of the fact that their decision depended upon the statutes of the state in which they were rendered, but a careful comparison of the statutes of such states with ours clearly shows that in most, if not all, of them the provisions are such that they would better authorize a holding that municipal corporations were liable to garnishment than would the provisions of

our statute. In all of them there is as broad a provision as to suing and being sued, and the acts providing for garnishee or trustee process cover corporations in language which would better authorize the inclusion of those for municipal purposes than does the language in our statute.

Under all of the authorities, we are satisfied that the law is and should be that municipal corporations, and especially counties, are not liable to garnishment, unless made so by express statutory provision, and that such statutory provision does not exist by reason of the fact that corporations are named as among those upon whom process in garnishment may be served, unless municipal corporations are expressly provided for.

It follows that the judgment sought to be enforced in this proceeding was void, and that the action of the superior court in refusing the relief sought must be affirmed.

Dunbar, Anders, and Gordon, JJ., concur.

GARNISHMENT—COUNTIES.—A county is not subject to garnishment: *Riggin v. Hilliard*, 56 Ark. 476; 35 Am. St. Rep. 113, and note. See, also, the extended note to *Divine v. Harvie*, 18 Am. Dec. 200.

STATE v. CUSHING.

[14 WASHINGTON, 527.]

HOMICIDE, DUTY TO RETREAT WHEN ON ONE'S OWN PREMISES.—If, while one is lawfully on his own premises, another advances in a threatening manner and under such circumstances that the former believes, and has reasonable ground to believe, that he is in danger of losing his life or of suffering great bodily harm, he is not obliged to retreat, but may stand his ground, and meet any attack made upon him in such a way, and with such force, as, under all the circumstances, he at the moment believes, and has reasonable ground to believe, is necessary to save his own life or to protect himself from great bodily harm.

HOMICIDE.—THREATS MADE BY THE DECEDENT a short time before the fatal encounter, both within and without the hearing of the defendant, are admissible in evidence on the trial of the latter for murder, as tending to show the feelings and interest of the decedent toward the defendant at the time of the encounter, and whether or not the deceased was the assailant, and whether or not he so acted as to induce in the mind of the defendant an honest belief of an intention to kill or to do him great bodily harm.

HOMICIDE.—THREATS MADE BY A DECEDENT CANNOT BE EXCLUDED, on the trial of his slayer for murder, on the ground that there is no evidence, save the testimony of the defendant, that he was at the time of the killing in imminent danger. He has the right to have his testimony weighed by the jury, and the court cannot refuse an instruction on the assumption that such testimony is false.

HOMICIDE.—EVIDENCE OF THE REPUTATION OF THE DEFENDANT on trial for murder, for peace and quietude, is admissible, to be considered by the jury in determining his guilt, and as bearing, in connection with all the other facts, upon the question of who was the aggressor in the affray. It is admissible, not only when doubt otherwise exists, but also for the purpose of creating doubt.

JURY TRIAL—INSTRUCTIONS, REVERSAL FOR REFUSAL OF.—If a court has permitted evidence to be given before a jury during a trial for murder of threats made by the decedent against the defendant, and of the defendant's reputation for peace and quietude, but refuses to instruct the jury respecting the consideration which may be given to such evidence, such refusal cannot be treated as harmless error, on the ground that from the conviction it appears that the jury did not believe it. The appellate court cannot conjecture what the jury would have done if furnished with proper instructions for its guidance.

HOMICIDE—EVIDENCE—CLOTHING OF THE DECEDENT, TAKING TO THE JURYROOM.—The clothing worn by the decedent at the time he was shot, and the gun with which the shooting was done, are admissible in evidence against the defendant, and the court may permit the jury to take them to their room when they retire to consider their verdict.

WITNESS—REPUTATION FOR TRUTH AND VERACITY, PLACE OF.—If a witness' reputation for truth and veracity is attacked, it is error to exclude testimony in rebuttal respecting the reputation which such witness had in a certain city for truth and veracity, though such city is five or six miles distant from the place of residence.

Blake & Post and Patrick Henry Winston, for the appellant.

J. W. Feighan, prosecuting attorney, for the state.

528 GORDON, J. The appellant was charged, in the superior court for Spokane county, with the murder of Thomas King. He was convicted of murder in the second degree and sentenced to imprisonment in the penitentiary for a period of ten years. From this judgment he appeals. The appellant admits that he did the shooting which caused the death of the deceased, but claims that he did it in self-defense. The shooting occurred upon the premises of the appellant near the city of Spokane. There were no eye-witnesses to the fatal encounter. It appeared from the evidence that the deceased had been in the employ of the appellant on the farm where the killing occurred; that he had been so employed for a period of about eight months immediately preceding the day of the homicide. It further appears that he did not live on the premises, but kept house with another bachelor on an adjoining farm. On the morning of the 14th of May, 1895, the day on which the shooting occurred, the deceased put in an appearance at the home of the appellant as usual, and asked for the amount of wages that was then due him. A wordy dispute followed between the parties. Upon his own behalf, the appellant testified that he told deceased that he

did not then have the money to pay him; that he would do so on the following day; that thereupon the deceased became abusive and threatened the appellant ⁵²⁹ with violence; that he continued to follow the appellant from place to place about the premises from about half past seven in the morning until about 11:30, when the shooting actually occurred. He further testified that he repeatedly ordered the deceased from his premises and that he refused to go; that King's conduct continued to become more violent and that, becoming alarmed and fearful for his own safety, the appellant went into his house and procured his shotgun, for the double purpose, as he says, of defending himself against any attack that King might make upon him, and in the belief that, finding him armed, King would withdraw from the premises; that when he appeared outside of the house with the gun, the deceased rushed upon him armed with a club uplifted in his hand; that thereupon he, appellant, fired, "aiming low with a view to disable him, not to kill him." This shot took effect in the legs of the deceased. Continuing, the appellant testified as follows: "The instant that the shot was fired, he raised his head up and came for me with the club uplifted and muttering curses, and I thought he had not been hit, and I immediately proceeded to reload. During the time that I was reloading he had gotten up to just a few feet of me; I don't think it was over eight or ten feet, and when I fired this time he repeated his movement (that is, ducking his head and turning his body), only this time he bent further down."

The second shot was received by the deceased in the back a little below the kidney on the right side of the spinal column, from the effects of which death resulted in about four hours thereafter. Although conscious and able to converse until final dissolution came, the deceased gave no account of the circumstances leading to the shooting. The testimony also ⁵³⁰ tended to show that the appellant, immediately after the shooting, in answer to a question as to how it occurred, stated in the presence and hearing of King that he, appellant, "had to do it"; that he did it in self-defense; to which statement King made no response.

Counsel for the appellant requested the trial court to give the following instruction to the jury: "The defendant, while on his own premises outside of his dwelling-house, was where he had a right to be, and, if you find that the deceased advanced upon him in a threatening manner, and the defendant at the time had reasonable grounds to believe, and in good faith did believe, that the deceased intended to take his life or do him great bodily harm, the defendant was not obliged to retreat nor to consider

whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him in such a way and with such force as, under all the circumstances, he at the moment honestly believed, and had reasonable grounds to believe, was necessary to save his own life or protect himself from great bodily injury."

The court refused to so instruct, and appellant excepted. Upon its own motion, however, the court instructed as follows: "Before a person can justify taking the life of a human being by self-defense, he must employ all reasonable means within his power, consistent with his own safety, to avert the necessity for the killing."

We think that this instruction, in connection with the entire charge, might reasonably have tended to create the impression upon the minds of the jurors that it was the duty of the appellant, notwithstanding that he was upon his own premises where he had the lawful right to be, to retreat from any assault then being made or threatened by the deceased; and this impression is strengthened by the fact that the instruction ⁵³¹ requested by the appellant and refused by the court contained a correct statement of the law upon the subject, as laid down by the supreme court of the United States in the case of *Beard v. United States*, 158 U. S. 550, and supported in *Baker v. Commonwealth*, 93 Ky. 302; *Runyan v. State*, 57 Ind. 80; 26 Am. Rep. 52; *Miller v. State*, 74 Ind. 1; *Erwin v. State*, 29 Ohio St. 186; 23 Am. Rep. 733; *Bohannon v. Commonwealth*, 8 Bush, 481; 8 Am. Rep. 474; *White v. Territory*, 3 Wash. Ter. 397; *Williams v. State*, 30 Tex. App. 430; *Fields v. State*, 134 Ind. 46.

Not only does the instruction under consideration contain a correct statement of the law, but it was applicable to the evidence, and it was the right of the defendant to have it or some equivalent instruction submitted to the jury.

2. There was evidence tending to show that the deceased had, prior to the morning of the encounter, in conversation with different parties, made threats against the appellant, none of which, however, were communicated to the appellant. It further appeared by the testimony of the appellant himself that, on the morning of the encounter, the deceased made repeated and violent threats against him. The following instruction upon the subject of threats was requested and refused: "Uncommunicated threats are only valuable, in a case of this kind, as tending to show the feelings and interest of the deceased toward the defendant at the time of their encounter, and whether or not the deceased was the first assailant, and whether or not the deceased

so acted at the time of the shooting as to induce in the mind of the defendant an honest belief that the deceased intended to kill him or do him great ⁵³² bodily harm. Communicated threats and threats made to defendant are valuable for the same purpose, and as also tending to throw light on the state of mind of the defendant at and just before the shooting, and as tending to show that his acts in shooting were not malicious."

This instruction was approved by the territorial supreme court in *White v. Territory*, 3 Wash. Ter. 397, and is sustained by *Brown v. State*, 55 Ark. 593; *Wiggins v. People*, 93 U. S. 465. We think it correctly states the law upon the subject of noncommunicated threats and threats made directly to a defendant. The court, however, refused to give it or any instruction whatever upon the subject. This, we think, was error.

The learned attorney for the state insists, however, that the threats were inadmissible because there was no proof, aside from the testimony of appellant, of any attack by the deceased, or that the appellant was, at the time of the shooting, in imminent danger; that, "leaving out Cushing's [appellant's] testimony, which is contradicted by all the circumstances in the case, there was no attempt on the part of King to injure Cushing." But it was the right of the appellant to have his testimony weighed and passed upon by the jury, and an instruction applicable to it could not properly be refused by the court solely upon the assumption that such testimony was false.

3. Upon the trial, the appellant called numerous witnesses who testified that his general reputation was that of a peaceable and well-disposed person. Based upon this evidence, his counsel requested the court to give the following instruction to the jury: "You are instructed that the defendant is entitled to have the evidence touching the question of his reputation for peace and quietude considered by the jury ⁵³³ in determining the question of his guilt, and especially in determining the question as to who was the aggressor in the affray in which King lost his life. In such cases, proof of good reputation for peace and quietude on the part of the defendant is proper evidence to be considered by the jury in connection with all the other evidence. In determining the guilt or innocence of the accused, the weight to be attached to the fact of good character or reputation, like that to be attached to every other fact of the case, is for the jury alone to determine."

This was refused by the court, and no instruction upon the subject was given to the jury. The appellant excepted to the refusal to so instruct, and has assigned it as error. We think the

instruction should have been given. In *State v. Dumphrey*, 4 Minn. 438, it is stated that proof of the good character of the appellant is received upon the ground that, "as all reasonable doubts are to be weighed in the balance in favor of the defendant, he is, therefore, entitled in all cases to give his good character in proof, because what would be a clear state of facts and circumstances to warrant a conviction against a man of bad or unknown character, might, when applied to a man of high standing and unimpeachable character, appear inconsistent with his guilt, or so enshroud the transaction with doubt as to justify an acquittal."

We think it too well settled to admit of any doubt or controversy that a defendant in a criminal case may introduce evidence of his good character (with respect to the elements involved in the charge against him) as a fact to weigh in his favor, and that he is entitled, if he requests it, to have the jury advised as to the weight to be given to such evidence: 2 *Thompson on Trials*, 2444; *Kistler v. State*, 54 Ind. 400; *State v. Clemons*, 51 Iowa, 274; *McQueen v. State*, 534 82 Ind. 72; *People v. Laird*, 102 Mich. 135; *People v. Jassino*, 100 Mich. 536. In this last case the court say: "Evidence of good character is admissible, not only in a case where doubt otherwise exists, but may be offered for the purpose of creating a doubt."

It will not do to say that, inasmuch as it appears from the verdict that the jury disbelieved the testimony of the appellant, the instruction, if given, would have been unavailing. What the jury would have done had they been furnished with proper lights for their guidance can only be conjectured. Appellant was entitled to have this instruction given to the jury as a matter of law necessary for their information in arriving at a verdict, and especially so in view of the nature of the charge and the testimony adduced in its support. Nor is the question at all affected by the fact that there may have been some testimony given which reflected upon his character.

4. Other instructions requested by appellant but refused by the court, as well as the instructions actually given, have been examined, but, aside from those already noticed, we do not think that any error was committed in connection with the charge. Many of the requests were proper and appropriate to the evidence, but as to them we find that they were sufficiently embraced within the general charge of the court, and hence no error was committed in refusing them.

5. As this cause must be retried, we deem it necessary to examine some of the more important questions arising upon the in-

introduction of the evidence at the trial. The clothing worn by the deceased at the time of the shooting, and the gun with which the shooting was done, were admitted in evidence over the objection of the defendant, and this is assigned as error. ⁵³⁵ We think that the state was entitled to introduce them, and that no error was committed in permitting the jury to take them to their room when they retired to consider their verdict: *Doctor Jack v. Territory*, 2 Wash. Ter. 101.

6. Nor do we think it was error for the court to refuse to permit appellant to ask the witness Rinear concerning a conversation which occurred between the witness and Wells and Newman. It was not cross-examination, and the appellant should have called Wells and Newman, if he desired their opinion upon the question of what caused the mark found upon the pine tree.

7. We think that the court erred in refusing to permit the witness Brill to testify to the reputation for truth and veracity of W. J. Newman, a witness for the defendant, whose reputation the state had attacked. If, in the course of business or otherwise Newman had acquired a reputation for truth and veracity in the city of Spokane, it was competent to be given in evidence, although his place of residence may have been distant therefrom some five or six miles, as shown.

Other errors assigned have been examined, but we do not find that they are of sufficient importance to merit extended consideration.

For the errors above noticed, the judgment will be reversed and the cause remanded for a new trial.

Anders and Dunbar, JJ., concur.

HOMICIDE—DUTY TO RETREAT WHEN ON ONE'S OWN PREMISES.—A person attacked in his own domicile is not bound to retreat to avoid killing his adversary: *Karr v. State*, 100 Ala. 4; 46 Am. St. Rep. 17, and note. See on this subject the extended note to *State v. Patterson*, 12 Am. Rep. 212-214.

HOMICIDE—EVIDENCE—THREATS BY DECEASED.—Upon a trial for murder, threats made by the deceased against the accused, although not communicated to him, are competent evidence, whether one or the other was the aggressor, and whether the act of the accused was done in defending himself: *Hart v. Commonwealth*, 85 Ky. 77; 7 Am. St. Rep. 576, and note. The character of the deceased for violence and previous threats should be weighed by the jury in determining whether the defendant, when he did the killing, acted under a reasonable apprehension of present impending peril to his life, or of suffering some other grievous bodily injury: *Karr v. State*, 100 Ala. 4; 46 Am. St. Rep. 17, and note. On a trial for murder, an overt act or hostile demonstration on the part of the deceased against the accused must be proved, before communicated threats by the former against the latter are admissible in evidence: *State v. Harris*, 45 La. Ann. 842; 40 Am. St. Rep. 259, and note. See, also, the notes to *State v. Turner*, 13 Am. St. Rep.

711; *Campbell v. Commonwealth*, 21 Am. St. Rep. 355, and the extended notes to *Campbell v. People*, 61 Am. Dec. 53.

CRIMINAL LAW—CREDIBILITY OF DEFENDANT.—The statement of a prisoner in a criminal case is for the consideration of the jury, who may give it such credit in part or in whole as under all the circumstances they may deem it entitled to: *Maher v. People*, 10 Mich. 212; 81 Am. Dec. 781. See, also, *Blackburn v. State*, 71 Ala. 319; 46 Am. Rep. 323.

HOMICIDE—EVIDENCE—GOOD CHARACTER OF ACCUSED. A person on trial for murder is permitted to prove his good character for peace in the neighborhood in which he resides: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96. Evidence of the general reputation of the accused for peace and quietude is admissible in a prosecution for murder, though committed by poisoning: *Carr v. State*, 135 Ind. 1; 41 Am. St. Rep. 408, and note with the cases collected.

WITNESSES—VERACITY.—Evidence is admissible to show the reputation of a witness for truth and veracity: *State v. Burpee*, 65 Vt. 1; 36 Am. St. Rep. 775. See, especially, the extended notes to *Allen v. State*, 73 Am. Dec. 771, and *Evans v. Smith*, 17 Am. Dec. 76.

CITIZENS' NATIONAL BANK v. WINTLER.

[14 WASHINGTON, 558.]

CORPORATIONS—PRESUMPTION OF AUTHORITY TO TRANSFER NOTE OF.—The possession by a third person of a negotiable note payable to a corporation, and bearing what purports to be its indorsement by its general manager, raises a presumption that he was authorized to so indorse it, and that the holder is the owner thereof.

Brents & Clark and Thomas Carroll, for the appellant.

B. L. & J. L. Sharpstein, for the respondents.

558 GORDON, J. Suit was brought in the superior court for Walla Walla county by the appellant bank, a corporation, against the respondents upon a negotiable promissory note made by the respondents to the South Harbor Land and Improvement Company, a corporation, transferred to the appellant prior to the maturity thereof. Respondents answered, admitting the execution of the note, but denying that the South Harbor Land and Improvement Company transferred the same to appellant, and for a further answer they alleged that **559** the said note was procured by fraudulent representations and without consideration. To this latter defense the appellants replied, and upon the issues thus made up the cause proceeded to trial.

The note was introduced in evidence, bearing the following indorsement: "The South Harbor Land and Improvement Company by R. E. Brown, General Manager."

Evidence was also offered showing that said R. E. Brown was, at the time of making the indorsement, the general manager of

said corporation, and that the transfer of the note was made to appellant prior to its maturity. After some further testimony not necessary to be noticed, appellant rested its case, and thereupon the court, upon respondent's motion, granted a nonsuit and entered judgment against appellant for costs. This appeal is from said order and judgment.

The possession by a third person of a negotiable promissory note payable to a corporation, bearing the indorsement of such corporation, regular in form and signed by its general manager, is sufficient to raise the presumption that the officer so indorsing it had authority to make the indorsement, and that the person having the possession thereof is the owner of the note. The production in evidence of the note in question bearing the indorsement as above set forth, coupled with the proof that Brown was the general manager at the time when said note was so indorsed and delivered, was sufficient *prima facie* to entitle appellant to recover, and the motion for nonsuit was improperly granted: *Carrigan v. Port Crescent Improvement Co.*, 6 Wash. 590.

Reversed and remanded.

Hoyt, C. J., and Anders, Dunbar, and Scott, JJ., concur.

NEGOTIABLE INSTRUMENTS.—POSSESSION of negotiable instruments carries title with it to the holder: *Doll v. Rizotti*, 20 La. Ann. 263; 96 Am. Dec. 399, and note; *Perot v. Cooper*, 17 Colo. 80; 31 Am. St. Rep. 258, and note. The indorsee of a promissory note is presumed to be a holder for value, and the burden is on the party denying to rebut this presumption: *Poorman v. Mills*, 35 Cal. 118; 95 Am. Dec. 90.

NEGOTIABLE INSTRUMENTS ISSUED BY AGENTS OF CORPORATIONS—RIGHTS OF HOLDERS.—A purchaser of negotiable paper issued by the agent of a corporation in its name buys at his peril as to the agent's authority, but if such agent, in issuing the paper, acts within the scope of his authority, though he acts wrongfully, of which the purchaser had no notice of facts sufficient to put him on inquiry, he is protected as an innocent purchaser: *Chemical Nat. Bank v. Wagner*, 93 Ky. 525; 40 Am. St. Rep. 206, and note, where the cases discussing the rights of holder of negotiable instruments issued by agents are collected.

FISH v. NETHERCUTT.

[14 WASHINGTON, 582.]

OFFICIAL BOND OF SHERIFF, ACTS WHICH CONSTITUTE BREACH OF.—The seizure by a sheriff of the goods of one person under process against another, is such an official act as constitutes a breach of his official bond.

DAMAGES, MEASURE OF.—IF PROPERTY IS WRONGFULLY TAKEN BY AN OFFICER, but not under such circumstances as to support the presumption of malice or a desire to oppress on his part, the value of the property when taken, or at such time as plaintiff may elect between the time of taking and the bringing of the action, with interest thereon, is the measure of damages.

DAMAGES, ERRONEOUS INSTRUCTION RESPECTING.—An instruction in an action against a sheriff, in which it is alleged that he had wrongfully and unlawfully taken property of the plaintiff, that the jurors may consider the value of the property and the circumstances in which it was taken, and also any sense of wrong suffered and feelings of humiliation and disgrace engendered by the wrongful taking, is erroneous, there being no allegation in the complaint that the taking was with unnecessary violence, or that there was any intent to harass or oppress the plaintiff. Nor is the error in the instruction rendered harmless by the further instruction that they cannot give anything by way of exemplary damages.

D. W. Henley, and Plummer & Thayer, for the appellants.

Harris Baldwin, for the respondent.

583 **HOYT, C. J.** Defendant Rinear was sheriff of Spokane county. Defendants Nethercutt were husband and wife and the owners of a mortgage made by one Emery Fish. The other defendants were sureties upon the official bond of said sheriff. The mortgage held by the Nethercutts was placed in the hands of the sheriff for foreclosure, and, by virtue thereof, the property in dispute was taken into his possession as that of the mortgagor, Emery Fish. The plaintiff, the wife of said Emery Fish, brought this action to recover damages for the conversion of the property, claiming that it belonged to her, and that her husband had no interest whatever therein at the time it was mortgaged or at the time when it was taken by the sheriff in the proceeding to foreclose. In plaintiff's complaint the property was alleged to be of the value of two hundred and fifty dollars. The trial of the issues made upon this complaint resulted in a verdict and judgment for the plaintiff in the sum of six hundred and twenty-eight dollars, besides costs.

Two reasons are stated in the brief why this judgment should be reversed: 1. That the complaint does not state a cause of action; and 2. That the court gave an erroneous instruction to the jury as to the measure of damages. The claim that the complaint is insufficient is founded upon the fact that it appears upon its face that the plaintiff was a stranger to the process under which

the sheriff was acting when he seized her goods. And it is contended that the action of the sheriff in taking the goods of a stranger to the process under which he was acting was not such an ⁵⁸⁴ official act as to constitute a breach of the conditions of his official bond, if wrongful; and the case of *Marquis v. Willard*, 12 Wash. 528; 50 Am. St. Rep. 906, is cited to sustain the contention. An examination of that case, however, will show that the question thus presented was not therein decided. On the contrary, it will appear from the opinion that the weight of authority was to the effect that the seizure by an officer under process of the goods of a person not named therein was, though a pure trespass, such an official act as to make the sureties on his bond liable for damages. What was decided in that case was, that if an officer without process did an act which the undisputed facts showed he had no right to do, such act would not be done by virtue of his office, but at most only under color of office.

The distinction which was there attempted to be drawn, and which seems to be founded upon a correct course of reasoning, was, that when an officer was called upon to act in his official capacity, the sureties upon his bond would be liable for such action, even though he should so depart from the command of the process under which he was acting as to make his act thereunder a pure trespass; but that, when there was nothing which called upon him to act in his official capacity, the fact that he assumed to do so in violation of law would not warrant the holding that his action was by virtue of his office. In other words, the sureties upon the official bond of an officer are liable for a mistake of fact made by the officer in attempting to discharge a duty which he is called upon to perform by virtue of his office, but are not liable for a mistake of law, by reason of which he assumed to act as an officer, when the undisputed facts show that he was not called upon to act in his official capacity. This ⁵⁸⁵ view seems to us a logical one, and the appellants having conceded that the greater number of cases hold in accordance therewith, we feel justified in adopting it. It was recognized in the case of *Mace v. Gaddis*, 3 Wash. Ter. 125. The complaint having shown that the sheriff had process in his hands which called upon him to take the property in question, if the property of the mortgagor, his mistake in taking thereunder the property of the plaintiff was one of fact, and, being a question of fact which he had to decide in the discharge of his duties as such sheriff, the sureties upon his bond were responsible for his mistake in deciding it.

The court instructed the jury that, in determining the damage to which the plaintiff was entitled, they might consider the value of the property and the circumstances under which it was taken, and also any sense of wrong suffered and feeling of humiliation and disgrace engendered by the wrongful taking of the property. Whether or not such would have been a proper instruction if the complaint had alleged facts tending to show that the taking was with such unnecessary violence as to show malice, or even as to show an intent to harass or oppress the plaintiff, we are not now called upon to decide. It was only alleged in the complaint that the taking was wrongful and unlawful, and under such an allegation the value of the property when taken, or at such time as the plaintiff may elect between the time of taking and the bringing of the action, with interest thereon, is the measure of damages. It is claimed on the part of the respondent that this instruction must be interpreted in the light of another one given by the court, to the effect that they could give nothing by way of punitive or exemplary damages, but, in our opinion, it did not state the law, ⁵⁸⁶ even when aided by such instruction. If, when the taking is alleged to be unlawful and no facts tending to show malice or desire to oppress are alleged, the measure of damages is the value of the property with interest, it was error on the part of the court to authorize the jury to take into consideration any other elements of damage.

The judgment will be reversed and the cause remanded for a new trial.

Scott, Anders, Dunbar, and Gordon, JJ., concur.

SHERIFFS—WRONGFUL SEIZURE—BREACH OF BOND.—A sheriff who, having execution against the goods and chattels of one person, levies upon and sells those of another, is not guilty of a breach of his official bond, and his sureties are not thereby rendered liable: *State v. Conover*, 28 N. J. L. 224; 78 Am. Dec. 54. The indemnitors of an officer who has levied upon property not subject to his writ are jointly and severally liable as principals for the original unlawful undertaking: *Dyett v. Hyman*, 129 N. Y. 351; 26 Am. St. Rep. 533. The sureties on a sheriff's bond are liable for levy of execution on the property of a stranger to the writ: *Note to Holliman v. Carroll*, 27 Tex. 23; 84 Am. Dec. 607. See, also, the extended notes to *Ives v. Jones*, 40 Am. Dec. 425, and *Commonwealth v. Cole*, 46 Am. Dec. 514.

DAMAGES—MEASURE OF, FOR WRONGFUL SEIZURE OF PROPERTY.—Where an attachment is simply wrongfully sued out, but without malice, only actual damages can be recovered: *Reed v. Samuels*, 22 Tex. 114; 73 Am. Dec. 253, and note; *Dickinson v. Maynard*, 20 La. Ann. 66; 96 Am. Dec. 379, and note; *Ellis v. Bonner*, 80 Tex. 198; 26 Am. St. Rep. 731. A defendant in an attachment wrongfully sued out, though there was no actual seizure of his property, if the levy was such as to place it in the custody of the

law, is entitled to recover such actual damages as result to him from being virtually dispossessed of his property during the time the levy was in force: *Rice v. Miller*, 70 Tex. 613; 8 Am. St. Rep. 630. See, also, the note to *Empire Mill Co. v. Lovell*, 14 Am. St. Rep. 274, and the extended note to *Burton v. Knapp*, 81 Am. Dec. 467.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

NYE v. SOCHOR.

[92 WISCONSIN, 40.]

JUDGMENT—RELIEF IN EQUITY FROM.—Before relief will be granted in equity against a judgment at law, it must appear that there was a good defense to the action, which the defendant was prevented from making by fraud, accident, mistake, or surprise, unmixed with laches or negligence on his part.

JUDGMENT, RELIEF AGAINST FOR FORGETFULNESS.—The fact that a defendant against whom an action was pending utterly forgot all about it, and for that reason failed to take an appeal until the time within which it could be taken had expired, does not entitle him to relief from the judgment in a suit in equity, though he had a good defense to the action, and the judgment against him is inequitable and such that relief therefrom would have been granted had he not been guilty of negligence.

JUDGMENT, FRAUD IN PROCURING.—It cannot be successfully contended that there was fraud in the recovery of a judgment because the plaintiff, as a witness in his own behalf, in testifying to the facts constituting his alleged cause of action, made no mention of a chattel mortgage and the seizure of the property in question under it for the payment of the debt secured thereby, under which mortgage it is claimed by the defendants that they rightfully took the property, they not being present or represented at the trial.

Suit in equity to enjoin the enforcement of a judgment rendered in favor of the defendant in this action and against the plaintiffs for damages and costs of suit. From the complaint, it appeared that in the original action the plaintiff therein had no cause of action against the defendants therein; that the matter of making a defense had been intrusted to one of the defendants, named Lusk, who failed to attend the trial because he miscalculated the time and missed the train; that he thereupon telegraphed to the plaintiff in the action requesting a continuance, but received no answer; that the defendants intended to appeal

the action, but that from the time of such trial "until the eighth day of August, 1894, they, and especially the said Lusk (who had special charge of the case), entirely forgot all about said action, or their duty to take the necessary steps to take an appeal to said circuit court, and they were not reminded of said action until the eighth day of August, 1894," at which time, through meeting an officer having an execution on the judgment in his hands, "the whole matter flashed into Lusk's mind, and he became conscious for the first time since the 16th of July, that any such action was pending, and that he had entirely forgotten the whole matter." By this time the period allowed for taking an appeal had already expired. The plaintiffs in the present suit showed, as a ground for relief and as excusing their forgetfulness, that during the time hereinbefore stated there were extensive and dangerous forest fires raging in the vicinity in which the plaintiffs had their mills and lumber yards, causing great loss of life and property, and that they were engaged during most of the months of July and August, in fighting the fire and protecting the property, and at times worked not only during the day, but until long into the night, and that the partner, Lusk, from his being so constantly engaged in the effort to protect the property from fire, had his mind so occupied as to make him forget nearly all the general business of the firm, and particularly the business involved in this suit. A demurrer to the complaint was sustained, and the plaintiffs appealed.

O'Neill & Marsh, for the appellants.

R. B. Salter, for the respondent.

43 PINNEY, J. 1. It is well settled that, in order to maintain an action to enjoin or set aside a judgment rendered in an action in which there was a good defense at law, known to the defendant at the time it was rendered, it must satisfactorily appear that the defendant was prevented from making his defense by fraud, mistake, accident, or surprise, unmixed with laches or negligence on his part. If he could have defended himself at law, but allowed judgment to go against him by his own neglect, he cannot have relief for a matter of which he might have availed himself at law: *Wright v. Eaton*, 7 Wis. 595; *Stowell v. Eldred*, 26 Wis. 504; *Barber v. Rukeyser*, 39 Wis. 590; *Duncan v. Lyon*, 3 Johns. Ch. 356; 8 Am. Dec. 513; *Floyd v. Jayne*, 6 Johns. Ch. 479; *Kibbe v. Benson*, 17 Wall. 625. As was said by *Bronson, J.*, in *Norton v. Woods*, 22 Wend. 525: "Independent of all authority, it will never do to permit a party to appeal to chancery for a new trial ⁴⁴ when he has neglected the proper

opportunity and the appropriate means to make his defense at law."

It may be conceded that the allegations of the complaint show that the judgment of the justice's court was inequitable, and that the plaintiff had no cause of action against the plaintiffs in the present case; but it is impossible, and inconsistent with well-established principles, to say that the case made by the complaint affords any ground for relief. It is not sufficient to show that injustice has been done, but it must appear that it has been done under circumstances which authorize a court of equity to interfere, for "the inattention of parties in a court of law can scarcely be made a subject of interference of a court of equity": 2 Story's Equity Jurisprudence, sec. 896. Equity will never interfere where a party under no disability neglects to make his defense at law: *Miller v. Morse*, 23 Mich. 368. The plaintiffs were not prevented by fraud, accident, surprise, or mistake from availing themselves of their defense to the action, unless sheer forgetfulness can be called such, within the sense of the rule—a proposition which we think cannot be maintained. We have not been referred to any authority holding that relief can be had in equity against a judgment at law on the ground that the party against whom it was rendered simply forgot to appear and make his defense at the time appointed for trial, or because he forgot to appeal from the judgment within the time prescribed by law.

The plaintiffs' contention is, that one of them (Lusk) had entire charge of their litigation, and that his forgetfulness was excused by the particular circumstances of the case, and that a prudent and careful man might make the same mistake that was made in this case. It does not appear that there was any erroneous mental conception on the part of Lusk, or either of the plaintiffs, influencing them to act or to omit to act. There was no error in action, opinion, or judgment; no misconception, misapprehension, or misunderstanding. ⁴⁵ Mistake differs, in a legal sense, from accident, in that it presupposes the action of the will, while in the latter case no such action is implied; but in either case, in the legal sense, it is essential to relief that the event or occurrence was not the result of personal negligence or misconduct. It is not claimed that the circumstances were such as to deprive of memory, or mentally disable or unfit either of the plaintiffs to transact their ordinary business during the twenty days allowed for appeal. So far as it appears, they were capable of appropriating and bestowing their time as they chose. Failure to remember, entire forgetfulness to act as duty or interest requires, is so closely allied to laches or negligence that it is dif-

ficult, if not impossible, in a case like the present, to distinguish between them. Indeed, "forgetfulness" is defined as negligence—careless omission: *Century Dictionary*. The case of *Hurd v. Hall*, 12 Wis. 126, and similar cases, go upon the ground of mistake of fact. The plaintiff Lusk failed to get to the station in time to take the train for the place of trial, to defend the action; and that fact, of itself, was calculated to admonish the plaintiffs of the necessity of being prompt and diligent in perfecting an appeal from the judgment which they had every reason to believe had been rendered against them that day. They suffered the necessity of appealing to pass wholly from their minds, and "utterly forgot all about said action, or their duty to take the necessary steps to take an appeal," until the 8th of August, 1894, when it was too late. From the time the plaintiff Lusk missed the train until the sheriff made the levy, they had not made any inquiry, or indulged in a thought—as the allegations of the complaint, in substance, show—as to what had been done in the action, or whether judgment had been given against them or not. The fact that they forgot, even under the circumstances stated, to appeal from the judgment, must be regarded as their misfortune, and not as affording any foundation for equitable relief against the judgment.

⁴⁶ 2. It was contended that there was fraud in the recovery of the judgment, because the plaintiff, as a witness in his own behalf, in testifying to the facts constituting his alleged cause of action, made no mention of the chattel mortgage and seizure of the property in question under it for nonpayment of the debt secured by it. It cannot be said that he testified falsely or did anything to impose upon or mislead the court. These facts were no part of his case, and he was under no obligation to bring forward the alleged justification of the taking and conversion of the property. If he had been interrogated on the subject, and had testified falsely, the case would have been within *Stowell v. Eldred*, 26 Wis. 507, relied on by the plaintiffs. The plaintiffs knew the facts, and it was solely their fault that they were not brought forward. The case of *Tucker v. Whittlesey*, 74 Wis. 80, is therefore not in point, and for these reasons this contention fails.

The demurrer was rightly sustained.

By the Court. The order of the circuit court is affirmed.

JUDGMENTS—RELIEF IN EQUITY FROM.—When a party to an action at law neglects to make a defense known to him, or which might have been known by the exercise of proper diligence, the judgment rendered therein will not be enjoined, nor the party relieved

in equity from the result of his own want of proper care and diligence, unless he was prevented from discovering and availing himself of such defense by the fraud of the opposite party or by other cause beyond his control; *Harding v. Hawkins*, 141 Ill. 572; 33 Am. St. Rep. 347, and note. This subject is fully discussed in the extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 117, 188, and the notes to *Fealey v. Fealey*, 43 Am. St. Rep. 117; *Hamblin v. Knight*, 26 Am. St. Rep. 820, and *Heim v. Butin*, 50 Am. St. Rep. 56.

JUDGMENTS—RELIEF FROM—NEGLIGENCE.—Relief will not be granted from a judgment brought about by the carelessness of the injured party: *Champion v. Woods*, 79 Cal. 17; 12 Am. St. Rep. 126; A party can come into a court of equity for relief after judgment at law only when he has been deprived of a legal right by fraud, accident, or mistake, unmixed with negligence or fault on his part; *Brenner v. Alexander*, 16 Or. 349; 8 Am. St. Rep. 301, and note. Negligence as a bar to relief in equity against judgments is the subject of the monographic note to *Payton v. McQuown*, ante, p. 444.

BUTTON v. AMERICAN MUTUAL ACCIDENT ASSOCIATION.

[92 WISCONSIN, 83.]

INSURANCE—ACCIDENT.—AN INJURY INTENTIONALLY INFLICTED on an assured by another person is an accidental injury within the meaning of a policy of insurance against injuries from external, violent and accidental means, though the policy provides that the insured shall not be liable for intentional injuries. The word "intentional," as here used, refers to the acts of the insured alone.

Phillips & Hicks, for the appellant.

Wickham & Farr, for the respondent.

84 WINSLOW, J. This is an action upon a policy of accident insurance. During the life of the policy the plaintiff was injured by the intentional discharge of a firearm at him by an unknown person. The policy insured the plaintiff against death or injuries through "external, violent, and accidental means," but contained a clause providing that it did not insure against death or injury resulting, wholly or in part, directly or indirectly, from any of the following causes, viz: Suicide or self-inflicted injuries, felonious or otherwise, sane ⁸⁵ or insane; war or riot; wrestling; fighting; lifting (foreign to the pursuit or occupation); racing; gymnastics; exposure to unnecessary dangers; intentional injuries; taking poison; contact with poisonous substances; inhaling gas, chloroform, or any anaesthetic; medical or surgical treatment; sunstroke or freezing; hernia; fits; vertigo; and sleepwalking. The only question raised is, whether this policy covers injuries intentionally inflicted by another person.

It seems quite well settled that an injury intentionally inflicted on the insured person by another is an "accidental injury,"

when such injury is unintentional on the part of the insured: *Cooke on Life Insurance*, sec. 50. Unless, therefore, there is some provision of the policy which excludes liability for such injuries here, the plaintiff must recover. It is claimed that the clause providing that the policy shall not cover "intentional injuries," excludes liability for such injuries. In support of this contention a number of authorities are cited, holding that where the policy excludes liability for "intentional injuries inflicted by the insured or by any other person," the insured cannot recover, even though the insured did not participate in the intention: *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661. Such a holding seems reasonable, in view of the words used. But here the words are simply "intentional injuries," and the question is, Whose intention is referred to? We think it must be held that the word "intentional," as here used, refers to the insured alone. The words, "intentional injuries," are in close connection with a long list of injuries, all of which import more or less of intent, consent, or participation by the insured, and are evidently excluded because of such intent, consent, or participation; the idea evidently being that the risk should be one which the insured cannot, by intent or consent, or by his own act, produce or hasten. Had it been the intention to exclude another class of injuries, namely, those inflicted intentionally by a third person only, it would have been ^{so} easy to do so by a very few plain words. In the absence of such words, we construe the words under the familiar rule of "*noscitur a sociis*." The plaintiff was entitled to the judgment which he recovered.

By the Court. Judgment affirmed.

INSURANCE—ACCIDENT—INTENTIONAL INJURY INFLICTED BY ANOTHER.—Death from the direct violence of a third party may be an accident within the meaning of a policy insuring the life of the deceased: *Lovelace v. Travelers' Protective Assn.*, 126 Mo. 104; 47 Am. St. Rep. 638, and note. See, also, the extended note to *Paul v. Travelers' Ins. Co.*, 8 Am. St. Rep. 766.

FORD v. HILL.

[92 WISCONSIN, 188.]

JUDGMENTS, RELIEF AGAINST.—IF A JUDGMENT IS JUST, equity will not relieve against it, though the plaintiff had no right to take it. Hence, relief in equity will not be granted against a judgment by confession against a corporation, on the ground that its president, who had executed the power of attorney authorizing such confession, had no authority to do so. Under such circumstances, the defendant will be left to contend against the judgment as best it can at law.

THE INSOLVENCY OF A CORPORATION DOES NOT CONVERT ITS PROPERTY INTO A TRUST FUND for the benefit of its creditors, so as to prevent it from confessing a judgment, and thereby giving a preference to one of such creditors.

CORPORATION.—THE AUTHORITY OF THE PRESIDENT of a corporation to do the act in question need not appear by the record or by any formal vote or resolution, but may be implied from acquiescence and from the nature and course of business transacted by the corporation, as where the doing of the act was known to the directors, and no objection was made to it at any time, and the president had been in the habit of exercising extraordinary powers.

CORPORATION.—THE AUTHORITY OF THE PRESIDENT OF A CORPORATION TO EXECUTE A WARRANT OF ATTORNEY to confess a judgment against it may be inferred from the fact that such execution was known to the directors, who did not object thereto, and from the fact that the president was in the habit of practically exercising the whole power of the corporation, with the knowledge and concurrence of the directors and persons directly interested, whose duties required them to object if he was exceeding his authority.

CORPORATIONS, IMPLIED AUTHORITY OF MANAGING OFFICERS.—If a corporation allows its managing officer to so conduct himself in his dealings and transactions on its part as to lead the public or those dealing with him to reasonably believe he possessed certain powers, the corporation will not be allowed to question such apparent authority against one relying in good faith on the same.

CORPORATIONS.—THE CORPORATE SEAL is not essential to the validity of an instrument authorizing the confession of judgment against a corporation. The corporation may act without a seal very much as individuals may, except when otherwise provided by statute or their articles of incorporation.

Action against a corporation by judgment creditors to sequester its property, wind up its affairs, and for the purpose of testing the validity of a judgment by confession against the corporation and in favor of the defendant, Hill. The corporation was organized for the purpose of carrying on the furniture business. It had a board consisting of three directors, one of whom acted as president and another as secretary. The entire management of the corporation during the time it was in business was intrusted to the president and secretary with the general consent of the directors. The articles of incorporation declared that the principal duties of the president should be to preside

at meetings of the board and of the stockholders, and "to generally represent the corporation in matters of more than ordinary importance." In December, 1892, the corporation, by Tanner as secretary, executed a note to the Wisconsin National Bank of Milwaukee for twenty thousand dollars, and at the same time the president executed in the name of the corporation a power of attorney, not sealed, purporting to authorize a judgment by confession upon the note so executed. The authority of the president to execute this instrument did not appear by any action of the board of directors, though there was presented at the time to the attorney of the bank in whose favor the instrument was taken what purported to be a certified copy of the resolution of the board giving the president of the corporation authority to execute the power of attorney. The note was received in good faith, and in May, 1893, was transferred for value to the defendant, Hill, who, a few days later, took judgment thereon by confession, pursuant to the authority granted by the power of attorney given when the note was executed. Though the corporation was solvent when the note was given, then possessing assets of the value of seventy-five thousand dollars, and being indebted in the sum of five thousand dollars only, still it had become insolvent before the entry of the judgment against it by confession. The judgment upon which the plaintiff relied bore date later than that of the judgment by confession. The trial court entered judgment in favor of the defendants, and the plaintiffs appealed.

Turner, Bloodgood, Kemper, Ryan, and J. F. Burke, for the appellants.

Quarles, Spence & Quarles, for the respondent.

¹⁹² MARSHALL, J. The question presented here, at the outset, is not whether the president of a corporation, without having been specially authorized thereunto by the board of directors, but by reason of the general and ordinary powers pertaining to his office, can bind the corporation by the execution of a power of attorney to confess a judgment. There is no controversy but that the note was taken by the bank in good faith; that it loaned the twenty thousand dollars on the faith of the note and the accompanying power of attorney, and ¹⁹³ that it supposed, and had good reason to suppose, that the president, Lappen, was duly authorized to execute such power of attorney; that the corporation received the full benefit of the money loaned, and that it was borrowed in furtherance of its regular business; that it was then solvent, having a large amount of

property in excess of its liabilities; and that, if the claim under the judgment is not legal, it cannot be said that it is inequitable. In this state of the case, ought a court of equity to interfere to set aside such judgment? That is the question at the threshold of this case, and we conclude that such question must be answered in the negative. It has been held by a long line of decisions in this state that courts of equity will not enjoin judgments at law on grounds showing that the judgment creditor had no right to take the same, even where there was no jurisdiction in the court to enter it, if the party seeking such relief can say nothing against the justice of the judgment. When the party is so circumstanced, equity will let him contend against the judgment as best he can at law: *Stokes v. Knarr*, 11 Wis. 389; *Crandall v. Bacon*, 20 Wis. 639; 91 Am. Dec. 451; *Bonnell v. Gray*, 36 Wis. 574; *McCabe v. Sumner*, 40 Wis. 386; *Pirie v. Hughes*, 43 Wis. 531; *Rogers v. Cherrier*, 75 Wis. 54; *Marshall etc. Bank v. Milwaukee Worsted Mills*, 84 Wis. 23; *Knox Co. v. Harshman*, 133 U. S. 152; *Walker v. Robbins*, 14 How. 584.

It is said in the brief of counsel for appellants that the complaint in this case has already been before the court, and that it has been held that, if there was fraud in the entry of the judgment against the corporation, it can be properly set aside in this action: Referring to *Ford v. Plankinton Bank*, 87 Wis. 363. But the difficulty is, in applying what the court there said, that there is no fraud shown here on the part of the judgment creditor. The bank acted in good faith, and its assignee, Hill, as well, from the beginning to the end. *Hill v. Pioneer L. Co.*, 113 N. C. 173, 37 Am. St. Rep. 621, ¹⁹⁴ and *Atwater v. American etc. Nat. Bank*, 152 Ill. 605, cited by counsel to the effect that this proceeding may be maintained because the judgment has the effect to give the judgment creditor a preference over the other creditors of the corporation, have no application here. In the jurisdictions where those cases were decided, the mere fact of insolvency of the corporation converted the property into a trust fund for the benefit of all the creditors, and, for that reason, it was held that the corporation could not confess the judgment nor give any preference; but that rule does not obtain here. The mere fact of insolvency of a corporation, in this state, does not convert the corporate property into a trust fund, so as to prevent preferences: *Ballin v. Merchants' etc. Bank*, 89 Wis. 278; 46 Am. St. Rep. 834. The case of *Ford v. Plankinton Bank*, 87 Wis. 363, to which counsel refers, is authority only for the maintenance of such an action as this where the circumstances are such as to show fraud, either upon the corporation or the other

creditors, in the entry of the judgment. The case goes no further, as is sufficiently explained in the opinion of Mr. Justice Winslow in *Ballin v. Merchants' etc. Bank*, 89 Wis. 278; 46 Am. St. Rep. 834.

But we think the judgment must be sustained upon another and a broader ground. It appears that the president, by the articles of organization, was expressly clothed with extraordinary powers in managing the business of the corporation. The course of business, from the beginning to the end, shows that he exercised such extraordinary powers; that his acts in that regard, and particularly the act here challenged, were known to all the directors of the corporation, and no objection was made thereto at any time.

Now, while many cases might be cited that restrict the powers of the president of a corporation, which he may exercise merely as such, within very narrow limits, they should be relied upon with caution; for the circumstances of each individual case are likely to have, within certain limits, controlling ¹⁹⁵ force. While it is true that in all cases an act done by the president, in order to be binding upon the corporation, must be shown to be within the scope of his authority, that does not necessarily mean that such authority must be shown by the record. The power may exist, as to innocent third parties, and may be shown to exist by acquiescence and the nature and course of business which the president transacts for the corporation. In *Sherman v. Fitch*, 98 Mass. 59, it was held that the authority of the president to mortgage corporate property may be presumed, so as to bind the corporation, by the course of business and by acquiescence. Mr. Justice Wells, speaking for the court, said: "It is not necessary that authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and acquiescence of the directors, or with their subsequent and long-continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of the corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in case of individuals": *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237; 7 Am. Dec. 66; *Mell-edge v. Boston Iron Co.*, 5 Cush. 158; 51 Am. Dec. 59; *Lester v. Webb*, 1 Allen, 34. To the same effect is *Martin v. Webb*, 110 U. S. 7, where it is said by Mr. Justice Harlan, in effect, that the authority of the officer of a corporation may be implied from acquiescence—from the course of business as it has been carried on for a considerable length of time without objection—and in such

cases his act will be taken to be the act of the corporation, where those who have had for a long time the right to object, with knowledge of the facts, have neglected to do so.

The same principle is recognized in *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237, cited by appellants and referred to in *Thompson on Corporations* to the point that the act of the president in confessing judgment must be specially authorized, ¹⁹⁰ where a corporation appeared in the action and moved to set aside a judgment taken by confession, as in this case, on the ground that the president had no authority to execute the warrant of attorney. The court there referred with approval to the long line of cases in which the powers of officers of corporations were held to have been enlarged beyond the ordinary powers inherent in the offices, from the assent of the directors, proved by their consent and acquiescence in permitting the officers to assume and direct the control of the business; but the court did not apply the rule of such cases, because it was held that the facts were not sufficient to warrant such application. But such is not the case here, where it is shown conclusively, not only that extraordinary power was vested in the president under the articles of organization, but that he exercised practically the whole power of the corporation with the knowledge and concurrence of all the directors and persons directly interested, whose duties required them to object if he was exceeding his authority, and that they neither objected to the general conduct of the president before the act complained of, nor to such act after they had knowledge of it. Under such circumstances, where the act is manifestly for the benefit of the corporation, in pursuance of its legitimate business, and it has the benefit, as against those who acted in good faith, relying upon the apparent authority of the officer to act in the particular case, such act must be held to be the act of the corporation and binding upon it and its creditors as well.

This is not inconsistent with the law as laid down by this court, that corporations are fictitious bodies and act through directors (*Ford v. Plankinton Bank*, 87 Wis. 363), but goes upon the principle that responsibilities will be laid upon the principal for the acts of the agent done within the apparent scope of his authority, according to the course of business as ordinarily carried on, and that the doctrine of estoppel by the conduct of the principal applies to corporations the ¹⁹⁷ same as to individuals. These principles have been more and more recognized in such cases, and applied with greater liberality for the protection of those who do business with corporate officers in matters in furtherance of the general purposes of the corporations, as the busi-

ness of the country has drifted more and more into the hands of such artificial bodies. While the extension, or, rather, more liberal recognition, of such principles has not changed the law, as the same has been settled for a long period of time by the weight of authority, that the president of a corporation cannot, by virtue of his ordinary powers, execute a valid warrant of attorney to confess a judgment so as to bind the corporation, but, to do so, must be specially authorized by the board of directors, the tendency has been, as between the corporation and a person dealing with its president in good faith in a matter in furtherance of the business of such corporation, under the circumstances mentioned, to hold, as a presumption of fact from the course of business as carried on with the knowledge and permission of the directors, that such president was so specially authorized, and thereby, and also by the application of the doctrine of estoppel, to protect the innocent party: *McDonald v. Chisholm*, 131 Ill. 273, and *Atwater v. American etc. Nat. Bank*, 152 Ill. 605, are conspicuous examples, and they meet with our approval. They are both cases where it was sought to avoid the effect of judgments by confession, as in this case. The doctrine is there laid down as follows: "When a private corporation allows its managing officer to so conduct himself in his dealings and transactions on behalf of the company as to lead the public, or those dealing with him, to reasonably believe he possesses certain powers, the company will not be allowed to question such apparent authority, as against one relying in good faith on the same; and, where the general manager of a corporation makes a judgment note in the course of the general business of the corporation, he will be presumed to have acted within the scope of his powers, even though no resolution ¹⁰⁸ of the directors is shown. A stranger dealing with him, without notice of want of authority, will be protected." Thus, the principle of law contended for by the appellants is maintained; yet, by the evolution, we may properly say, of equitable principles, and their more liberal application as well, rather than by the discovery of any new ones, the effectiveness of the whole body of the law is preserved to accomplish justice in dealing with business conditions as they now are, when corporations exist, not created by special grant, and few in number, for purposes of more or less public concern, as formerly, but organized under general and very liberal acts for all kinds of legitimate business which concern the individual at every turn in the ordinary affairs of everyday life.

In this discussion we have not noticed the fact that the power of attorney in this case was not sealed with the seal of the

corporation, because we do not deem that fact of any special importance. The seal would only be presumptive evidence that the execution of the instrument was a corporate act. If it be such in fact, or if the circumstances be such that defendant Hill had a right to rely upon it as such, then the absence of the seal makes no difference; the seal was not essential to the validity of the instrument: Angell and Ames on Corporations, sec. 282; 4 Thompson on Corporations, sec. 4630. The old doctrine that corporations can act only by deed or instrument under seal has been very much modified. It has given way to the pressure put upon it by the great growth of corporate transactions, and the necessity for greater freedom in their operations, for the convenience of business. Such bodies may now act without a seal, very much as individuals can, except when otherwise provided by statute or their articles of organization.

It follows from the foregoing that the judgment of the circuit court must be affirmed.

By the Court. The judgment of the circuit court is affirmed.

CORPORATIONS — INSOLVENT — TRUST FUNDS — PREFERENCES.—A corporation, though insolvent, if still in possession of its property, may prefer one creditor to another: First Nat. Bank v. Dovetail Body etc. Co., 143 Ind. 550; 52 Am. St. Rep. 435, and note. The entire property of a corporation constitutes a trust fund for the benefit of all its creditors, without preference, only when the affairs of the corporation have reached the point that its managers find themselves obliged to deal with its assets in view of a suspension by reason of its insolvency: Sabin v. Columbia Fuel Co., 25 Or. 15; 42 Am. St. Rep. 756, and extended note fully discussing this subject.

CORPORATIONS — AUTHORITY OF PRESIDENT.—The president of a corporation may, without express authority, perform all acts which are incident to the execution of the trust reposed in him and which custom or necessity imposes upon the office: Mitchell v. Deeds, 49 Ill. 416; 95 Am. Dec. 621, and note; Chicago etc. R. R. Co. v. Coleman, 18 Ill. 297; 68 Am. Dec. 544; Sparks v. Dispatch Transfer Co., 104 Mo. 531; 24 Am. St. Rep. 351; Ceeder v. Loud etc. Lumber Co., 86 Mich. 541; 24 Am. St. Rep. 134, and note. See, also, the notes to Lyndon Mill Co. v. Lyndon Literary etc. Inst., 25 Am. St. Rep. 788, and Wait v. Nashua Armory Assn., 49 Am. St. Rep. 631.

CORPORATIONS — ESTOPPEL TO DENY AUTHORITY OF OFFICERS.—In an action against a corporation on a note signed in its name by its president, secretary, and treasurer, without express authority from or ratification by the corporation, it is estopped from asserting that such officers acted outside of their authority, where it appears that all of the business of the corporation, including the kind in question, has universally been transacted by such officers, and informally ratified by the corporation: Duggan v. Pacific Boom Co., 6 Wash. 593; 36 Am. St. Rep. 182, and note with the cases collected.

A CORPORATE SEAL IS NOT ESSENTIAL to the validity of a written contract entered into by a corporation: B. S. Green Co. v. Blodgett, 159 Ill. 169; 50 Am. St. Rep. 146, and extended note.

GUETZKOW COMPANY v. ANDREWS.

[92 WISCONSIN, 214.]

DAMAGES, PROSPECTIVE PROFITS ON GOODS KNOWN TO BE PURCHASED FOR RESALE.—If one who sold goods to another knew that the latter purchased to fulfill a contract which he had theretofore made to sell them to a third person, and there is no market price for such goods, and they are furnished by the first vendor, but not according to contract, for which reason the second vendee refuses to keep and pay for them, the measure of damages, in an action by the first vendee against his vendor, is the price agreed to be paid by the second vendee, whether it was communicated to the first vendor at the time of his sale or not, unless that price was such as to yield an extraordinary and unusual profit, such as could not reasonably be presumed to have been contemplated by the first vendor at the time of entering into his contract. In such a case, he is not liable beyond such sum as would yield a fair and reasonable profit to his vendee.

DAMAGES, PROFITS TO BE REALIZED FROM A RESALE. Where goods are purchased to fill a contract of sale already made by the vendee, and the vendor knows that fact, the price for which the goods have been resold will be presumed to be a reasonable price in an action against the original vendor for not delivering goods of the character sold. This presumption may be rebutted, however, by proving that such price would yield an extravagant or extraordinary profit. In that event, the first vendor is not liable for damages computed upon the price of such extraordinary profits, nor to any damages whatever, unless there is evidence before the court to show what would amount to a reasonable profit on the transaction.

PRACTICE.—THE FINDINGS OF A REFEREE will not be set aside as contrary to the evidence, unless they appear to be against the clear preponderance thereof.

Action to recover money alleged to be due from the defendant to the plaintiff for showcases purchased of the plaintiff, and which defendant had contracted to furnish exhibitors at the Columbian Exposition. The defendant interposed a counterclaim for loss of profits which it could have made had the articles been furnished as provided for in its contract, such profits being, as it alleged, an advance from one hundred to one hundred and fifty per cent of the purchase price. The goods which were the subject of the contract did not have any market price. The other facts appear from the opinion of the court. The case was referred in the trial court, and, the referee finding against the defendant, judgment was entered in favor of the plaintiff, and the defendant appealed.

Cary & Cary, for the appellant.

F. C. Eschweiler, for the respondent.

216 MARSHALL, J. There is no controversy but that the findings of fact warrant the judgment that was entered, and it seems clear that, waiving the question of whether they are sup-

ported by the evidence, in respect to the determination that the contract between the parties was substantially complied with, appellant is not entitled to prevail on this appeal unless the rule for which it contends—that is, that it is entitled to recover the loss of profits, amounting to from one hundred to one hundred and fifty per cent—should have been adopted by the trial court. The evidence was taken on appellant's theory, but at the close of the trial was stricken out; the referee holding that the rule contended for would not be applied to the case. He said: "The decided weight of authority is in favor of the exclusion from consideration, on the question of damages, the profits the original contractor might have made under his contract; that such damages—possible profits—are uncertain, speculative, and too remote to affect the plaintiff, and the testimony in relation to the same should be excluded." Looking at this ruling in the light of the evidence and appellant's contention, we assume the court did not hold, or intend to hold, that lost profits are not recoverable in a proper case, but that the rule contended for by appellant could not be applied, and that the evidence did not tend to establish damages under any other rule. On this subject ²¹⁷ the learned counsel for appellant say: "We say, frankly, that if, in the light of the facts of this case, the referee decided that proposition correctly, the judgment should be affirmed." So we may properly consider this subject at the outset in determining the case, and in doing so, shall take into consideration the evidence that was stricken out. If, notwithstanding such evidence, the court could not, on the whole case, have allowed loss of profits as damages, then the error in striking out such evidence, if it was error, did not prejudice appellant; hence, does not constitute reversible error.

There is no controversy but that the difference between the contract price for the goods to appellant and what it was to receive was unusually large. To say that such increased price to the exhibitors was extraordinary in a superlative degree, would be fully justified. It also appears beyond controversy that respondent's officers knew, when the contract was made with appellant, that the goods were intended for a special purpose. They had reason to know that there was no established market price for such goods. They knew that defendant was under contract to furnish the goods to the exhibitors, but it does not appear that they had any notice of the contract price such exhibitors were to pay; and it is in the light of these facts that we must determine the question presented.

As stated, in effect, by this court in *Wright v. Mulvaney*, 78

Wis. 89, 23 Am. St. Rep. 393, it is sometimes difficult to determine when the rule of prospective profits should be applied, and when not, and such determination must be largely governed by the special circumstances in each particular case; and, as often said by this court, in terms or in effect, such profits are at best conjectural and uncertain, and, when allowed, are likely to, or necessarily do, operate unjustly and oppressively: *Wright v. Mulvaney*, 78 Wis. 89; 23 Am. St. Rep. 393; *Pewaukee Milling Co. v. Howitt*, 86 Wis. 270; *Bierbach v. Goodyear etc. Co.*, 54 Wis. 208; 41 Am. Rep. 19; ²¹⁸ *Anderson v. Sloane*, 72 Wis. 566; 7 Am. St. Rep. 885. Therefore, before the rule should be applied to any given case, such case should be brought clearly within the authorities on the subject, leaving no reasonable controversy in respect to it. To be sure, in this case the element of uncertainty, as the term is commonly used, was in some respects not present, because the contract between the appellant and the exhibitors relieved it in a measure of that difficulty; but uncertainty still remained, quite prejudicial to respondent, in that it was not known to its officers, at the time of the making of the contract, that the price appellant was to obtain from the exhibitors would yield an extraordinary profit. Where there has been a previous sale, or where there has not, the fundamental principle to be observed is that the damages for the breach complained of must be confined to such as may be fairly considered to arise, according to the usual course of things, from such breach, or such as may reasonably be supposed to have been in contemplation of the parties at the time of making the contract as the probable result of the breach of it: *Hadley v. Baxendale*, 9 Ex. 341; *Cockburn v. Ashland etc. Co.*, 54 Wis. 619. Hence, it is held that, in order to make applicable the special rule of damages—that is, loss of profits—it must be shown that the special circumstances, by reason of which the party invokes such application, were brought clearly home to the knowledge of both parties at the time the contract was made, and it is only applicable in so far as such circumstances were so brought home.

All rules for the assessment of damages for the breach of contracts are supposed to be founded upon principles of natural justice, the intention being to keep strictly within such principles. It is on that ground that the general rule established for the assessment of damages for the breach of an executory contract to sell and deliver property, i. e., the difference between the contract price and the market value ²¹⁹ at the time and place of the delivery, in order to work out natural justice in case of special circumstances, must necessarily be broadened out to fit such circum-

stances, but only when such special circumstances are shown to have been brought home to the knowledge of both parties at the making of the contract. The leading case of *Hadley v. Baxendale*, 9 Ex. 341, states the rule applicable to a case of this kind, and it has been repeatedly approved by this court. It is thus stated, in the language of Anderson, B: "Where two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i. e., according the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to defendants, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated; but, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great majority of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for a breach of contract by special terms as to the damages in that case." To the same effect are *Borries v. Hutchinson*, 18 Com. B., N. S., 445; *Messmore v. New York etc. Co.*, 40 N. Y. 422; ²²⁰ *Booth v. Spuyten Duyvil etc. Co.*, 60 N. Y. 487; *McHose v. Fulmer*, 73 Pa. St. 365; *Poposkey v. Munkwitz*, 68 Wis. 322; 60 Am. Rep. 858; *Cockburn v. Ashland etc. Co.*, 54 Wis. 619, and substantially all the authorities on the subject; and, if all were collated, no more light could be thrown on the general principle involved.

But the question arises whether the price to the first vendee must be communicated to the second vendor, in order that he may be charged with the special rule of damages at the suit of his vendee, in case of a breach on the part of such second vendor; and upon the precise point here presented the authorities are not numerous. In *Cockburn v. Ashland etc. Co.*, 54 Wis. 619, Mr. Justice Lyon said: "To bind the defendant by a price stipulated for on a resale, he must have had notice of such resale when the contract was made, though, perhaps, not of the

contract price." But it must be observed that, in the case then under consideration, the circumstance of extraordinary profits was not present; that is, the evidence did not disclose but that the profits were such as were reasonable and might reasonably have been in contemplation by both parties to the transaction when the contract was made.

The question has been many times considered in the courts of England, and may be said to have been long settled, that the second vendor is only bound by the terms of the contract with the second vendee so far as communicated to him or he had reasonable ground to know the same by inference from facts brought to his knowledge. All of the cases refer to and are founded upon the general principle laid down in *Hadley v. Baxendale*, 9 Ex. 341. In *Borries v. Hutchinson*, 18 Com. B., N. S., 445, these circumstances were present: There was a Russian contract between the plaintiff and a third person as his vendor. The fact of the contract was made known to defendant, but not its terms. He knew the goods were to be delivered in Russia, to be transferred ²²¹ there by rail. He was familiar with the fact that freight rates and insurance rates were higher there in winter than in summer. He agreed to deliver the goods in summer, but did not deliver until later, so that the winter rates of freight and insurance applied. It was held that he was bound to know, under the circumstances, at the time he made the contract, that the late delivery would necessitate a loss on the plaintiff by reason of increased freight and insurance charges. Hence, he was charged with such loss, because so much of the contract was made known to him as charged him with knowledge that the loss by increased freight and insurance rates would naturally follow such late delivery. Plaintiff was liable to his Russian vendee for certain penalties for failure to deliver the goods at the time agreed upon; but defendant was not held liable for such penalties, because knowledge of the terms of the Russian contract in that regard was not brought home to him, nor facts that would reasonably have suggested that element of probable damages in case of a breach. To the same effect are *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473; *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85. In this last case there was a contract between plaintiff and a third person, as his vendee, for goods of a particular kind, which contract was made known to him. The contract was the same as between plaintiff and defendant, except as to price. The latter contract was broken. There was no market price for the goods. There was no question but that the difference in price was no more than a reasonable profit. He was held

liable for such profits as one of the natural consequences of the breach of so much of the contract as was made known to him. Brett, M. R., stated the rule thus: "It seems to me, according to what has been decided, that the original vendor in such a case is only liable, in case of a breach, for the natural consequences of so much of the subcontract as was made known to him. ²²² If he were told, for instance, that the contract was that, if I do not supply my purchaser with the goods which I am ordering from him, my vendor, I shall have to pay my purchaser four pounds a ton for every ton which I do not deliver; then, if there be a breach of the contract, the original vendor would have to pay the four pounds a ton. But, supposing there was in the subcontract between myself and my purchaser, not only that I should pay four pounds a ton, but, besides, that I should be liable to a penalty of five pounds a day; although that is in the subcontract, yet if that part of it was not made known to the original vendor, then for that reason, and because it is not a natural consequence of his bargain, he would not be liable to pay the penalty of five pounds a day. It seems to me that the cases establish that the original vendor is to be liable to so much of the subcontract as was made known to him, but only to that extent." To the same effect are the American authorities, all substantially adopting the rule of *Hadley v. Baxendale*, 9 Ex. 341. They are numerous, and it is sufficient to refer to *Poposkey v. Munkwitz*, 68 Wis. 322; 60 Am. Rep. 858; and *Cockburn v. Ashland etc. Co.*, 54 Wis. 619, in our own court.

Differences may be found in the interpretations which courts have put on the rule of *Hadley v. Baxendale*, 9 Ex. 341, but they generally hold that the price in the first contract need not be communicated, as intimated in *Cockburn v. Ashland etc. Co.*, 54 Wis. 619, in this court. They proceed upon the principle, all of them, that knowledge of the first contract is sufficient to bring home to the second vendor, as an inference of fact, knowledge that the price of the first contract is sufficiently in advance of the price in the second contract to allow a reasonable profit to the second vendee. We venture to say that no case can be found, where the price was out of all proportion to anything that might be considered reasonable in order to give a fair profit, that the court has held that such unreasonable profits, may be recovered as damages, where knowledge of such unreasonable profits, as a special ²²³ circumstance, was not known to both parties at the time of the making of the contract. The most that is held in *Booth v. Spuyten Duyvil etc. Co.*, 60 N. Y. 487, cited with confidence by appellant, is, that the sec-

ond vendor is bound by the price his vendee is to receive, unless it is shown that such price is extravagant or of an unusual or exceptional character. That is as far as the New York courts have gone. Church, C. J., said: "There is considerable reason for the position that, where the vendor is distinctly informed that the purchase is made to enable the vendee to fulfill a previous contract, and he knows there is no market price for the article, he assumes the risk of being bound by the price named in such previous contract, whatever it may be." But no such rule was adopted, and no case was there cited to support such a rule, and we are unable to see wherein such reason exists. It could only be consistent with the theory that the law aims at complete compensation for all losses, including gains prevented as well as losses sustained, without the important condition, requisite to give the rule the basic foundation upon which all rules for the assessment of damages are supposed to rest, that of natural justice, which condition must always be considered in order that the true rule may be correctly stated—that is, that the damages must be such as can be fairly supposed to have entered into the contemplation of both parties.

Further discussion of the subject might be interesting, but is not necessary to a decision of this case; and the only excuse for extending it thus far is the fact that it does not appear that the precise question here presented has heretofore been decided by this court. We state the conclusion arrived at thus: When the vendor is informed that the purchase is made to enable the vendee to fulfill a contract which he has theretofore made with a third person, and such vendor furnishes the goods, but not according to contract, and there is no ²²⁴ market price for such goods, and the purchaser furnishes such goods to such third person, but is not able to recover of him the price stipulated in the contract with such third person, by reason of the breach of the contract committed by such vendor, in determining the damages for such breach such vendor is bound by the price his vendee was to receive from such third person, whether such price was communicated to him at the time of the making of the contract with his vendee or not, unless the price was such as to yield an extraordinary and unusual profit, which could not reasonably have been presumed to have been in contemplation by him at the time he made his contract. In such a case he would not be bound beyond such sum as would yield a reasonable and fair profit to his vendee. Ordinarily, the price to the first vendee would, presumptively, be held to be a reasonable price; but if the facts in any given case are such as to show such price to yield an

extravagant or extraordinary profit, the second vendor will not be bound by such price, in the absence of evidence of previous knowledge, as before stated; and, in order to assess the damages the court must be put in possession of sufficient evidence to enable it to arrive at a conclusion in respect to what would amount to a reasonable profit on the transaction.

It follows from the foregoing that there was no evidence before the referee by which he could have assessed in plaintiff's favor damages for loss of profits for the breach of the contract between it and the defendant, if there was a breach.

After a careful examination of the evidence, we are unable to conclude that the trial court erred in refusing to set aside the referee's findings of fact on the question of whether the contract was substantially complied with or not. Under repeated decisions of this court, to warrant setting aside findings of fact as against evidence, it must appear that they are against the clear preponderance of the evidence: *Briggs v. Hiles*, 87 Wis. 438; *Bacon v. Bacon*, 33 Wis. 147; *Lord* ²²⁵ *v. Devendorf*, 54 Wis. 491; 41 Am. Rep. 58; *Messersmith v. Devendorf*, 54 Wis. 498. Moreover, it is doubtful whether the bill of exceptions is sufficiently certified to enable the court to review the question of whether the evidence supports the findings or not.

It follows, from the foregoing, that the judgment of the superior court should be affirmed.

By the Court. The judgment of the superior court is affirmed.

DAMAGES—PROSPECTIVE PROFITS.—One injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as losses sustained, if they are certain, and such as might naturally be expected to follow the breach: *State v. Andrews*, 39 W. Va. 35; 45 Am. St. Rep. 884, and note. Profits which are the direct results and fruits of a contract may be assessed for a breach thereof: Note to *Martin v. Deetz*, 41 Am. St. Rep. 163. See, also, the notes to *Western Union Tel. Co. v. Hyer*, 1 Am. St. Rep. 228, 229, and the extended notes to *Griffin v. Colver*, 69 Am. Dec. 725, 727, and *Sitton v. Macdonald*, 60 Am. Rep. 488.

FOUNTAIN SPRING PARK COMPANY v. ROBERTS.

[92 WISCONSIN, 845.]

CORPORATIONS.—PROMOTERS OF A CORPORATION CANNOT LEGALLY TAKE ANY ADVANTAGE over the members thereof, and are accountable to it for any profits realized from a violation of their duty in this regard.

CORPORATIONS.—PROMOTERS, PERSON CONSPIRING WITH.—Persons who conspire with promoters of a corporation to procure it to take property at a designated price, upon the representation that such is a reasonable price and the one which is agreed to be paid therefor, whereas it is greatly in excess of the sum agreed to be paid, are, equally with such promoters, liable for the profits realized on the sale of the property to the corporation at such extravagant price, though it is not alleged that such persons, other than the promoters, had any dealings with the corporation or its members, or occupied fiduciary relations toward them, or that they made misrepresentations to the stockholders, or personally knew that any were made.

CONSPIRACY, LIABILITY OF CONSPIRATORS.—If several persons combine to carry out a fraudulent conspiracy to cheat another, each and all are liable to him without reference to the amount of the fruits of the transaction each obtains, or the degree of his activity in the scheme.

Action by the corporation plaintiff against Carrick, Willis, Russell, and Roberts. The two first named formed a plan to promote the organization of plaintiff for the apparent purpose of purchasing a tract of land and reselling the same at a profit. Their real purpose, however, was to defraud such persons as became members of the corporation. One Weber had contracted to purchase the land in question from Wells & Upham for the sum of twelve thousand seven hundred and fifty dollars. The defendants Russell and Roberts, with knowledge of the fraudulent purpose of their codefendants, agreed to assist them in carrying out the scheme, in consideration of receiving a portion of the profits. Carrick and Willis each subscribed to the stock to the amount of nine hundred and fifty dollars, and procured such additional subscribers as to make the aggregate sum subscribed sixteen thousand dollars. The land to be purchased was subject to a mortgage for six thousand dollars, and the real amount of moneys to be paid was six thousand seven hundred and fifty dollars, it being the intention to leave the mortgage outstanding, but it was represented to the corporation and the stockholders that the land was to cost twenty-three thousand dollars, and relying on these representations, the stock was subscribed and paid for, and the money turned over to Carrick and Willis to enable them to secure the land. Russell and Roberts, to assist the scheme, obtained an assignment of the right which Weber had to purchase the land. The profits realized in the

transaction were ten thousand five hundred and eighty-seven dollars and twenty-seven cents, of which sum two thousand and sixty-two dollars and twenty-seven cents were paid to the defendants Roberts and Russell. They interposed a demurrer to the complaint, which being overruled by the court, they appealed from the order entered upon such ruling.

P. G. Lewis and A. B. May, for the appellants.

Robinson & Geiger, for the respondent.

347 MARSHALL, J. The law is well settled that the promoters of a corporation occupy such relation to it that they cannot legally take any advantage over other members of such corporation, and that they are accountable to it for any profits which they may, by a violation of duty in this regard, receive: *Chandler v. Bacon*, 30 Fed. Rep. 538; *Pittsburg etc.* **348** *Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 159; *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. Div. 394; *Emma etc. Co. v. Grant*, L. R. 11 Ch. Div. 918; *Short v. Stevenson*, 63 Pa. St. 95; *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43; *McElhenny's Appeal*, 61 Pa. St. 188; 1 Morawetz on Private Corporations, sec. 291; *In re British Seamless Paper Box Co.*, L. R. 17 Ch. Div. 471.

In *Pittsburg etc. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, a case precisely like this, in respect to defendants Carrick and Willis—the law pertaining to the subject was most exhaustively discussed. Mr. Justice Taylor there stated the conclusion reached, as follows: “It being shown that the defendants formed the company for the purpose of purchasing this option, and having induced the present stockholders to furnish ninety thousand dollars of their money to make the purchase under the false impression, created by the defendants, that the defendants would be compelled to pay that amount for the purchase price, and the defendants having afterward, as officers and agents of the company, purchased for the company such option, and paid themselves seventy thousand dollars more than they knew they could purchase it for, and seventy thousand dollars more than they, in fact, paid for the same, it seems to me there can be no doubt of their liability to refund to the corporation the seventy thousand dollars so obtained.”

It being conceded, as it must be, that there is a good cause of action stated in the complaint against Carrick and Willis, the actual promoters of the enterprise and the persons who made the false representations and directly received the fruits of the fraudulent transaction, the question is presented on this appeal of whether Roberts and Russell, whom they employed to assist them in perpetrating the fraud, for a portion of the profits, and who,

with knowledge of the facts, aided them in the scheme, are also liable to the corporation. It is not alleged that they had any dealings directly with the plaintiff or its members, or occupied any fiduciary relation, strictly so-called, to them, or that they made any misrepresentations to the stockholders, or personally knew that any were made. To support the contention that they are ³⁴⁹ not liable on the facts stated, counsel for appellants cite *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43, and *McElhenny's Appeal*, 61 Pa. St. 188, but an examination of those cases fails to disclose wherein they are applicable to the facts alleged in the complaint. Here it is distinctly alleged that Carrick and Willis entered into an agreement with appellants, whereby the former were to promote the organization of the corporation and directly procure it to take the property at twenty-three thousand dollars, and appellants agreed, in consideration of a part of the profits, to aid in carrying out the scheme which resulted in defrauding the plaintiff out of ten thousand five hundred and eighty-seven dollars and twenty-seven cents; that appellants carried out their part of the agreement, and actually received a portion of the fruits of the fraudulent transaction, with knowledge of the facts. The principle of law, that where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains or the degree of his activity in the scheme, is too well settled to admit of discussion or to need any citation of authority in support of it. It is on that principle that defendants Roberts and Russell are charged in this case, and the allegations of the complaint in that regard, as appears from the statement of facts, make out a conspiracy to defraud, entered into and carried out by all the defendants; hence all are equally liable, and the complaint states a good cause of action as to each.

It follows from the foregoing that the demurrer to the complainant was properly overruled.

By the Court. The order of the circuit court for Milwaukee county is affirmed.

CORPORATIONS—PROMOTERS.—The "promoter" of a corporation may lawfully deal with his company, but such transaction must in all its parts be open and fair. Suppression, concealment, or misrepresentation of material facts is fraud which will justify a rescission of the contract or compulsory repayment of secret profits; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101; 42 Am. St. Rep. 159, and note. See, also, the note to *Pittsburg Min. Co. v. Spooner*, 17 Am. St. Rep. 161-168.

CONSPIRACY—LIABILITY OF PARTIES TO.—Where several, by combination and conspiracy, entice a citizen of this state to go

to another state that he might there be arrested on civil process, and he was so arrested, it was held that they were liable to him in an action on the case, although the debt for which he was arrested was justly due: *Phelps v. Goddard*, 1 Tyler, 60; 4 Am. Dec. 720. Where two persons conspire with a third to defraud the latter's creditors, and, in pursuance thereof, take an assignment of his property and aid him in leaving the state, they are liable in an action upon the case to such creditors: *Mott v. Danforth*, 6 Watts, 304; 31 Am. Dec. 468.

SHAKMAN v. UNITED STATES CREDIT SYSTEM Co.

[92 WISCONSIN, 366.]

INSURANCE, WHAT IS A CONTRACT OF.—A contract to indemnify a person from loss arising from the insolvency of his customers is a contract of insurance, and a corporation authorized to make it is an insurance corporation.

INSURANCE AGENT, POWERS OF.—An agent of a corporation, permitted to insure persons from loss from the insolvency of their customers, and who is authorized, on behalf of his principal, to solicit insurance, transmit applications, and collect premiums, has power to make an agreement that where customers are not rated in Dun's Commercial Agencies, as required in the original contract of insurance, the insured may use, as to them, the rating of Bradstreet's Mercantile Agencies.

INSURANCE, SILENCE RESPECTING PROPOSAL TO CHANGE TERMS OF.—If, after contract of insurance is effected, a memorandum is sent to the assured in effect modifying such terms, he is not deemed to have accepted or acquiesced in this modification, because of his silence respecting it, where it is not shown that the insurer was influenced in his conduct by the silence of the assured.

ESTOPPEL FROM SILENCE.—One of the essential elements of an estoppel is change in the position of the person who claims the benefit thereof. Therefore, one cannot be held to be estopped by his silence, where the person who relies upon such silence has not changed his position on account thereof, and will, therefore, suffer no substantial injury if not permitted to rely on the estoppel.

INSURANCE AGAINST LOSS BY INSOLVENCY OF CUSTOMERS, CONSTRUCTION OF.—If a policy, as written, purports to indemnify a party from all loss within one year from July 1, 1889, from the insolvency of his customers, provided they are rated in Dun's Mercantile Agencies, but on objection being made that the assured should be permitted to use Bradstreet's rating as well as Dun's, at the time of the delivery of the policy, November 8, 1889, the agent of the assured wrote thereon a memorandum extending the liability to persons rated in Bradstreet's Agency, the liability of the insurer is not limited to the business transacted after the latter date, but extends, as to both classes of customers, to all business done with them after the commencement of the term of insurance named in the policy.

INSURANCE AGAINST LOSS BY INSOLVENCY, CONSTRUCTION OF CONTRACT.—If a policy of insurance against loss by insolvency of customers provides that, in calculating losses, no credit shall be included therein exceeding a credit of thirty per cent of the lowest capital rating of the customers in specified books, though a credit is given exceeding such rating, the assured does not lose the right of indemnity altogether, but his indemnity is restricted to thirty per cent of such rating.

JUDGMENT NUNC PRO TUNC as of the date of the submission of a cause for decision may be entered where it appears that the defendant had ceased to be a corporation after such submission. The forfeiture of the charter of the corporation is equivalent to the death of a natural person, and the judgment in the one case as in the other may be entered, nunc pro tunc, as of a day in the lifetime of the party where it might have been entered in such lifetime but for some delay of the court.

Action upon a "certificate of guaranty" issued by the defendant in favor of the plaintiff, a manufacturer of clothing doing business in Milwaukee in the year 1889. The defendant was a corporation organized under the laws of the state of New Jersey. One of its agents, named Langsdorf, solicited business of the plaintiff, and caused him to make an application for a guaranty in the sum of five thousand dollars against loss from insolvency of persons to whom he might sell goods during the period of one year, commencing on the first day of July, 1889. This application was made October 23, 1889, and resulted in a certificate being forwarded by the defendant to its soliciting agent, who presented it for delivery to the plaintiff on the eighth day of November, 1889. A part of the terms of this certificate were that it did not apply to cases in which the plaintiff should give credit to parties who were not rated in R. G. Dun & Co.'s Mercantile Agencies, and that, in calculating the losses, no credit should be included exceeding a credit of thirty per cent on the "lowest capital rating such party or parties were rated at in said Mercantile Agency's books or reports." On the presentation of this certificate to the plaintiff by the agent, the plaintiff objected, on the ground that it did not allow the use of Bradstreet's reports of ratings as well as Dun's, and the agent thereupon wrote and delivered with the policy the following slip:

"Milwaukee, Nov. 8, 1889.

"Indorsement to certificate No. 3452 in favor of L. A. Shakman & Co., to wit: Should any party to whom the above-named firm may sell goods not be rated, within the system of this company, at Dun's Mercantile Agency, and Bradstreet's Agency does rate such party within the system of this company, then in such cases, the latter shall be binding upon this company.

"A. LANGSDORF, Genl. Supt."

On the 26th of the same month the plaintiff received a letter from one Fishell, who was a partner of the agent Langsdorf, and inclosing an indorsement slip, with the request that it be attached to the certificate, to take the place of the slip which Langsdorf had left. The slip so inclosed was as follows: "Should Dun's Mercantile Agency not rate a party, and Bradstreet's

Agency should give such party a rating or report, and such rating or report is sufficient to be covered by the system of this company, then and in that case the said L. A. Shakman & Co. may use Bradstreet's Mercantile Agency as a basis for such party. This special permission to take effect November 13, 1889." The plaintiff testified that he read the letter, but not the slip, and paid no attention to it, though he did not return it. The finding of the trial court was in favor of the plaintiff with respect to all disputed questions of fact, and that he had suffered losses covered by the contract amounting to two thousand eight hundred and fifty-six dollars and seventy-five cents, for which judgment was entered in favor of the plaintiff, and the defendant appealed.

Winkler, Flanders, Bottum & Vilas, for the appellant.

Bloodgood, Bloodgood & Kemper and W. J. Turner, for the respondent.

374 WINSLOW, J. We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is, in fact, much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. This very contract has been (sub silentio) construed as a policy of insurance by the supreme court of New Jersey: *Robertson v. United States etc. Co.*, 57 N. J. L. 12.

The contract being, then, a contract of insurance, and the defendant's business being the making of such contracts, it follows that the defendant is an insurance corporation, within the meaning of sections 1977, 1978 of the Revised Statutes. Langsdorf was its agent for the purpose of soliciting insurance, transmitting applications, and collecting premiums, and received pay therefor. He was, consequently, under section 1977 of the Revised Statutes, its agent for all intents and purposes, and had power to make the additional agreement contained in the indorsement dated November 8th: *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89. The court has found, on ample evidence, that he did make that agreement, and the fact is, therefore, **375** settled. It is, then, a fact in the case that a complete contract of

insurance was made, on or about November 8th, by the terms of which the plaintiff was to have the right to use the Bradstreet's ratings in case a given customer was given no rating by Dun.

But it is said that the memorandum sent to the plaintiff November 26th, which permitted the use of Bradstreet's reports only after November 13, 1889, became effective and binding by reason of the plaintiff's receiving it and failing to object thereto. We are unable to agree with this contention. The agreement of November 8th, being perfect, the letter and inclosed memorandum of November 26th could, at the most, amount to nothing more than a proposal to change the terms of the existing contract. This the plaintiff could do or not, as he chose; but it cannot be said that he did so unless he expressly agreed to the change, or unless his silence was legally equivalent to an express consent to the proposed change. There was no express agreement to make the change, nor do we think that the simple failure to answer the proposal should be construed as such an agreement, in the absence of all evidence showing that the defendant was influenced in its conduct by plaintiff's silence. An agreement inferred from silence must, in such case, rest on the principle of estoppel; and one essential element of estoppel is lacking here, namely, a change of position on the part of the defendant, relying on the plaintiff's silence, which would result in substantial injury to the defendant were it not permitted to rely on the estoppel. The conclusion necessarily is, that the contract which became perfected, November 8th, with the Langsdorf indorsement, became the contract governing the rights of the parties.

Another question now arises upon the construction to be given to the Langsdorf indorsement. It will be noticed that the policy, though dated October 23, 1889, in terms ³⁷⁶ covers the period of one year commencing on the 1st of July, 1889, and that it insures against losses accruing for merchandise sold and delivered during that period. Thus, the contract covers several months' business transactions previous to its date. It appears in evidence that a considerable number of the losses for which the plaintiff has recovered judgment were suffered between July 1, 1889, and the delivery of the contract, and that these losses arose from credits given to parties who had no credit rating in Dun's reports, but did have such rating in Bradstreet's reports. It is now contended that the Langsdorf indorsement is purely prospective in its operation, and only insures losses occurring after November 8th; so that, for the losses occurring before that date, covered by Bradstreet's reports only, there can be no recovery.

The indorsement reads: "Should any party to whom above-named firm may sell goods not be rated, within the system of this company, at Dun's Mercantile Agency," etc. The argument cannot prevail. This indorsement is part of the whole contract. It must be read in connection with all the other provisions of the contract, and as though it were incorporated in the contract at the proper place. So read, there can be no doubt that the contract refers to all goods sold and credits given between July, 1889, and July, 1890, and that the right to use the Bradstreet ratings in the proper cases was intended to be as broad in its terms as to time as the right to use the Dun ratings.

Subdivision 2 of the terms and conditions of the policy provides that, in calculating "losses, no credit that may have been given shall be included therein exceeding a credit of thirty per cent on the lowest capital rating such party or parties were rated at in said Mercantile Agency's books or reports." In a number of instances of losses, the plaintiff had given the insolvent debtors a larger credit than thirty per cent of their lowest capital rating. The court allowed, in such cases, thirty per cent of such rating, and disallowed ³⁷⁷ the excess. It is claimed by appellant that the clause means that the entire credit is to be excluded, and not simply the excess above thirty per cent of the rating. This is purely a matter of construction of language, and our construction agrees with that of the trial court, namely, that it is only that part of the credit exceeding thirty per cent of the rating which is to be excluded.

It is claimed that a loss of three hundred dollars suffered by the failure of one Simansky was improperly allowed. It appears that Simansky's name appears in Dun's reports with the notation "Blank 3"; that is, no capital rating, and credit "fair." In Bradstreet's reports, however, he appears rated "X D," which means one thousand dollars to two thousand dollars capital, credit fair. It seems to us that this loss was properly allowed. Simansky had no capital rating in Dun's reports. The system of the defendant required both a capital and a credit rating. This was, therefore, a case clearly within the Langsdorf indorsement, where the party was not "rated, within the system of the company, at Dun's Agency," and was so rated in Bradstreet's Agency.

This case was tried and submitted to the court February 20, 1894, and taken under advisement by the court, and held under advisement until October of the same year. The original findings were signed and filed October 2d, and, on motion of defendant, were amended in some particulars on the twenty-seventh

day of October, on which day the appellant's attorneys made proof to the court that, on the second day of October, the court of chancery of New Jersey had by decree declared that the defendant had ceased to be a corporation and had forfeited its franchises and rights under the laws of New Jersey, and appellant's attorneys objected to the entry of judgment for that reason. Thereupon the court ordered the findings to be dated and filed as of March 3d, so as to bring them within the term at which the case was tried, and also rendered judgment *nunc pro tunc* as of that day. This was right. ³⁷⁸ The action was upon contract. Where such an action has been fully tried and submitted and taken under advisement by the court, and, pending the decision, a party dies, the court will not allow the action to abate, but will enter judgment as of the time when the action was submitted. The judgment forfeiting the franchises of the corporation could amount to nothing more than the death of an individual: 1 Black on Judgments, sec. 127; *Mitchell v. Overman*, 103 U. S. 62.

By the Court. Judgment affirmed.

INSURANCE—WHAT IS A CONTRACT OF.—A contract of insurance is an agreement by which one person, for a consideration, promises to pay money or its equivalent, or to do some act of value to the insured, upon the destruction or injury of something in which he has an interest: *Clafin v. United States Credit System Co.*, 165 Mass. 501; 52 Am. St. Rep. 528.

ESTOPPEL BY SILENCE.—If a man is silent when he ought to speak, equity will debar him from speaking when conscience requires him to be silent: *Phillips v. Clark*, 4 Met. 348; 83 Am. Dec. 471. The silence of a party having full knowledge of his own rights, so as to intentionally permit others to be deceived and misled in relation to them, will conclude him from afterward interposing his claim to the prejudice of the party thus deceived or misled: *Titus v. Morse*, 40 Me. 348; 63 Am. Dec. 665, and note. See on this subject the notes to *Cook v. Walling*, 10 Am. St. Rep. 22; *Marines v. Goblet*, 17 Am. St. Rep. 24, and the extended note to *Ward v. Williams*, 79 Am. Dec. 387-389.

THE INSURANCE OF MERCANTILE CREDITS OR ACCOUNTS is discussed in the case of *Clafin v. United States Credit System Co.*, 165 Mass. 501; 52 Am. St. Rep. 528.

HAYES v. DOUGLAS COUNTY.

[92 WISCONSIN, 429.]

TAXES, RELIEF AGAINST IN EQUITY.—Though the manner of levying a tax is so irregular as to render it void, still, unless the tax is excessive or unequal or unjust, so as to affect its substantial justice, equity will not interfere to declare it invalid or to enjoin its enforcement.

ASSESSMENT BY FRONTAGE.—If the cost of a street improvement is directed by statute to be assessed against the lots chargeable therewith, in proportion to the benefit secured thereto, an assessment according to the frontage rule, and without any actual view or consideration by the officers making the assessment of the benefits actually accruing to each parcel by reason of the improvement, is invalid.

AN ASSESSMENT BY THE FRONTAGE RULE is presumed to be erroneous and invalid, when the property is required to be assessed according to the benefits accruing to it. This presumption can only be rebutted by proving that the board or officers authorized to make the assessment considered and passed upon all questions made material by the statute, and thereby reached a conclusion that the assessment computed by the frontage rule will, as to each parcel assessed, represent its proportion of the benefits accruing thereto.

ASSESSMENTS.—WHILE MERE ERRORS OF JUDGMENT do not invalidate an assessment, it must appear to be a fair attempt at compliance with the statute, and an assessment made in entire disregard of the statute is presumed to be unequal, and to justify the interference of a court of equity to prevent its enforcement.

ASSESSMENT NOT INCLUDING ALL THE PROPERTY BENEFITED.—Where an assessment is made by law chargeable to the lots and parcels benefited thereby, and officers are authorized to ascertain and determine what parcels are benefited by a proposed improvement, such officers should include in the assessment district all the lands which, in their judgment, fairly exercised, would be benefited; and if, instead of so doing, they impose an assessment only on the lands directly fronting upon the improvement, others being also benefited thereby, the assessment is unequal and invalid.

EQUITY.—AN ASSESSMENT MAY BE ENJOINED THOUGH THERE IS NO OFFER to pay such part as may be rightfully due from the complainant, where such assessment is shown to be unequal and to be imposed upon a part only of the property rightfully subject thereto.

DUE PROCESS OF LAW.—A statute providing that no action shall be maintained to avoid any special assessment levied pursuant thereto for which improvement bonds have been issued, and making such bonds conclusive proof of the regularity of all proceedings upon which they are based, is an attempt to deprive property owners of due process of law, where no actual notice is provided for, and the time within which they may bring an action may expire before they have any notice of the proceeding by which their property is sought to be made answerable for the supposed charges against it, and the whole time within which it is possible to commence such action may not exceed forty days.

CONSTITUTIONAL LAW.—A STATUTE OF LIMITATION WHICH ATTEMPTS TO CUT OFF A RIGHT OF A PROPERTY owner without affording him a just and reasonable opportunity to try his rights in the courts savors of spoliation and pillage, and is unconstitutional.

A STATUTE SO LIMITING THE RIGHT TO BRING AN ACTION to avoid an assessment that it may expire within forty days after such assessment has been levied, and before the property owner has any actual notice thereof or of the proceedings on which it is based, is unreasonable and void.

ASSESSMENTS, APPEAL FROM.—A statute authorizing an appeal from an assessment for street assessments, which does not permit the appellant to raise any question except about the proper amount of benefits to his particular lot, and which declares that the appeal shall be the only remedy of the owner of any parcel of land for the redress of any grievance he may have by reason of the improvement, cannot deprive him of his right to enjoin the enforcement of the assessment by a suit in equity, where such assessment is imposed in an unequal and irregular manner. The legislature cannot be presumed to have intended that the appeal should be the exclusive remedy as to the matters which cannot be redressed by it.

TAXES FOR UNAUTHORIZED PURPOSE.—A tax levied by a county to pay the expenses of placing stones in the state building at the Columbian World's Fair Exposition is unauthorized and void.

COSTS, LIMITING AMOUNT OF.—If a court of equity determines that a plaintiff is entitled to costs, it cannot limit the amount thereof. The law determines that question.

Suit to set aside certain taxes and assessments and a tax sale and certificate based thereon. As to a portion of the taxes, they were claimed to be invalid because included in a general item designated as a "general fund," without any specification of the particular purpose or purposes for which they were levied. Another portion of the taxes was levied to pay the expenses of placing some blocks of Douglas county stone in the Wisconsin building at the Columbian World's Fair. Another item consisted of charges of several thousand dollars for assessments for street improvements and installments on certain improvement bonds issued to pay for other street improvements. The grounds for complaint against these several assessments for street improvements and against the installments upon the improvement bonds sufficiently appear in the opinion of the court. The trial court adjudged the sale and certificate to be set aside, but imposed the condition that the plaintiff pay all the taxes included in the certificate, except four hundred and twenty-one dollars for the general fund, fifty-two cents for the World's Fair stone tax, one hundred and twenty-five dollars and sixty-four cents for the Grant avenue grading bond tax, and excessive interest included in the certificate, amounting to forty-one dollars and eighteen cents, leaving the total amount to be paid by defendant eight thousand nine hundred and eleven dollars and eighty cents, with costs to plaintiff, but providing that such costs should not exceed thirty dollars. Both parties appealed.

H. H. Grace & H. C. Sloan, for the defendant, Douglas county.

Ross, Dwyer & Hanitch, for the defendants.

⁴³⁹ NEWMAN, J. The point made against the general tax is not, indeed, that it was not authorized to be levied at all, but that it was not authorized to be levied in the manner in which it was levied, nor unless the item criticised—that is, the item “\$61,000, general fund”—should be included, with a detailed statement of the items which enter into it, in the general statements required to be made and filed by the board of public works and by the city comptroller. It is urged that this detailed statement is a necessary prerequisite to a valid levy of the city’s taxes.

The statute which authorizes the levy of the city’s taxes, and which directs the manner of this levy, is section 102 of the city charter, which is chapter 124 of the Laws of 1891. The section reads as follows: “On or before the first day of October in each year, the board of public works shall file with the city clerk a detailed statement of the amount of money that will be required for the ensuing fiscal year in their departments, and the city comptroller shall likewise file a statement of the amount required by the police department, fire department, and the remainder of the general fund, and for the purpose of paying interest for the ensuing year on the public debt and five per cent of the principal thereof. The city clerk shall, not later than the second Tuesday of October, place such estimates before the city council for their consideration, and the council shall thereupon, by resolution, levy such sums ⁴³⁹ of money as may be sufficient for the several purposes for which taxes are authorized, not exceeding the limit provided by law, and, in making such levy, they shall take into consideration the estimated amount that will be received by the city during the fiscal year from licenses.”

This section evidently contemplates that a fund shall be raised in the nature of a general fund, and which it will not be a misnomer to call the “general fund,” for it speaks of the “remainder of the general fund.” And in other sections the charter speaks of payments to be made out of the “general fund”: Charter, secs. 118, 125. The section seems to contemplate that at least the amounts required by the police department and fire department are parts of the fund denominated the “general fund,” for they are coupled by the conjunction “and” with “the remainder of the general fund.” There are other purposes for which taxes may be lawfully levied which would seem appropriately to come within the designation of “general fund.” Such are moneys for the payment of salaries to city officers, the expenses of the health department, of city hospitals, of lighting and cleaning streets, of caring for the sewers, and many other

like purposes. But it was contemplated that the city comptroller should make and file an estimate of the entire amount of moneys needed to be levied for such general fund. The charter only requires the statement to specify the amount required. It is not, in terms at least, required to specify in detail. Nor is it, in terms at least, required that the common council specify in detail the items which go to make up the sum which it levies. Nor is it, in terms, limited by the amount estimated by the comptroller. But it is directed to "levy such sums of money as may be sufficient for the several purposes for which taxes are authorized," up to the limit provided by law. This seems to confide to the judgment and discretion of the common council to levy such sums as, in its judgment, are sufficient for all the several ⁴⁴⁰ purposes for which taxes may be raised, uncontrolled by the estimates of the board of public works and the city comptroller. It would seem that the statements of these officers are designed for aids to the judgment of the common council, rather than for limitations upon its power.

This view seems to be re-enforced by section 112 of the charter, which provides: "The directions hereby given for the assessing of lands and personal property, and levying and collecting taxes, shall be deemed directory only, and no error or informality in the proceedings of any of the officers intrusted with the same, not affecting the substantial justice of the tax, shall vitiate or in any wise affect the validity of such tax or assessment."

It does not appear that a larger sum or sums were levied than were sufficient for the several purposes for which taxes were authorized, nor that any error or informality intervened affecting the substantial justice of the tax; and while it is realized that there are too few safeguards around this power of levying municipal taxes, and that it is a power liable to be abused, and which, very likely, is often abused, no doubt it is a subject difficult of adequate regulation. This regulation is within the province of the legislature, not within that of the court. The court can only enforce the law as it is written by the legislature. And, even if the court should be of opinion that the manner of the levy of this particular tax was so irregular as to render the levy void, still, unless it shall also appear that the tax is excessive or unequal and unjust, so as to affect its substantial justice, a court of equity will not interfere to declare it invalid or to restrain its collection, without payment of the tax: *Fifield v. Marinette Co.*, 62 Wis. 532; *Wisconsin Cent. R. R. Co. v. Ashland Co.*, 81 Wis. 1. So no ground is apparent on which the plain-

tiff can be relieved from the payment of this tax as a condition of the relief which he seeks.

The special assessments for street improvements were all ⁴⁴¹ made in the same manner, and all have a common vice. Both charters under which they were respectively made provide that the improvements shall be chargeable to the lots or parcels to be assessed, "in proportion to the benefits secured thereto." All of these assessments were made by the frontage rule. In each case, the whole amount of benefits to be assessed for the entire improvement was divided by the number of feet fronting on the improvement. This found the benefit accruing to each separate front foot fronting on the improvement. The benefit to each front foot, so found, multiplied by the number of front feet in each parcel, produced the benefit which was assessed against such parcel. This so-called assessment was made in the office of the city engineer, and without actual view and consideration, by the board of public works, of the benefits actually accruing to each parcel by reason of the improvement.

It is fundamental that the assessment of "benefits shall be made by the rule of apportionment prescribed by the charter; and where the rule of actual benefits is the rule prescribed, as in these charters, such benefits can be assessed only upon an actual view of all the property in the assessment district, and an impartial comparison and estimation of the benefits actually accruing to each parcel from the improvement; and it must be made to appear affirmatively that the assessment has been made in substantial compliance with the authority given by the charter: *Johnson v. Milwaukee*, 40 Wis. 315; *Watkins v. Zwietusch*, 47 Wis. 513; *Liebermann v. Milwaukee*, 89 Wis. 336, and cases cited on page 346; *Springfield v. Sale*, 127 Ill. 359.

In *Johnson v. Milwaukee*, 40 Wis. 315, the court say: "We rest our decision, not upon the rule of assessment, but upon the necessity of assessment, fairly and actually made, upon actual view of the premises to be assessed, of the benefits actually accruing to the premises by the improvement. This must have rested, in the first instance, upon the judgment and ⁴⁴² conscience of the commissioners of public works, which we could not probably have reviewed; that would have been for the common council firstly, and for the circuit court secondly. But we can require the apparent exercise of such judgment and conscience, in an apparently fair and just assessment, made under the conditions of the statute, by the board of public works, as a condition precedent to a valid charge upon the property assessed for the improvement. And where it is apparent that there was

none such, it is our duty to hold invalid the attempt to charge the property liable to assessment."

In *Liebermann v. Milwaukee*, 89 Wis. 336, the court say: "The assessment must show upon its face that the board has considered and passed upon all questions made material by the statute, and the results at which they have arrived. That which the law regards as of the substance of the proceeding we cannot treat as immaterial, nor can presumptions supply its place. We must, therefore, hold that the assessment in question is void on its face for a failure to show affirmatively that it was made in conformity with the authority conferred upon the board of public works by the provisions of the charter referred to."

When it is required that the assessment shall be according to benefits accruing to each parcel, an assessment by the frontage rule does not show affirmatively a compliance with the statute. While such an assessment is not necessarily erroneous, it is presumed to be so, unless the return shows that the board has considered that matter and finds that the benefits are in the proportion of the frontage of each parcel: *State v. Hudson*, 29 N. J. L. 104; *State v. Jersey City*, 38 N. J. L. 410; *O'Reilley v. Kingston*, 114 N. Y. 439; *Springfield v. Sale*, 127 Ill. 359.

It is evident that these assessments each fail to show upon their face that the statute which authorized them was complied with. Hence they must be held to be void.

443 The plaintiff's land was not liable, at all, to assessment for the Grand avenue improvement. It did not front or abut on that improvement, and so, under the charter of 1889, was not in the assessment district.

The assessments for paving Belknap avenue, and for the grading of Hill and Ritchie avenues, were made after the enactment of the charter of 1891. The former charter had constituted the frontage upon the improvement as the district upon which benefits were to be assessed. The new charter formed no assessment district, but declared the cost of the improvement to be "chargeable to the lots and parcels of land benefited thereby." The purpose of this change is manifest. It is fair and just that each parcel of property benefited by the improvement shall bear its proportionate share of the burden. It is matter of common knowledge that property lying in the vicinity of such improvements often derives important benefits from them, although not fronting upon or directly contiguous to them. There necessarily devolved upon the board of public works the duty to ascertain and determine what parcels of land were or would be benefited by the improvement—in effect, to determine the assess-

ment district. It was the duty of that board to include within the limits of the assessment district all parcels of land which, in its judgment, fairly exercised, would be benefited.

In the case of these last-named assessments, the board of public works entirely disregarded this provision of the new charter, and levied the assessments, as theretofore, upon the property fronting the improvement only; and it in no way appears that the board considered the matter, or determined, in the exercise of its judgment, that no other property would be benefited. So wide a departure from the rule of the statute cannot be without important effect upon the validity of the assessment. An assessment, under this statute, which does not distribute the burden fairly upon all ⁴⁴⁴ the property benefited by the improvement, cannot be just and equal. While mere errors of judgment do not invalidate it, it must appear to be a fair attempt at compliance with the statute. As suggested by Ryan, C. J., in *Johnson v. Milwaukee*, 40 Wis. 315, the court may and should require an apparent exercise of the judgment and conscience of the board of public works, in an apparently fair and just assessment, in conformity with the directions of the statute. An intentional omission from the assessment of property benefited must necessarily make the assessment unequal and unjust: *Weeks v. Milwaukee*, 10 Wis. 242, 264. These assessments were made in entire disregard of the statute, and are presumed to be unequal, and that the inequality is sufficient to justify the interference of a court of equity: *Hassan v. Rochester*, 67 N. Y. 528, 536, 537; *In re New York etc. School*, 75 N. Y. 324. And because the defects go to the very foundation of the assessment and make it necessarily unequal, the plaintiff is not required to pay his proportion of the assessment as a condition of relief: *Hassan v. Rochester*, 67 N. Y. 528; *Marsh v. Clark Co.*, 42 Wis. 502; *Meggett v. Eau Claire*, 81 Wis. 326.

In the cases of the Belknap avenue improvement and the grading of Grand avenue, the common council issued and sold improvement bonds upon the assessments. This it is authorized by the charter, sections 131, 132, to do as soon as the amount of benefits chargeable to the real estate has been "finally determined" and the contract for doing the work has been let, after giving thirty days' notice, by publication in a newspaper, of its intention to issue such bonds; and to collect it from the property assessed, by installments, as special taxes: Charter, sec. 136. The charter, section 137, also provides that "no action shall be maintained to avoid any of the special assessments of [or?] taxes levied pursuant to the same," after such improvement bonds

have been issued; and that "said bonds shall be conclusive proof of the regularity ⁴⁴⁵ of all proceedings upon which the same are based." The right to question the validity of these assessments and bonds in this action is denied, upon the authority of these provisions of the charter. So the question is presented whether the right of the owner to contest the validity of these assessments can be lawfully taken away by so short a limitation, by a statute which provides for no actual notice.

The assessments of benefits must be finally complete before the contract for doing the work can be let: Charter, sec. 127. The contract may be let after publication of notice for bids for one week. After the contract has been let, the improvement bonds may be issued after thirty days' notice by publication in a newspaper. No actual notice is provided for, and the bonds may be issued before the work has commenced. So that, if the statute is sustained as a valid limitation, its bar may be complete within forty days after the assessment is finally determined, and regardless of the fact whether the owner has acquired actual knowledge of the proceedings against his property.

These are proceedings whereby property is to be taken in invitum. No man's property can be lawfully taken or taxed but by due and regular process of law; nor forfeited except by his own omission seasonably to assert his right. It has been already demonstrated that these assessment proceedings are not due process of law, and are invalid to deprive the plaintiff of his property. So the plaintiff's property has not been effectually taken by these proceedings, unless the plaintiff has debarred himself from contesting the validity of the proceedings by his own laches; and this depends upon the validity of this statute as a statute of limitations.

All statutes of limitation proceed upon the theory that the party has forfeited his right to assert his title in the law by lapse of time and omission to assert it. This necessarily presupposes that a full and fair opportunity has been afforded ⁴⁴⁶ him to try his right in the courts; for it cannot justly be considered that he is in default and laches until such just opportunity has been afforded him and he has failed to avail himself of it. Any attempt to cut off his right without having afforded him such just and reasonable opportunity is not, properly, a statute of limitations at all. It savors rather of spoliation and plunder: Cooley's Constitutional Limitations, 6th ed., 449. No doubt, under a statute which provides for actual notice to the owner, a shorter limitation could be held reasonable than where constructive notice only is provided. Under this statute, many an owner may,

without fault, be without actual knowledge of the pendency of proceedings against his property, until the bar of this statute has foreclosed his right; and this may all well happen before any work, such as might arrest the attention of resident owners, is actually commenced under the contract. It is not questioned that all the proceedings relating to the assessment may be supported on notice by publication only; but the fact that the notice provided for is constructive only is an element proper to be considered in determining whether the time limited affords reasonable opportunity for the owner to assert his right. No doubt such time should be allowed as would give a reasonable chance to acquire actual knowledge of the pendency of proceedings against his property, and to ascertain and assert his rights. No absolute rule can be laid down as to what length of time will be deemed reasonable for the government of all cases alike. Different circumstances require different rules. What would be reasonable in one class of cases would be entirely unreasonable in another: *Wheeler v. Jackson*, 137 U. S. 245, 255. While it is, no doubt, convenient and desirable, on the part of the municipality, that all questions in respect to the validity of such proceedings shall be put at rest as soon as may be, still there is no such exigency as to justify even an apparently unfair abbreviation of the rights of property owners or undue advantage ⁴⁴⁷ taken. The time allowed should be ample to afford a reasonable probability that he would become informed of the proceedings against his property, and be fairly able to assert his right, before it is finally barred. It is considered that, plainly, this statute does not afford such reasonable opportunity, and cannot be sustained as a valid limitation. A short statute of limitations is not an allowable substitute for due process of law. It is utterly subversive of that constitutional protection to private rights of property. The fact that such short limitations have been sustained by some courts does not persuade the court that they are just and supportable on principle.

But it is said the plaintiff's remedy is limited to an appeal from the assessment. It is true that an appeal is given to the owner who feels aggrieved by the determination of the board of public works; but this appeal does not stay the progress of the work if the contract has been let, nor the issuing of the certificate against the lot for the benefit assessed; and, in case the appellant succeeds on his appeal, the only remedy given him is, that "the difference between the amount charged in the certificate so issued and the amount adjudged to be paid as benefits accruing to the real estate described in the certificate shall be

paid by the city out of the general fund": Charter, sec. 125. It is also declared that the appeal so given "shall be the only remedy of the owner of any parcel of land . . . for the redress of any grievance he may have by reason of the making of such improvement": Charter, sec. 126. It is obvious that, upon this appeal, only the proper amount of benefits to the particular lot can be investigated. No remedy appropriate to any other wrong is given. It furnishes no remedy by which to avoid an unequal and void assessment. Clearly, the appeal is no adequate remedy for the lotowner in this case; and it will not be presumed that the legislature intended the appeal given to be the exclusive ⁴⁴⁸ remedy, except as to matters which can be redressed upon the appeal: *Pier v. Fond du Lac*, 38 Wis. 470.

The Columbian Fair stone tax was altogether unauthorized and void.

It was error to limit the amount of costs to be recovered to thirty dollars. The court had exhausted its powers over the matter of the costs when it had determined that the plaintiff should recover them. The law determines their amount: Rev. Stats., sec. 2918, subd. 7; Rev. Stats., sec. 2921; *In re Carroll's Will*, 53 Wis. 228.

The judgment should be reversed on both appeals. On payment of the sum of four hundred and twenty-one dollars, the taxes for general fund hereby held valid, and the sum of four thousand four hundred and ninety-seven dollars and thirty cents, for taxes and assessments conceded by both parties to be valid—in all, the sum of four thousand nine hundred and sixty-eight dollars and thirty cents, with legal interest, that is, with interest at the rate of seven per cent per annum up to March 27, 1893, and six per cent per annum thereafter up to the time of payment (*Pierce v. Schutt*, 20 Wis. 423; *State v. Guenther*, 87 Wis. 675), the tax certificate and the several special assessments hereby declared void, and the tax for the Columbian Fair, should be vacated and set aside.

By the Court. The judgment of the circuit court is reversed on both appeals, and the cause remanded, with directions to render a judgment in accordance with this opinion.

Marshall, J., took no part.

A motion by the respondents for a rehearing on the plaintiff's appeal was denied March 10, 1896.

TAXES.—AN INJUNCTION will not issue to restrain the collection of taxes merely because of illegality or irregularity appearing upon the face of the assessment, but the complainant will be left to his

remedy at law: *Hibernian Ben. Soc. v. Kelly*, 28 Or., 173; 52 Am. St. Rep. 769. See, also, the extended notes to *Williams v. County Court*, 53 Am. Rep. 110, *White v. Stender*, 49 Am. Rep. 287, and *Holland v. Mayor*, 69 Am. Dec. 189.

ASSESSMENTS BY FRONTAGE are discussed in the case of *Violet v. Alexandria*, 92 Va. 561; ante, p. 825 and note. See, also, the extended notes to *People v. Mayor*, 55 Am. Dec. 288. The cost of grading a street should be distributed among the lotowners on a square by imposing upon each his aliquot portion of the whole cost, estimated according to the extent of his lot on the street: *Louisville v. Hyatt*, 2 B. Mon. 177; 36 Am. Dec. 594. An assessment for street grading may be made upon each frontage foot equally: *Schenley v. Commonwealth*, 36 Pa. St. 29; 78 Am. Dec. 359, and note at page 370.

TAXES—PUBLIC CELEBRATIONS.—A municipal corporation cannot, unless authorized by the legislature, raise money by taxation for the purpose of celebrating great historical events: Extended note to *Zigler v. Menges*, 16 Am. St. Rep. 371.

ASSESSMENTS—NECESSITY FOR NOTICE—DUE PROCESS OF LAW.—That notice must be given a property owner and an opportunity to appear and contest the same, where his property is assessed for a local improvement, is discussed in *Violet v. Alexandria*, 92 Va. 561; ante p. 825, and note.

KIEL v. CHOATE.

[92 WISCONSIN, 517.]

NEGOTIABLE INSTRUMENTS.—AS BETWEEN TWO INDORSERS, whose names appear on the back of a promissory note, parol evidence is admissible to prove their agreement that each should be liable for one-half only.

Action by J. N. Kell against Choate and Bray for contribution, it being claimed by the plaintiff that while a certain promissory note had been executed in his favor, and had been by him indorsed in blank, and under his indorsement had been placed that of the defendants, such note and indorsements had been made for the accommodation of other persons, under a parol agreement between the two indorsers that, as to themselves, each should be liable for one-half only. The whole evidence to this effect was objected to in the trial court, but the objection was overruled, the evidence received, and judgment rendered thereon in favor of the plaintiff. The defendants appealed.

Hooper & Hooper, for the appellants.

Eaton & Weed, for the respondents.

518 **NEWMAN, J.** It was settled for this court by *Cady v. Shepard*, 12 Wis. 639, that, where a note is indorsed by a payee and a third party, the legal inference from the instrument itself that the payee is the first indorser may be explained by oral evidence of the facts and circumstances under which the in-

dorsement was made, in order to show the proper order of liability among the indorsers. The indorsement itself is not such a written contract between the indorsers themselves as cannot be explained by oral evidence. ⁵¹⁹ Between the indorsers, the presumption no doubt is, that as between themselves, their liability is in the order in which their names appear upon the paper. But that is a fact which is collateral to the contract of indorsement, and may be proved and the presumption rebutted by oral evidence. The authorities are nearly or quite uniform: 2 Randolph on Commercial Paper, secs. 740, 741, 908, and cases cited; 1 Daniel on Negotiable Instruments, 3d ed., secs. 703, 704, and cases cited; 2 Wharton on Evidence, 3d ed., secs. 942, 1060, and cases cited in note 1; 18 Cent. L. J. 382; Browne on Parol Evidence, sec. 83, and cases cited. It does not conflict with the rule that parol evidence is inadmissible to contradict or vary the terms of a written contract. No doubt, within this rule, a blank indorsement is to be treated as a written contract. But the blank indorsement forms a new and independent contract between the indorser and indorsee. It implies a promise that the paper is due and payable according to its tenor; that the maker or previous indorsers will pay it at maturity, when duly called upon and notified; and that the indorser will pay the same if they do not. The promise is made to the immediate indorsee not only, but to each subsequent indorsee. It is an agreement between the indorser and subsequent holder of the note. But it does not import an agreement among the indorsers themselves as to the order or manner of their liability. The indorser is liable alone on his contract of indorsement, and not jointly with the maker on the note itself: *Boyd v. Beaudin*, 54 Wis. 193, 201; 1 Daniel on Negotiable Instruments, 3d ed., sec. 669; 2 Parsons on Notes and Bills, 23.

The obligation of one indorser to contribute to one who has paid the note does not arise from any breach of the contract of indorsement, but only from its fulfillment. It is not an action upon the contract of indorsement at all, but is a liability which springs collaterally from it. It arises out of an agreement between the indorsers themselves. In the absence of evidence of a special agreement, the law implies ⁵²⁰ that they have agreed to be liable severally, in the order in which their names appear upon the paper. But this presumption is of little weight in the presence of evidence showing an actual agreement. Such evidence does not contradict or vary the contract of indorsement, which is only collaterally in issue: *Browne on Parol Evidence*, 18; *Abbott's Trial Evidence*, 7, 294; 1 *Greenleaf on Evidence*, sec. 89; *Phill-*

ips v. Preston, 5 How. 278. The charge was correct in substance, and fairly submitted the question to the jury.

By the Court. The judgment of the circuit court is affirmed.

NEGOTIABLE INSTRUMENTS — INDORSEMENT — PAROL EVIDENCE TO VARY EFFECT OF.—As a general rule, oral evidence is inadmissible to change the contract of indorsement: Notes to Drennan v. Bunn, 7 Am. St. Rep. 366, 367, and Kulenkamp v. Groff, 15 Am. St. Rep. 287. Parol evidence is admissible to prove that an indorsement was made upon the express agreement the note should be negotiated at a specified place only: United States Nat. Bank v. Ewing, 131 N. Y. 506; 27 Am. St. Rep. 615, and note. See, also, the note to Adrian v. McCaskill, 14 Am. St. Rep. 793, 794.

STATE v. STEINBORN.

[92 WISCONSIN, 605.]

ELECTION, BALLOTS, LATENT AMBIGUITY.—Where there are two men in the same town with the same name, one of whom is a candidate for office at an election and the other is not, and there are ballots which do not designate which of these persons are voted for thereon, parol evidence may be received to show for which the votes were intended.

ELECTIONS—BALLOTS, CONTRADICTING.—Where there are two persons in the same town, one commonly known as "C. H. C., Sr." and the other as "C. H. C., Jr." both being eligible to an office for which the former only is a candidate, parol evidence is not admissible to prove that ballots on which the name "C. H. C., Jr.," appeared were intended for "C. H. C., Sr."

ELECTIONS, EVIDENCE OF INTENTION OF THE VOTERS.—Parol evidence is not receivable to explain what is placed upon a ballot, nor to contradict or vary it, nor can the intention of the voter as expressed upon his ballot be explained by parol evidence, except for the same general purpose that such evidence might be received to explain any other written instrument.

Action to determine the right to the office of town treasurer. In the town were two men named Cornelius H. Cremer, both eligible to office; the one who was in fact a candidate for the office in question usually added after his name the designation, Sr., and the other after his name the designation, Jr. There were several votes for Cornelius H. Cremer without any designation after the name. There were also seven ballots having the name of Cornelius H. Cremer, Jr. The two questions presented were: First, whether the ballots having no designation could be counted for Cornelius H. Cremer, Sr., who was the candidate, and also whether the ballots bearing the designation Cornelius H. Cremer, Jr., could also be counted for Cornelius H. Cremer, Sr. In the trial court, all the ballots were counted in favor of Cornelius H. Cremer, Sr., thus giving him a majority over the other candidate, who thereupon appealed.

Morrow & Masters, for the appellant.

D. F. Jones, for the respondent.

607 NEWMAN, J. Doubtless, parol evidence was competent to show for which Cremer the ballots which failed to designate were intended to be cast. The evidence disclosed a latent ambiguity in them. But, clearly, there was no defect or ambiguity in the seven ballots which designated C. H. Cremer, Jr., as the person voted for; and the parol evidence failed to disclose any defect or ambiguity. On the contrary, it did disclose the pertinence and force of the abbreviation "Jr." in pointing out which of the two of the same name was intended. Instead of disclosing an ambiguity in the ballots, it showed that they were industriously accurate and free from uncertainty.

Parol evidence to show the intention of the voter is receivable on the same general ground and for the same general purpose as parol evidence to explain written instruments is received. It is not receivable to explain what is already plain on the face of the instrument, and in no need of explanation; nor to contradict or vary the instrument: *Attorney General v. Ely*, 4 Wis. 420, 429; *State v. Elwood*, 12 Wis. 551, 558; *State v. Goldthwaite*, 16 Wis. 146. To find that these seven voters whose ballots read for C. H. Cremer, Jr., voted for C. H. Cremer, Sr., is in direct contradiction of the definite and unambiguous evidence of the ballots themselves. These ballots cannot be counted for the relator, unless it can be found, on competent evidence, that it was his name which was on the ballots when they were cast. The intention of the voter cannot be proved to contradict the ballot, nor in opposition to the paper ballot which he has deposited in the ballot-box. A ballot which is unambiguous cannot be varied by parol proof. Nor can it be proved that the voter intended to vote for one man when his ballot was cast for another: *McCrary on Elections*, 2d ed., sec. 407; *Cooley's Constitutional Limitations*, 611; *People v. Seaman*, 5 Denio, 409; *People v. Pease*, 27 N. Y. 45, 84; 84 Am. Dec. 242.

608 It is plain that there was no competent evidence to show that these contested ballots were cast for the relator. They were unambiguous, and it was not competent to vary their plain import by parol evidence; and without them the relator was not elected.

At the close of the testimony, the appellant moved for the direction of a verdict in his favor. The court denied the motion. This was error.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

ELECTIONS—BALLOTS—PAROL EVIDENCE.—A ballot is to be construed as any other writing, and, while a resort to parol evidence may be had for the purpose of interpreting what would otherwise be doubtful, it cannot be shown by such or any evidence that the intention of the voter was anything different from what plainly appears on the face of the ballot: *Rutledge v. Crawford*, 91 Cal. 526; 25 Am. St. Rep. 212, and note. This question is fully discussed in the extended note to *Gumm v. Hubbard*, 10 Am. St. Rep. 317.

HUBER v. LA CROSSE CITY RAILWAY COMPANY.

[92 WISCONSIN, 686.]

ELECTRIC RAILWAYS, CARE TO PREVENT INJURY FROM ELECTRICITY.—An electric railway corporation, which has employed an electric light company to change the location and method of using street lamps, is bound to exercise toward the employes of the latter reasonable care and caution in the management and control of its railway and electric current, so as not to injure such employes while engaged in their work. It is bound to avoid acts the nature and probable consequences of which may be to inflict injury on persons thus employed, and is liable for such injuries as may result from an omission on its part to exercise such care.

NEGLIGENCE, DUTY OF ONE PERSON TO ANOTHER.—Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause injury to the person and property of the other, the duty arises to use ordinary care and skill to avoid such danger.

NEGLIGENCE IS NOT THE PROXIMATE CAUSE of an accident, unless, under all the circumstances, it might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident was the natural consequence of the negligence; it must also have been the probable consequence. The mere failure to ward against a result which could not have been reasonably anticipated is not actionable negligence.

NEGLIGENCE, QUESTION FOR JURY.—Whether the negligence of the defendant was the proximate cause of an injury, so that it and the result stand in the relation of cause and effect, is a question for the jury, where the evidence is not clear, or the proper inference to be drawn from the evidence is in doubt.

ELECTRIC RAILWAY, INJURIES WHICH IT COULD NOT ANTICIPATE.—If an electric railway has taken all reasonable and proper precautions against any probable injury to persons and property in the streets or elsewhere, except possibly those whose duty it is to repair span and trolley wire or the wires of an electric light company, and the persons who are required to perform those duties are understood to be familiar with the application of electricity to such uses, and with the appliances required and employed for their safety, and the dangers against which they should guard, and one of these persons is injured because a span wire has become charged by the coiling over it and the trolley wire a portion of the latter, and there is no reasonable ground for supposing that a prudent and careful operative would have failed to notice it under the circumstances, but he, not noticing it, exposed himself to danger, and received in-

jury. The railway corporation is not liable to him for the reason that his injury, under the circumstances, was a consequence which the corporation could not reasonably anticipate.

Action to recover damages sustained by the plaintiff, attributed by him to the negligence of the defendant. He was an employé of the Brush Electric Light Company, and as such was intrusted with the duty of changing the location of certain street lamps, so as not to interfere with the operation of the railway of the defendant corporation, and, while engaged in the performance of his duties, was injured by receiving a powerful current of electricity from the trolley wire of the defendant. It was claimed by the defendant that it had not been guilty of any negligence, but had constructed and maintained its posts, trolley wires, and other appliances in accordance with the city ordinance, and that the injuries of the plaintiff resulted from his carelessly coming in contact with a span wire at a point beyond which it was insulated, whereby he received a shock; that he knew the point to which the wire was insulated and the consequence of making a connection with it. At the trial, the defendant moved for a nonsuit at the close of the defendant's case. This being denied, the cause was submitted to the jury, which returned a verdict in favor of the plaintiff, upon which a judgment was subsequently entered, and the defendant appealed. There was no doubt from the evidence that the appliances of the defendant were of the best kind and in good order, and under the control of a competent electrical engineer. The cause of the accident sufficiently appears from the opinion of the court.

Losey & Woodward, E. C. Higbee, and G. M. Woodward, for the appellant.

Fruit & Brindley, for the respondent.

⁶⁴⁴ PINNEY, J. 1. The plaintiff was engaged as a servant of the light company, and using its poles and appliances under the direction of its superintendent, performing an engagement that company had entered into with the defendant ⁶⁴⁵ company to change the location and method of hanging the electric street lamps so that their use and management would not interfere with, or embarrass the use and operation of, the defendant's electric railway, for a consideration to be paid by the defendant. Under the circumstances, the defendant was bound to the exercise of reasonable care and caution in the management and control of its railway, and of the electric current which was its motive power, so as not to injure the employés of the light company while engaged in such work. It was bound to

avoid acts the natural and probable consequences of which might be to inflict injury on persons thus employed, and, if it omitted such precautions as were reasonably necessary under the circumstances, it would be liable for such damages as anyone thus engaged might suffer, being the proximate result of such neglect of duty. The rule was stated by Brett, M. R., in *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, 509, that, "whenever one person is, by circumstances, placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." This principle was referred to in *Zieman v. Kieckhefer etc. Mfg. Co.*, 90 Wis. 503, in *Bright v. Barnett etc. Co.*, 88 Wis. 307, and in *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455. In *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, 509, Cotton and Bowen, JJ., declined to approve the view expressed by the master of the rolls to its broadest extent. But, in the subsequent case of *Thrussell v. Handyside*, L. R. 20 Q. B. Div. 359, 363, the view of Brett, M. R., was expressly approved, Hawkins, J., saying "that where a man is employed to do certain work, and knows that the work he is doing is dangerous to others and that accidents are likely to happen, and knows that other persons are lawfully engaged ⁶⁴⁶ in other work and are under obligations to perform such work, the person engaged in the dangerous work is subject to the duty of using reasonable care and taking precautions to prevent accidents arising from the work in which he is engaged."

2. As was said by Newman, J., in *Block v. Milwaukee Street Ry. Co.*, 89 Wis. 378, 46 Am. St. Rep. 849: "The negligence is not the proximate cause of the accident unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence": *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 163; 50 Am. Rep. 352; *Barton v. Pepin etc. Soc.*, 83 Wis. 19; *McGowan v. Chicago etc. Ry. Co.*, 91 Wis. 147. A mere failure to ward against a result which could not have been reasonably expected is not actionable negligence. Whether the negligence of the defendant was the proximate cause of the injury, so that it and the result stand in the relation of cause and effect, is a question for the jury, where the evidence is not clear or the

proper inference from undisputed evidence is in doubt. It is not, however, necessary that injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence: *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 258, 259.

The evidence on this subject is not conflicting, and the real question is as to the inferences which may be fairly drawn from the evidence, and whether they are in doubt. It appears that the defendant had substantially complied with the statute (Laws 1889, c. 375, sec. 1), and by bell insulators and circuit breaks had provided by suitable insulation against injury to persons or property by reason of the leakage or escape of the current of electricity from the trolley wire. The trolley wire and the span wires were sustained ⁶⁴⁷ at an elevation of about twenty feet in the air. The bell insulators were to prevent the escape of the electric current from the trolley wire, and the circuit breaks to prevent the span wires, if they should become charged from the trolley, from charging the iron posts by the sidewalks. All reasonable and proper precautions had been taken, it must be conceded, against any probable injury to persons or property in the streets or on the sidewalks or elsewhere, except, possibly, to those whose duty it was to repair and give suitable attention to the span and trolley wires of the defendant, and the wires of the light company, so far as necessary in the operation of the respective lines. All such persons were understood to be, as the plaintiff was, familiar with the application of electricity to such uses, and with the theory of insulation, as well as the use and functions of the bell insulators and circuit breaks. The introduction and use of circuit breaks must be regarded, of itself, to the apprehension and judgment of these trained and experienced operatives, as a signal of danger—a warning that any given span wire may be charged with a heavy current from the trolley, by leakage or otherwise. They cannot come near a span wire without being thus admonished, and of the general judgment in construction that circuit breaks are necessary to secure immunity from electric shocks and to prevent the iron posts from being charged with an electric current down to the streets. These are all parts of the lines with which they are familiar. It is to be considered that they understand the peril and the provided protection as well. The plaintiff was injured because the span wire became charged by coiling, over it and the trolley wire, a portion of the latter, designed to make the curve down Main street. There was no other apparent method of disposing of it

for the time being, and no reasonable grounds for supposing that any prudent and careful operative would have failed to notice it under the circumstances; and, if he did not, the circuit ⁶⁴⁵ breaks provided protection against the charged span wire, unless he came in contact with the span wire beyond the circuit break and the iron post at the same time. This, we think, the defendant had no reasonable ground to suppose, in the present instance, that the plaintiff would do. The defendant had been operating its railway to the point in question for eight days, beyond which it had not been completed, and the plaintiff had been at work all this time and for some time previous, along the line, in changing the location of the street lamps of the light company, and knew that the trolley wire had been kept charged to operate the railway, and the defendant must have understood that he was familiar with these facts, as well as the near proximity of the iron and wooden poles, and the space between the iron poles and the outer end of the circuit break. These were obvious facts, and not to be mistaken or misunderstood. The injury could occur in only one way, as the plaintiff substantially tells us, namely, by his bare hand coming in contact with the span wire beyond the circuit break, and his other hand, or part of his bare person, coming in contact, in the same instant, with the iron post, so as to pass the electric current through him. Could the defendant have reasonably anticipated, under these circumstances, the occurrence of an accident such as this? Ought the defendant to have foreseen it, in the light of attending circumstances? We think not. It clearly appears that the use of the wooden pole in climbing up or coming down was not dangerous, nor was it possible for the plaintiff, while climbing or clinging to it, to have received a shock even by touching the charged span wire, unless he completed the circuit at the same instant by touching the iron post with his naked hand or person. The defendant had no reason to expect that an inexperienced operative would have climbed to such a point, much less that an experienced and competent one, with his knowledge of the situation at the only possible point of danger, with the ⁶⁴⁰ warning of the circuit break before him, would practically eliminate it as a means of safety, and, by placing his body substantially in its place, complete the electrical circuit, so that the current would necessarily pass through his body. It was not expected that he would have occasion to touch or come in contact with the span wire beyond the circuit break, or the iron post, for any purpose, and certainly not so as to complete an electrical circuit with his body.

We think the case of *Illingsworth v. Boston etc. Co.*, 161 Mass. 583, where the right of use was given to the operatives of both companies in common, for that and other reasons is distinguishable. We hold, therefore, that the evidence did not make a case to go to the jury to show that the negligence of the defendant relied on was the proximate cause of the plaintiff's injury.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

NEGLIGENCE IS A FAILURE to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done under the circumstances: *Harker v. Burlington etc. Ry. Co.*, 88 Iowa, 409; 45 Am. St. Rep. 242, and note. Negligence, in a legal sense, is no more than the failure to observe for the protection of another person that degree of care, precaution, and vigilance which the circumstances demand, whereby such other person suffers injury: *Barrett v. Southern Pac. Co.*, 91 Cal. 296; 25 Am. St. Rep. 186, and note.

NEGLIGENCE—PROXIMATE CAUSE—PROBABLE CONSEQUENCE.—Negligence is not the proximate cause of an accident, unless, under the circumstances, it might have been reasonably foreseen by a man of ordinary intelligence and prudence: *Block v. Milwaukee etc. Ry. Co.*, 89 Wis. 571; 46 Am. St. Rep. 849; *Yoders v. Amwell Tp.*, 172 Pa. St. 447; 51 Am. St. Rep. 750. The consequence for which a negligent person is answerable must be the natural result of the alleged negligent act, or one which might reasonably have been anticipated: *Knox v. Eden Musee etc. Co.*, 148 N. Y. 441; 51 Am. St. Rep. 700, and note. See, also, the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 809, 810.

NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY. There appears to be no dispute as to the proposition that the question of causal connection between the wrongful act and the injury complained of is ordinarily for the jury, under proper instructions from the court: Extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 851.

ELECTRIC CORPORATIONS OWE A DUTY, independent of statutory regulations, to see that their lines are safe for those who by their occupation are brought in close proximity to them: *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692; 32 Am. St. Rep. 348, and note.

INDEX TO THE NOTES.

- ABSENTEES**, jurisdiction to render personal judgment against, 179-191.
- ANIMALS**, increase of, whether included in a mortgage of, 210.
- ARREST**, illegal, right to resist, 713.
-telegram does not authorize, 36.
- ATTORNEYS**, insolvency of, does not entitle party to relief from judgment due to their negligence, 450.
negligence of, cannot constitute any ground for relief in equity against a judgment, 449.
- ATTORNEYS' FEES**, statutes imposing, when unconstitutional, 873.
- BANKS**, check, whether operates as an assignment before presentment, 874.
setoff against deposit, right of, 414.
surety on note to, whether released by allowing the principal to draw out moneys on deposit, 414.
- BOARDS OF TRADE**, power of courts to supervise decisions of, in expelling members, 319.
- BOUNDARIES**, parol agreements to establish, 491.
- CARRIERS**, are insurers against what losses, 399.
contracts limiting liability, burden of proof, 399.
freight, when earned by, 390.
- CHARACTER** of the defendant, evidence of in criminal prosecutions, 100.
- CHILDREN**, bequest to, when includes grandchildren, 456.
contributory negligence of, 647, 648.
minor, nonresident, when subject to the jurisdiction of the courts of the state, 184, 185.
street railways, neglect by, of duties to, 678.
- CONSTITUTIONAL LAW**, attorneys' fees, statutes imposing on specified classes of litigants, 627.
notice of proceedings to impose street assessments, whether must be given, 838.
- CONTRACTS**, place of performance of contract of support, 657.
rescission, consideration, return of, whether essential to, 354.
- CORPORATIONS**, contracts of in reference to objects which they are not authorized to secure, 789.
domicile of, 238.
estoppel against denying the authority of their officers, 908.
foreign, jurisdiction over when doing business within the state, 182.
incidental powers of, what are, 789.
meetings, holdings of in another state, 238.
powers of, express and implied, 789.
president, authority of, 908.
promoters, terms upon which may deal with, 919.
trust fund for creditors, property of, to what extent constitutes, 908.

COTENANCY, adverse possession by one of the cotenants, 812.

COVENANT, for quiet enjoyment, attornment of tenant, when supports allegation of breach of, 116.

for quiet enjoyment, breach of by the entry of the covenantor, 120.

for quiet enjoyment, breach of, measure of damages for, 116, 117.

for quiet enjoyment, breach of must be by title paramount, 115.

for quiet enjoyment, contained in a conveyance, effect of, 118.

for quiet enjoyment, divisibility of, 118.

for quiet enjoyment, does not apply to wrongful acts of third persons, 113, 114.

for quiet enjoyment, effect and scope of, 114.

for quiet enjoyment, eviction constituting a breach of, may be actual or constructive, 115.

for quiet enjoyment, eviction constituting a breach of need not be by process of law, 118, 119.

for quiet enjoyment, eviction sufficient to constitute a breach of, 115.

for quiet enjoyment, existence of encumbrance does not constitute a breach of, 119.

for quiet enjoyment, implied in leases, 113, 114.

for quiet enjoyment, improvements, whether value of may be recovered on breach of, 117.

for quiet enjoyment in conveyances, breach of, what constitutes, 118, 119.

for quiet enjoyment in conveyances, when broken, 119, 120.

for quiet enjoyment is equivalent to a covenant of general warranty, 118.

for quiet enjoyment, measure of damages for breach of, 116, 117, 120.

for quiet enjoyment, premises then being in the possession of third persons, 119.

for quiet enjoyment, profits, loss of, whether may be recovered by breach of, 117, 118.

for quiet enjoyment runs with the land, 114, 115, 118.

for quiet enjoyment, trespasses on the part of the covenantor which do not constitute a breach of, 116.

for quiet enjoyment, unlawful acts of third persons do not constitute a breach of, 115, 116.

for quiet enjoyment, voluntary surrender of lands by covenantee, 120.

for quiet enjoyment, when broken, 114.

for quiet enjoyment, when satisfied, 115, 116.

for quiet enjoyment, wrongful acts of covenantor which do not constitute a breach of, 116.

CRIMINAL LAW, corpus delicti, confessions as evidence of, 716, 725.

homicide, threats of the decedent, when admissible in evidence, 889.

DAMAGES, death, measure of in actions for, 621.

duty of injured person to diminish, 247.

exemplary, railway corporations, when liable for, 604, 605.

for breach of a contract to furnish machinery, 143.

measure of, on breach of covenant for quiet enjoyment, 116, 117, 120.

profits, loss of, whether recoverable on breach of covenant for quiet enjoyment, 117, 118.

profits, prospective as elements of, 143.

- DEED**, acceptance of, when presumed, 545, 546.
 acceptance of, presumption is against where it imposes a burden, 546.
 delivery of, conditional, 540.
 delivery of, crucial tests of, 543.
 delivery of, instances of insufficient, 543.
 delivery of, instances of sufficient, 542.
 delivery of, manual is not effective where there is no intention to deliver, 540, 542.
 delivery of, acceptance by grantee who did not know of delivery, when takes effect, 553.
 delivery of, acceptance of, when presumed, 545, 546.
 delivery of, acceptance while essential need not be express, 545.
 delivery of, acknowledgment as evidence of, 548.
 delivery of, acts of the parties as tending to prove, 544.
 delivery of, after the grantor's death is unavailing, 554, 555.
 delivery of, assignment for the benefit of creditors, presumption as to their consent to, 546.
 delivery of, by leaving in the possession of an officer taking an acknowledgment, 540, 541.
 delivery of, by mail, when becomes effective, 550.
 delivery of, by one of the grantors without the consent of the other, 539.
 delivery of, by person having no authority, 539.
 delivery of cannot be partial, 538.
 delivery of, conditioned to take effect upon the happening of a subsequent event, 550.
 delivery of, consent of a trustee, when presumed, 547.
 delivery of, consent of the grantee is essential to, 544.
 delivery of, consent of the grantor is essential to, 538, 539.
 delivery of, constructive, 541.
 delivery of, dissent of the grantee is fatal and may be established by parol evidence, 545.
 delivery of, illustrations of insufficient, 550, 551.
 delivery of, in escrow, 555, 556.
 delivery of, in escrow to the grantee, 556.
 delivery of, intent to effect, when may be implied from circumstances, 546.
 delivery of, intention of the grantor is the controlling element of, 539, 544.
 delivery of, is not accomplished by bequeathing to the grantee a chest in which the deed is, 554.
 delivery of, leaving in a place accessible to the grantee is not, 555.
 delivery of, may be effected by words without acts or by acts without words, 541.
 delivery of, must include the parting by the grantor of all dominion and control over, 541, 542.
 delivery of, need not be made to grantee in person, 552.
 delivery of, no particular form is required, 541.
 delivery of, presumption of acceptance by the grantee, 545, 546.
 delivery of, question of must be submitted to the jury, 547.
 delivery of, record as evidence of, 547-549.
 delivery of, record as evidence of, in favor of infant grantee, 548.
 delivery of, recording does not supply want of, 538.

DEED, delivery of, recording of, when equivalent to, 549.

delivery of, recording of, without the grantee's knowledge, 548.

delivery of, requires an intent on the part of the maker that it shall take effect, 538-544.

delivery of, retention of possession by the grantor, when inconsistent with, 543.

delivery of, retention of possession, when not inconsistent with, 543, 544.

delivery of, signing and leaving on a table is not sufficient evidence of, 537.

delivery of, testimony of the grantor as to his intention, 544.

delivery of, to agent of the grantee, 540.

delivery of, to another than the grantee, 540.

delivery of, to infants and other incompetent persons, 546.

delivery of, to third person, for use of the grantee, 552.

delivery of, to third person, to be given to the grantee upon the grantor's death, 553.

delivery of, to third person where grantor reserves the right to recall it in his lifetime, 554.

delivery of, to the beneficiary is sufficient, though he is not named as a grantee, 540.

delivery of, to the grantee need not be manual, 539.

delivery of, unauthorized may be ratified, 539.

delivery of, what constitutes, 537, 541.

delivery of, when complete, 539, 544.

delivery of, when presumed, 545, 546.

delivery of, without the consent of the grantor, 538.

delivery, sufficient and insufficient, illustrations of, 542, 543.

delivery, to one of several grantees, 540.

recording with intent that it shall operate as a delivery, 549.

recording without delivery, 538.

takes effect only from the time of its delivery, 538.

DEFINITION, of act of God, 339.

of assault, 357.

of contract of insurance, 925.

of deed, 556.

of delivery of a deed, 537.

of innuendo as this term is used respecting actions for slander and libel, 698.

of negligence, 945.

of proximate cause, 621.

of the police power, 572.

of watercourses, 272.

of writ of prohibition, 491.

DIVORCE, alimony and counsel fees, personal judgment, when not binding on nonresidents, 184.

both parties being nonresidents, is void, 182.

collusive change of domicile to procure, 182.

estoppel to deny validity of, 183.

not recognized by the laws of the defendant's domicile, 183.

personal judgments in suits for, when not binding on nonresidents, 184.

property rights of nonresident, whether may be affected by, 184, 185.

EQUITY, judgments, relief from, when will be denied because of the negligence of the complainant in not making his defense in the original action, 444-453.

EVICION, to constitute a breach of a covenant for quiet enjoyment, 118, 119.

trespasses on the part of the landlord which do not constitute a, 117.

EVIDENCE, analysis of liquors, 383.

burden of proof where writings appear to have been altered, 86.

confessions, corpus delicto, proof of, whether necessary when there has been a confession, 27.

confessions, duty of court to determine admissibility of, 26.

confessions, involuntary, what are, 26.

confessions, when admissible, 26.

illegally obtained is admissible, 383.

in actions of libel and slander as to meaning and application of words used, 698-700.

of experiments, 375-385.

EXECUTORS AND ADMINISTRATORS, torts and illegal acts of, the estate is not liable for, 353.

EXPERIMENTS before the jury for the purpose of determining a disputed fact, 376, 377.

compelling making of, by person accused of crime, 378, 379.

compelling witness or other person to write in the presence of the court or jury, 379.

conditions under which must take place, 375, 376.

criminal cases, footprints, evidence of measurement of, 383.

discretion of court in admitting or excluding evidence of, 375.

discretion of court in admitting or rejecting evidence of, in criminal cases, 384, 385.

discretion of court in permitting in the presence of the jury, 377.

error of court in rejecting evidence of, 375.

evidence of, in criminal cases, 382.

evidence of, is not admissible where the conditions are not similar, 381, 382.

evidence of, may be admitted, when, 376.

evidence of, preliminary showing necessary to warrant admission of, 377.

ex parte, admissibility and weight of, 377.

jurors are not permitted to make themselves, 377, 378.

new trial, granting because of experiments conducted by the jury, 378.

outside of the issues should not be permitted, 382.

principle upon which a thing or machine works may be shown to the jury, 380.

to show the effect of the firing of a pistol at a close distance, 382.

FISHERIES, state control and regulation of, 293.

FRAUD in acquiring jurisdiction over nonresidents, 182.

FRAUDULENT CONVEYANCE, declarations of grantor, when admissible against grantee, 223.

FRAUDULENT TRANSFERS are valid between the parties, 62.

creditors, contingent, are deemed to be, 63.

creditors, who are entitled to attack, 62, 63.

- FRAUDULENT TRANSFERS**, judgments as evidence in suits to vacate, 63.
 subsequent creditors, when may attack, 62.
 voluntary, are presumed to be as against creditors, 62.
- GARNISHMENT**, what demands are subject to, 36.
- GUARDIAN'S SALE**, collateral attack upon, 149.
- HIGHWAYS**, obstructing, private person when may sustain an action for, 611.
 rights of railways therein under a grant of the right to use, 671.
 street railways, reciprocal rights of corporations and the public in, 737, 738.
 street railways, whether are additional servitudes in, 737.
- HOMESTEAD**, assessments, whether exempt from, 778.
 insurance money, exemption of, 751.
 reformation of instruments affecting, 220.
- HOMICIDE**, character and reputation of the defendant, admissibility of evidence of, 100.
- HUSBAND AND WIFE**, dower, transfer made to fraudulently defeat her right of, 824.
- INDICTMENT**, charging crime of sodomy, 26.
- INNKEEPERS**, liability of for loss or theft of goods of a boarder, 476.
- INSURANCE**, arbitration, effect of stipulations for, 693.
 certificate of magistrate as to loss, 693.
 general agents, who are, 803.
 issued without any written application, 852.
 judgment liens, whether constitute a breach of warranty against encumbrance, 123.
 life, untrue answers in applications for, 757.
 loss, certificate of, duty of insurer to furnish, 693.
 proofs of loss, waiver of defects in, 693.
 waiver of proofs of loss, 693.
- INTEREST**, when should be allowed, 247.
- JUDGMENT**, agreement to compromise action, if not kept, may entitle the party to relief in equity, 451, 452.
 as evidence of the existence of a debt, 63.
 attorney, insolvency of does not entitle party to relief from judgment due to his negligence, 450.
 continuance, failure to move for is a bar to relief in equity, 447, 448.
 default, when will not be relieved against in equity, 445, 446.
 diligence in preparing for trial and in discovering and presenting evidence, want of precludes relief in equity, 446, 447.
 diligence, want of induced by the adverse party, 451.
 equitable defenses which are not barred by, 450, 451.
 equitable jurisdiction to grant new trial is becoming obsolete in the United States, 448.
 garnishee, when entitled to relief from, 452.
 going to trial without due preparation or readiness, relief because of, cannot be had in equity, 447.
 mismanagement at the trial, relief cannot be granted because of, 447, 448.
 neglect in preparing for trial precludes equitable relief, 446.
 negligence as a bar to relief in equity, general rule, 445.

- JUDGMENT**, negligence as a bar to relief in equity, rigor of the rule, 444.
 negligence, default due to, will not be relieved against in equity, 446.
 negligence, duties the failure to perform which by litigants constitutes, 444.
 negligence, forgetfulness as a form of, 445.
 negligence in forgetting the service of process, 446.
 negligence in matters of pleading, 446.
 negligence in not being present at the trial, 447.
 negligence in not presenting release or receipt, 450.
 negligence in not procuring counsel to take the place of one who is ill, 446.
 negligence in not reading process, 446.
 negligence in relying upon statements of adverse litigants, 452, 453.
 negligence in relying upon the promise of an officer or other person not interested in the action, 446.
 negligence in suffering default, 445.
 negligence induced by the fraud or misrepresentation of the adverse litigants, 451.
 negligence of a member of a partnership, 449.
 negligence of attorneys or other agents as a cause for relief in equity, 449.
 negligence of garnishees in not making proper answer or defense, 445.
 negligence of public officer representing litigants, 449.
 negligence, whether precludes relief in equity when the judgment is admitted to be inequitable, 450.
 pleading, relief in equity because of neglect in, 446.
 receipt or release, subsequent discovery, whether entitles party to relief from in equity, 450.
 relief from because of newly discovered evidence, 446, 447.
 relief from in equity, evidence essential to, 899.
 relief from in equity, where the want of diligence is due to the adverse litigant, 451.
 relief from, where a compromise or settlement has been made during the pendency of the action, 451, 452.
- JURISDICTION**, actual notice to the defendant is not essential to, 180.
 appearance for the purpose of objecting to, 190.
 appearance, when deemed voluntary, 190.
 divorce, alimony, and costs, personal judgment for is not binding on nonresidents, 184.
 divorce, both parties being nonresidents, is void, 182.
 divorce, collusive change of domicile, 182.
 divorce, effect of foreign in the state of New York, 183, 184.
 divorce, estoppel to deny validity of, 183.
 divorce, not recognized by the laws of the defendant's domicile, 183.
 divorce, personal judgment, when not binding on nonresidents, 184.
 divorce, property rights of nonresident, whether may be affected by, 184, 185.
 domicile for all purposes continues in one state until another is acquired, 188, 189.
 fraud in procuring over nonresidents, 182.
 in bankruptcy over fugitive from justice, 187.
 judgments by confession, 191.

JURISDICTION, minor children, decree respecting custody of, when may operate beyond the state, 185.

minor children, jurisdiction over, whether depends on the citizenship or residence of their parents, 185.

minor children, nonresident, when not subject to, 184, 185.

nonresidents, decrees of divorce against, 182, 183.

nonresidents, who are, 186.

of each state over all property within its borders, 181.

over citizens of other states or countries, 181.

over citizens temporarily absent, 186, 191.

over foreign corporations doing business within the state, 182.

over fugitive from justice, 187.

over nonresidents, brought within the state by fraud, 182.

over nonresidents, temporarily within the state or country, 181.

over nonresidents, voluntary appearance confers, 189.

over persons leaving the state or country intending not to return, 182.

over persons not served with process within the state, 179.

over persons temporarily absent from the state or country, 181.

over suits for divorce, 182, 184.

process, mode of serving is subject to state regulation, 179, 180.

process, publication, service by may be authorized, 180.

process, publication, service on persons residing within the state, 180.

process, service of in proceedings in rem, 180.

process, service of on nonresident on board a foreign vessel, but within the state, 181.

process, service of on nonresident temporarily within the state, 181.

temporary absence of citizen, whether divests state of authority over him, 181.

to enter judgments against nonresidents based on warrant, authorizing confession of, 191.

to enter decree of divorce against nonresidents, 182.

waiver of objection to, what is, 191.

JURY TRIAL, instructions, special duty of party desiring to prepare, 371.

LAKES, inland, title to lands beneath, 292.

LEASE, assignee in bankruptcy does not become assignee of, 324.

attornment of tenant to third person, when justifiable, 146.

breach of covenant for quiet enjoyment, what is, 115.

covenant for quiet enjoyment implied does not apply to acts of strangers without title, 113.

covenant for quiet enjoyment is implied in, 113.

demise, covenant implied from the use of this word, 113.

eviction by unlawful acts of third persons, 115.

eviction may be actual or constructive, 115.

express covenants, modification of implied by, 113, 114.

forfeiture, waiver of, what is, 324.

paramount title, when justifies tenant in refusing payment of rent, 113, 114.

wrongdoers, landlord is not liable for acts of, 113.

LIBEL AND SLANDER, averment or colloquium, understanding of parties, extent which may be subject of evidence, 699.

LIBEL AND SLANDER, evidence of witness as to meaning and application of words used, 798-800.

innuendo, difference between and an averment, 698.

innuendo, evidence to support or explain, 698, 699.

innuendo, meaning of in actions of, 698.

meaning in which words are used, averments of, 699.

witness, understanding of as to meaning or application of words used, 700.

LICENSE, parol, right to revoke, 878.

MARRIED WOMEN, reformation of instrument executed by, 220.

MASTER AND SERVANT, difference between inexperienced and incompetent servants, 374.

duties of master to servant, 374.

inexperienced employees, liability of master for defaults of, 373.

presumption that master has performed his duty to the servant, 372.

MECHANIC'S LIENS, conflicts between and mortgages, 603.

MORTGAGE, of animals, increase, whether included within, 210.

of personal property providing for sales and for the purchase of other property to take the place of that sold, 154.

MUNICIPAL CORPORATIONS, delegation of legislative power to, 331.

indebtedness in the excess of the income for a year, what deemed to be, 200.

legislative control over, 331.

lighting streets, power over, 350.

power to restrict business to certain localities, 331.

NAVIGABLE WATERS, access, right of adjacent landowners to, 289.

fish, right of citizens and subjects to take, 290.

fisheries, regulation of by the state, 293.

fisheries, state control over, 293.

fisheries, trust in favor of, 293.

grants of lands bordering upon, 291.

inland lakes, title to lands beneath, 292.

lands beneath, alienation of by the state, 296, 297.

lands beneath, are not included in grants or conveyances not specially naming them, 297.

lands beneath, disposition of by the state, 298.

lands beneath, grants of, authority to make must be shown, 297.

lands beneath, grants of by the United States, 296.

lands beneath, laws authorizing disposition of public lands do not apply to, 297.

lands beneath, may vest in private ownership, 297, 298.

lands beneath, purposes for which may be granted, 298.

lands beneath, right to use for purposes of commerce, 299, 300.

public rights in, 291.

states, title of extends a league from the shore, 293.

states, title to lands beneath bays and arms of the sea, 293.

tidal only were at the common law, 292.

tide lands belong to the states, 298, 299.

title of, state cannot by grant impair the trusts in favor of navigation and commerce, 204, 295.

title to lands beneath arms of the sea, 290.

- NAVIGABLE WATERS**, title to lands beneath, conflict between state and national grants of, 292.
 title to lands beneath, in the states admitted since the adoption of the constitution, 291.
 title to lands beneath, in the states whose territory was acquired by conquest or purchase, 292.
 title to lands beneath, vested in the crown, 290.
 title to lands beneath, was reserved by the several states, 291.
 title to lands beneath, when vested in adjacent proprietor, 289.
 title to lands beneath, which may be passed by grant, 295.
 trust in favor of navigation and commerce, 293.
 trust in favor of riparian owners, 294.
 trust upon which title to land beneath is held, 293.
 wharves and landings, right of riparian owners to construct, 294.
 wharves, erection in, without permission of the crown, were perperstors, 291.
 what are in the United States, 292.
- NEGLIGENCE**, as a bar to relief in equity against inequitable judgments, 444-453.
 concurring with the act of God, liability for, 339.
 drunkenness does not excuse person from responsibility for, 43.
 minor children, contributory on the part of, 647, 648.
 violation of the law is deemed to be, 647.
- NEGOTIABLE INSTRUMENTS**, indorsement, parol evidence to vary effect of, 312.
 with blanks, authority of holder to fill up, 421.
- NONRESIDENTS**, jurisdiction over, 181, 186, 187.
 temporarily within the state, jurisdiction over, 181.
 who are, 186.
- POLICE POWER**, definition of, 572.
 statutes professed to be passed in pursuance of must have some real relation to the end sought to be accomplished, 572.
- PRINCIPAL AND AGENT**, authority to sell goods does not include authority to collect payment, 126.
- PROCESS**, fraud in service of, 182.
 mode of serving is subject to state regulation, 179, 180.
 publication, service of by may be authorized, 180.
 service of in proceedings in rem, 180.
 service of on nonresidents temporarily within the state, 181.
- RAILWAY CORPORATIONS**, drunken passenger, ejection of, 43.
 highways, crossings of, duty to restore, 671.
 highways, rights therein under grants of right to use, 671.
 receivers of: actions against for damages, 757.
 receivers of, liability for negligence, 757.
 trespassers on track, engineer's duty towards, 621.
- RAPE**, chastity of prosecutrix, how far may be inquired into in prosecutions for, 480.
- SALE**, instrument purporting to be a lease may operate as a conditional, 575.
 of personal property, symbolical delivery, 293.
 of personal property, title when vests, 38.
 of personal property, to be used for specific purposes, 347.

- SLANDER**, adultery, charge of, 405.
 - rumors and statements of, admissibility of in mitigation of damages, 405.
- SPECIFIC PERFORMANCE**, laches as a defense to suits for, 261.
- STATUTES**, adopted from another state after being there judicially construed, 462.
- STATUTES OF LIMITATION**, absence from state, but temporarily visiting it at various periods, 770.
 - absence from state of person holding adverse possession of land, 766, 770.
 - new promise of payment by one joint debtor, 276.
 - return to the state, what is within meaning of, 770.
- STREET RAILWAYS**, children, negligence toward when crossing track of, 678.
 - overcrowding cars as negligence, 845.
 - steps, passengers riding upon, whether guilty of negligence, 673.
- TELEGRAM**, presumption of delivery of, 223.
- TIDE LANDS**, belong to the states, 298, 299.
- TRUSTS**, investment of funds in the stock of a private corporation, 70.
 - power of equity over, 70.
- VOLUNTARY ASSOCIATIONS**, decisions of, when binding on their members, 319.
 - members of are bound by their by-laws, 319.
- WATERCOURSE**, navigability of is a question of fact, 135.
- WATERS**, as boundaries, 289.
 - lands beneath navigable, title to and conveyances and grants of, 290-300.
 - percolating, right to divert, 273.
- WILLS**, grandchildren, when included in a bequest to children, 456.
- WITNESSES**, chastity, bad reputation or character arising from notorious want of, 481.
 - chastity of male witness, whether may be inquired into, 479, 482.
 - chastity of, whether may be inquired into in prosecutions for rape, 482.
 - chastity, want of may be shown for the purpose of impeachment of, 480.
 - chastity, want of on the part of a female witness, whether a ground for impeachment, 481, 482.
 - chastity, want of, whether may be shown to impeach, 481, 482.
 - chastity, want of, whether the same rule applies in the case of male as female witnesses, 480-482.
 - compelling to write in the presence of the court or jury, 379.
 - common prostitute, weight to be given to evidence of, 481, 482.
 - husband and wife, when competent to testify against each other, 716, 725.
 - impeachment by proof that witness was or had been a common prostitute, 481.
 - impeachment, character, extent to which inquiry is permitted respecting, 479, 480.
 - impeachment, general grounds of, 479, 480.
 - impeachment, particular immoral acts cannot be proved, 480.

- WITNESSES**, impeachment, particular immoral acts, whether may be inquired into, 480.
in prosecutions of rape, impeachment by proof of reputation for want of chastity, 482.
objection to competency of, at what time must be taken, 812.

INDEX.

ABSENCE.

See Limitations of Actions, 1-6.

ABUTTING OWNERS.

See Railroads, 32-34.

ACCESSARIES, ETC.

WITNESSES—ACCOMPLICE—PROOF OF REPUTATION FOR VERACITY.—An accomplice, whose testimony has been attacked, may be sustained by evidence of his good character for truth and veracity, the same as any other witness. (*Anderson v. State*, 722.)

ACKNOWLEDGMENT.

See Deeds, 2.

ACT OF GOD.

See Carriers, 1-4; Railroads, 3, 5.

ADULTERY.

ADULTERY—LASCIVIOUS COHABITATION—WHAT CONSTITUTES.—Under a statute making it a misdemeanor for a "man and woman, one or both of whom are married, and not to each other, to lewdly and lasciviously abide and cohabit with each other," such persons can only be convicted upon proof that they have lived together in the same habitation in the manner of husband and wife. Evidence of clandestine sexual intercourse is insufficient to sustain a conviction. (*State v. Chandler*, 483.)

See Slander, 1.

ADVERSE POSSESSION.

1. ADVERSE POSSESSION—WHAT CONSTITUTES.—A purchaser of land who has paid the price for which he bought, whether from a public officer under execution or from a private individual, and is in occupation of the land purchased, holds it adversely to all the world under any writing that describes the land and defines the nature of his claim. His holding, however, is subject to the registration laws of the state. (*Neal v. Nelson*, 590.)

2. EXECUTION SALES—ADVERSE POSSESSION—COLOR OF TITLE.—A sheriff's return of execution showing a sale, a description of the land sold, the purchaser's name, and the payment of the purchase price, is such color of title as will, by adverse possession, ripen into a perfect title. (*Neal v. Nelson*, 590.)

See Cotenancy; Partition, 2.

AGENCY.

1. AGENCY—AUTHORITY OF SALESMAN TO COLLECT MONEY.—A traveling salesman making contracts for the sale of goods has no implied authority to collect their price, and payment to him by the purchaser in the absence of express authority in him to collect or ratification of such payment by his principal, does not discharge the purchaser who is still liable to the principal for the purchase price of the goods. In such case, evidence of the payment of the debt to the salesman is not admissible as against the principal. (*Simon v. Johnson*, 125.)

2. EVIDENCE.—DECLARATIONS OF AGENTS are not admissible against their principal as part of the *res gestae*, when made after the occurrence of an accident to which they relate. Nor can they be regarded as his admissions, unless the agent was authorized by the principal to make them. (*Jammison v. Chesapeake etc. Ry. Co.*, 813.)

3. AGENCY—DISCHARGE OF LIEN—EXECUTION OF NOTE. Under a power of attorney authorizing the agent to carry on a general mercantile business, in a certain state, and to do all necessary acts in conducting it, as fully as the principal might do, the agent is authorized, in buying cotton within the scope of his authority, to satisfy a third person's claim to, or lien upon, the cotton bought, by giving a promissory note in the name of the principal. (*Wimberly v. Windham*, 70.)

See Insurance, 23-27; Negligence, 9; Real Property, 1.

ALIBI.

See Homicide, 9.

ALIMONY.

See Marriage and Divorce, 2.

ALTERATION OF INSTRUMENTS.

1. ALTERATION OF INSTRUMENTS—REMOVAL OF SUSPICION.—If any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection, or is made so by extrinsic evidence, the party producing it, and claiming under it, is bound to remove the suspicion by accounting for the alteration. (*Alabama etc. Land Co. v. Thompson*, 80.)

2. ALTERATION OF INSTRUMENTS—ALTERED DEED AS EVIDENCE OF TITLE.—A deed to land, confessedly valid when executed, passes title, which is not divested by the grantee's subsequent unauthorized alteration of the deed in a material part, and the deed, though altered, may still be given in evidence to prove the conveyance and the existence of title in the grantee. (*Alabama etc. Land Co. v. Thompson*, 80.)

3. ALTERATION OF INSTRUMENTS—EVIDENCE—ADMISSIBILITY OF ALTERED DEED.—If a party claims title to land under a deed which shows an erasure of the reservation of the minerals in the land, it cannot be received as evidence of his title to the minerals, in the absence of a sufficient explanation of the erasure. Without such explanation, the deed must be deemed to have been taken as if it contained the erased words reserving title in the mineral deposits in the grantor; but the deed is admissible in evidence to show title in the grantee to the land described in it, excepting only the minerals in the land. (*Alabama etc. Land Co. v. Thompson*, 80.)

AMENDMENT.

See Statutes, 18.

ANIMALS.

See Mortgages, 4; Sales, 5, 9; Statutes, 25, 26.

APPEAL.

1. **APPEAL—WANT OF JURISDICTION—NOTICE OF.**—If facts showing a want of jurisdiction of the subject matter of the suit appear upon the face of the record, the nullity of the judgment will be taken notice of by any court, and at any time. (*Higgins v. Bordages*, 770.)

2. **APPELLATE PROCEDURE.—AN APPEAL MAY BE PROSECUTED FROM AN ORDER REFUSING TO VACATE A JUDGMENT** where there is no other method in which the right of the appellant to the relief sought by him can be presented to the appellate court, and the facts on account of which he bases his claim to relief do not appear from an inspection of the judgment-roll. (*De La Montanya v. De La Montanya*, 165.)

3. **APPEAL—CONTINUANCE — NONREVIEWABLE ORDER.** The granting or refusal of an application for a continuance is discretionary with the trial court, and not revisable on appeal. (*Wimberly v. Windham*, 70.)

4. **APPEAL—SETTING ASIDE SUBMISSION—NONREVIEWABLE ORDER.**—It is within the discretion of the court, after a cause has been submitted for final decree on the pleadings and proof, either to grant or to deny an application to set aside the order of submission, for the purpose of allowing new evidence to be introduced, whether upon a sufficient showing or not, but, in any event, the court's ruling thereon is not revisable on appeal. (*Yeend v. Weeks*, 50.)

5. **PRACTICE—BILL OF EXCEPTIONS.**—A paper claimed to be the identical paper given in evidence at the trial, which is attached to the bill of exceptions only by being pasted between the pasteboard back and the stenographer's report, in which position it was held with sufficient tenacity to retain its place, but which was not made or identified as an exhibit by anyone, cannot be treated as a part of the bill of exceptions. (*Railroad Co. v. Mackey*, 641.)

6. **APPEAL—EXCEPTIONS—MISCONDUCT OF COUNSEL.**—In order to save any question in relation to the misconduct of counsel during the progress of the trial, the court must be called upon to correct the injury done; if the court refuses to do so, the injured party may then except, and thus save the question involved for the consideration of the appellate court. (*Chicago etc. R. R. Co. v. Champion*, 357.)

7. **PRACTICE—ERRONEOUS RULING ON DEMURRER.**—If, by a ruling on demurrer, the plaintiff is compelled to proceed to trial on an amended complaint, he has the right to insist upon appeal that such ruling was erroneous and to have the judgment reversed on account of it, unless it affirmatively appears that he was not prejudiced by the action of the trial court. (*Chestnut v. Tyson*, 101.)

8. **APPEAL—OBJECTIONS TO EVIDENCE MUST BE SPECIFIC.**—An objection to the admissibility of evidence should be specific, especially to raise any question on appeal. (*Chicago etc. R. R. Co. v. Champion*, 357.)

9. **EVIDENCE—OBJECTIONS TO.**—A proper question to which offered evidence would be responsive is essential to enable appellant to raise any question upon its admissibility. (*Gray v. Elzroth*, 400.)

10. **APPEAL — INCOMPETENT EVIDENCE — MOTION TO STRIKE.**—If testimony is partly competent and partly incompetent, a motion must be made, and acted upon, to strike out the incompe-

tent testimony, and that part only, in order to present any question for review on appeal. (Chicago etc. R. R. Co. v. Champlon, 351.)

11. **APPEAL—EXCLUDING OFFERED EVIDENCE—REVIEW.** A party who wishes to avail himself of the exclusion of testimony must ask a pertinent question of the witness on the stand, and, if objection is made, state to the court what the witness will testify to in answer to the question, and, if the court sustains the objection, reserve an exception. (Chicago etc. R. R. Co. v. Champlon, 357.)

12. **ASSAULT—APPEAL—DUTY TO REVERSE JUDGMENT.**—If there is, in the record on appeal, no evidence upon which a conviction for an assault may be legitimately based, it is the duty of the appellate court to reverse the judgment. (Klein v. State, 354.)

13. **APPEAL—REVERSAL WITHOUT REMANDING.**—The general rule that, if the appellate court reverses a judgment, it should remand the cause for another trial, does not apply where nothing could be gained by sending the case back for a new trial. Hence, it is not error to reverse a judgment against one sued as guarantor upon a note, without remanding the cause, where the defendant is liable only as indorser, and the declaration is not sufficient to charge him as such, as there could be no recovery by the plaintiff. (Hately v. Pike, 304.)

14. **NEGLIGENCE—WHEN ERROR TO DIRECT A VERDICT.** It is error for the court, in any case of negligence, to direct a verdict where there is a conflict in the evidence as to material facts. (Mayer v. Thompson-Hutchinson Building Co., 88.)

15. **NEGLIGENCE — BUILDING — QUESTION FOR JURY—DIRECTION OF VERDICT.**—In an action against one who superintended the construction of a building, for an injury caused by a brick falling from the top of one of the walls, alleged to have been the result of the negligent construction of the wall, the admitted fact that the brick fell, is in the absence of some affirmative proof that the brick was made to fall by some external force, a circumstance or fact which the jury have the right to consider in determining the weight and credibility of the defendant's testimony that it could not have fallen without some external force. It is error, in such a case of conflicting evidence as to a material fact, to direct a verdict for the defendant, as this invades the province of the jury. (Mayer v. Thompson-Hutchinson Building Co., 88.)

16. **APPEAL—REVIEW OF MOTION FOR JUDGMENT NON OBSTANTE.**—Upon an assignment of error in overruling a motion for judgment notwithstanding the general verdict, the appellate court cannot look into the evidence to determine whether it sustains a finding established by such verdict. (Merchants' etc. Bank v. Fraze, 341.)

See Instructions; Municipal Corporations, 19; New Trial.

ARBITRATION.

ARBITRATION, STIPULATION FOR, WHEN REVOCABLE. A stipulation for arbitration, which does not provide for submitting the matters in dispute to a particular person, or to a particular tribunal, but to one or more persons to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject matter of the controversy. (Home etc. Ins. Co. v. Kennedy, 521.)

See Insurance, 7, 8.

ARREST.

1. **ARREST—ILLEGAL—RIGHT TO RESIST.**—One person has a

right to resist an illegal arrest by another, whether an officer or a private individual, with as much and no more force, than is necessary for the purpose of resistance. (*Miers v. State*, 705.)

2. **ARREST—ILLEGAL—RIGHT TO USE FORCE IN REGAINING LIBERTY.**—A person wrongfully and illegally deprived of his liberty by arrest has a right to regain it, and to use all force necessary for that purpose, taking care to use no more force than is required. What degree of violence is necessary always depends upon that used or attempted by his adversary. (*Miers v. State*, 705.)

3. **ARREST—RESISTING ILLEGAL—RIGHT TO RESORT TO DEADLY WEAPONS.**—If a person illegally arrested attempts to regain his liberty, and the party arresting tries to prevent this by the use of deadly weapons, the person arrested may resort to such weapons, and, if the party arresting presents his gun in shooting position, commanding the party arrested and fleeing to halt, the latter may shoot, if it reasonably appears to him that the arresting party is about to shoot, and, if he kills the arresting party, the killing is justifiable and excusable. (*Miers v. State*, 705.)

4. **ARREST FOR CRIME COMMITTED IN ANOTHER STATE—WHEN UNLAWFUL.**—If two persons are arrested in this state, by a city police officer, upon the strength of a telegram addressed to him by a city police officer of another state, requesting him to see the conductor of an approaching train, and to "keep track of" the pair, and describing them as "swindling commission merchants," the arrest is illegal and unjustifiable, because the telegram furnishes no reasonable ground to believe that such persons, or either of them, had committed, or intended to commit, a felony. (*Cunningham v. Baker*, 27.)

5. **ARREST FOR CRIME COMMITTED IN ANOTHER STATE—PREREQUISITES.**—Conceding that an officer, having authority to make arrests, can, without warrant, arrest a person in this state whom he has reasonable cause to believe has committed a felony in another state, such authority cannot be exercised unless there is reasonable cause to believe that the crime supposed to have been committed is a felony, not a less offense, under the law of the state in which it was committed, that the person arrested committed it, and that he is a fugitive from the justice of that state. (*Cunningham v. Baker*, 27.)

6. **ARREST UPON GROUND OF BELIEF THAT A FELONY HAS BEEN COMMITTED—WHEN JUSTIFIABLE.**—An officer cannot justify an arrest upon the ground that he had reasonable cause to believe that the person arrested had committed a felony, unless he has information of facts, derived from those reasonably presumed to know them, which, if submitted to a judge or magistrate having jurisdiction, would require the issue of a warrant of arrest, and the holding of the accused to await further examination. (*Cunningham v. Baker*, 27.)

7. **ARREST—JUSTIFICATION.**—An illegal arrest cannot be justified by facts subsequently ascertained; nor can an arrest, made for one purpose, be justified for another. (*Cunningham v. Baker*, 27.)

8. **ARREST AND DETENTION—COMPLIANCE WITH STATUTE.**—If the matter of apprehension and detention of a criminal is regulated by statute, the statutory mode of procedure must be observed, and arrest and detention otherwise is illegal. (*Cunningham v. Baker*, 27.)

9. **ARREST—ILLEGAL—RIGHT TO DETAIN PRISONER.**—An officer who attempts to arrest without authority is a trespasser, and stands on no better ground than a private individual. He has no right to detain the prisoner, and no authority to prevent an escape,

and in attempting to prevent such escape he is a trespasser, standing toward the prisoner on the same ground as a private citizen. (*Miers v. State*, 705.)

10. **ARREST**.—A SEARCH OF THE PERSON ARRESTED is justifiable only as an incident to a lawful arrest; if the arrest be unlawful, the search is unlawful, and is aggravated by the illegality of the arrest. (*Cunningham v. Baker*, 27.)

ASSAULT.

ASSAULT—WHAT IS NOT.—There is no assault without an actual attempt to do physical violence coupled with a present ability to carry it into execution. Therefore, a person who stands on the opposite side of even a very narrow street from another, and points an unloaded pistol, or a pistol not shown by any evidence to have been loaded, at the other, and threatens to use it upon him, is not guilty of an assault, as the element of present ability is lacking. (*Klein v. State*, 354.)

ASSESSMENTS.

See *Homestead*, 2; *Injunctions*, 6, 7; *Municipal Corporations*, 12-19; *Receivers*, 4; *Statutes*, 19, 20.

ASSIGNMENT.

See *Chattel Mortgages*, 3; *Landlord and Tenant*, 9, 10; *Suretyship*, 5.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

LANDLORD AND TENANT—ASSIGNMENT OF LEASEHOLD ESTATE FOR BENEFIT OF CREDITORS.—A valid voluntary assignment for the benefit of creditors transfers the title of all the assignor's property to the assignee. Hence, a voluntary assignment of a leasehold estate, for the benefit of creditors, when accepted by the assignee, transfers the leasehold interest as would a sale and transfer of the lease to a purchaser in the ordinary way. (*Medinah Temple Co. v. Currey*, 320.)

ASSOCIATIONS.

PUBLIC POLICY, ASSOCIATIONS IN RESTRAINT OF TRADE.—An association, formed for the purpose of controlling the price of brick in the interest of its members, is against public policy. It therefore cannot maintain any action in its association or partnership name. (*Jackson v. Brick Assn.*, 638.)

See *Boards of Trade*; *Partnership*.

ATTACHMENT.

1. **ATTACHMENT—WHAT DEMANDS ARE SUBJECT TO GARNISHMENT**.—The controlling characteristic of the remedy by garnishment is, that the liability of the garnishee must originate in, and be dependent on, contract. Hence, with the exception of conveyances, transfers, or agreements to defraud creditors, a garnishment cannot be employed to reach or subject any debt or demand, which the debtor, suing in his own name, could not recover in an action *ex contractu*. An unliquidated demand, having in it no element of contract, or unliquidated damages, or the right of action for a tort, is not, therefore, the subject of garnishment. (*Cunningham v. Baker*, 27.)

2. **GARNISHMENT—INSURANCE MONEY—HOMESTEAD**.—Money due from an insurance company upon a policy of insurance issued upon the homestead is not subject to garnishment at the suit of a creditor. (*Chase v. Swayne*, 742.)

3. A GARNISHMENT IS PREMATURE when it is based upon a writ against the vendor of chattels, and is served on the purchaser before they have been delivered, and, therefore, before it is certain that any sale will be perfected, or any sum of money will ever become due to the vendor on account of the sale. (*Maier v. Freeman*, 151.)

4. A GARNISHMENT UNDER EXECUTION IS SUBJECT TO THE LIEN OF ATTACHMENTS previously levied in actions which have subsequently been prosecuted to judgment. (*Maier v. Freeman*, 151.)

5. ATTACHMENT—UNLAWFUL SEARCH OF PERSON—GARNISHMENT.—The fact that the plaintiff in an attachment suit had nothing to do with the act of an officer in unlawfully arresting the defendant in attachment, searching him, and taking possession of money, or other effects, found on his person, does not give the plaintiff the right to garnish such property in the hands of the officer. (*Cunningham v. Baker*, 27.)

6. ATTACHMENT—UNLAWFUL SEARCH OF PERSON—GARNISHMENT.—If a police officer unlawfully arrests the defendant in an attachment suit, and searches his person, the search is unlawful, and money or other effects thus obtained are not subject to garnishment, in the hands of such officer, by a creditor of the person arrested, as there is no contractual relation between the debtor and the garnishee. (*Cunningham v. Baker*, 27.)

7. MUNICIPAL CORPORATIONS ARE NOT SUBJECT TO GARNISHMENT proceedings unless expressly made so by statute. (*Porter etc. Hardware Co. v. Perdue*, 124.)

8. MUNICIPAL CORPORATIONS—GARNISHMENT—SPECIFIC FUND.—The fact that money due from a municipal corporation to defendant by execution, and sought to be reached by garnishment proceedings, has been segregated from the general fund of the corporation, and is held by its treasurer for the specific purpose of paying that particular debt, does not render the corporation subject to garnishment. (*Porter etc. Hardware Co. v. Perdue*, 124.)

9. MUNICIPAL CORPORATIONS—GARNISHMENT OF OFFICER.—The process of garnishment, whether nominally issuing against a municipal officer or against the corporation itself, is, in reality, a proceeding by garnishment against the corporation, and not maintainable in the absence of statute expressly authorizing it. (*Porter etc. Hardware Co. v. Perdue*, 124.)

10. MUNICIPAL CORPORATIONS—GARNISHMENT—WAIVER OF EXEMPTION.—A municipal corporation when exempt from garnishment proceedings cannot waive the exemption and confer jurisdiction by appearing in such proceedings against it without objection, and admitting indebtedness for the corporation. (*Porter etc. Hardware Co. v. Perdue*, 124.)

11. GARNISHMENT.—COUNTIES are not subject to garnishment. (*State v. Tyler*, 878.)

12. GARNISHMENT.—COUNTIES AND OTHER MUNICIPAL CORPORATIONS are not made subject to garnishment by the fact that the statute names corporations as among those upon whom process in garnishment may be served. (*State v. Tyler*, 878.)

13. JUDGMENT VOID.—A JUDGMENT AGAINST A COUNTY AS GARNISHEE is void, because there is no authority to serve garnishment process upon it. (*State v. Tyler*, 878.)

See Chattel Mortgages, 1; Landlord and Tenant, 8; Sales, 4.

ATTORNEY AND CLIENT.

ATTORNEY AND CLIENT—POWER OF ATTORNEY TO RELEASE DEBTOR.—An attorney at law has no power, under a

general employment to collect a debt, to release a debtor without an actual payment of the full amount of the debt in money. (*Smith v. Jones*, 519.)

See Injunctions, 10.

ATTORNEY'S FEES.

See Statutes, 21-23.

BAGGAGE.

See Railroads, 5, 6, 13.

BALLOTS.

See Evidence, 11-13.

BANKS.

1. BANKS AND BANKING.—IN THE CASE OF A SPECIAL DEPOSIT with a bank the title does not pass to it, but remains with the pledgor. (*Anderson v. Pacific Bank*, 228.)

2. PLEDGE, FACTS CREATING.—If moneys are deposited in a bank under an agreement that it will furnish bail for certain persons against whom a criminal charge is pending and that the deposit is to protect from loss the bank and the sureties on the bail bond, the transaction is a pledge or special deposit, though the bank issues a certificate showing the deposit and declaring that the moneys are payable on the return of the certificate properly indorsed, on release of the bonds. (*Anderson v. Pacific Bank*, 228.)

3. A BANK RECEIVING MONEYS AS A PLEDGE OR SPECIAL DEPOSIT cannot change its relation as pledgee by wrongfully converting and using the pledged moneys in its own business. The pledgor may, as such, maintain an action against the bank upon its failure to surrender the pledge, upon demand, after the purpose for which it was made has been accomplished. (*Anderson v. Pacific Bank*, 228.)

4. BANKS, OFFSET, RIGHT OF.—A bank having money on general deposit has the right to offset against it a matured note belonging to it and made by the depositor. (*Pursifull v. Pineville Banking Co.*, 409.)

5. BANKS AND BANKING—APPLICATION OF DEPOSIT TO PAYMENT OF NOTE.—While a bank which is the holder of a note, and has on deposit at the time of maturity a sum to the credit of any party liable to it on the note sufficient to pay it, and not previously appropriated by the depositor to be held for a different purpose, may apply the deposit to the payment of the note, yet it is not in general bound to do so. The cases where the right becomes a duty on the part of the bank rest on the special equity of the party, usually the indorser, to have the payment enforced against the depositor as the one primarily liable. In such cases, the deposit must be sufficient at the time of the maturity of the note, and must be to the credit of the party primarily liable. (*First Nat. Bank v. Peltz*, 686.)

6. BANKS AND BANKING—APPLICATION OF DEPOSIT TO PAYMENT OF NOTE.—If a note is made payable to the order of the payee, who indorses it, and, after procuring a third party to indorse it for his accommodation, discounts it at a bank, and it is not paid at maturity, such third party indorsing it cannot, in an action against him thereon by the bank, prove as a defense that shortly after the maturity of the note, and at other times thereafter, the bank had a deposit to the credit of the payee sufficiently large to pay the note. Nor can he show that he was an accommodation indorser, and that the bank had knowledge of this fact. (*First Nat. Bank v. Peltz*, 686.)

7. BANKS AND BANKING—REDISCOUNTED PAPER.—If a bank accepts a renewal note with the same indorser, which is rediscounted for the bank under an arrangement with third parties, and the proceeds are received by the bank, such third parties are entitled to protection as bona fide holders of the new note, although the bank has failed to surrender the old note or to enter the new one on its books. (*Davenport v. Stone*, 467.)

8. BANKS AND BANKING—REDISCOUNT OF PAPER—AUTHORITY OF CASHIER.—If the directors of a bank, with authority to rediscount its notes, intrust the entire management of the bank business to its cashier, and third parties at his request rediscount a note belonging to the bank, in the due course of business, without notice of want of authority in such cashier, the bank and its directors are bound by his action and are liable on the note. (*Davenport v. Stone*, 467.)

9. BANKS AND BANKING—AUTHORITY OF CASHIER.—If the directors of a bank intrust its entire management to its cashier, neither the bank nor its receiver can be heard to deny the authority of the cashier to do any acts which it or its directors might lawfully authorize him to do. (*Davenport v. Stone*, 467.)

See Checks.

BEQUEST.

LEGACIES TO CHURCH, WHEN INVALID—SOUL OF DECEASED PERSON AS USEE.—A bequest by a testator, to a church, of a stated amount of money, to be used "in solemn masses for the repose of my soul," is invalid. It cannot be enforced as a direct bequest to the church for its own general uses, as the form of the bequest repels such an idea; or as a charitable use, because it does not confer a public benefit open to an indefinite number of persons; or as creating a valid private trust, because there is want of a living beneficiary. (*Festorazzi v. St. Joseph's etc. Church*, 48.)

BILLS OF LADING.

BILLS OF LADING—COLLATERAL SECURITY.—The surrender of bills of lading, held as security, is a good consideration for the substitution, as security of new bills of lading antedating the loan. The holder is still a holder for value as against the carrier. (*Midland Nat. Bank v. Missouri Pac. Ry. Co.*, 505.)

See Carriers 5-8.

BLANKS.

See Negotiable Instruments, 8.

BLASTING.

See Master and Servant, 1.

BOARDS OF TRADE.

1. BOARDS OF TRADE.—Although incorporated, the Chicago board of trade is merely a voluntary association, although it rents out rooms and derives an income therefrom. (*Board of Trade of Chicago v. Nelson*, 312.)

2. BOARDS OF TRADE—ENFORCEMENT OF BY-LAWS.—COURTS will not attempt to enforce the by-laws of a voluntary association, such as the Chicago board of trade. The association or board must itself enforce its rules and regulations by such means as it may adopt for its government. (*Board of Trade v. Nelson*, 312.)

3. BOARDS OF TRADE.—A BY-LAW of a board of trade, pro-

viding that a member, who fails to comply with a business contract made with another member, shall be expelled, is valid. (Board of Trade v. Nelson, 312.)

4. **BOARDS OF TRADE—SUSPENSION—VALID BY-LAW.**—The Chicago board of trade, having authority to admit or expel members, and to make such rules, regulations, and by-laws as the members may think necessary or proper for its government, has power to enact a by-law providing for the suspension of a member for dishonorable conduct. (Board of Trade v. Nelson, 312.)

5. **BOARDS OF TRADE—MEMBERSHIP AS A PROPERTY RIGHT.**—While the right to pursue a business, as a member of the Chicago board of trade, in the hall of a building devoted to that purpose, may be a thing of value, its value is incidental to the membership, and a determination of such membership destroys the rights under it. (Board of Trade v. Nelson, 312.)

6. **BOARDS OF TRADE—STATUS OF MEMBER.**—One who becomes a member of a board of trade voluntarily submits himself to the operation of its laws, and agrees to be bound thereby, so far as they are within the corporate authority. (Board of Trade v. Nelson, 312.)

7. **BOARDS OF TRADE—JUDGMENT SUSPENDING MEMBER—COLLATERAL ATTACK.**—The judgment of a board of trade, suspending one of its members, according to rules assented to by him when he became a member, and upon due notice of the proceedings, is conclusive, like that of any other tribunal, and cannot be collaterally reviewed by the courts. (Board of Trade v. Nelson, 312.)

8. **BOARDS OF TRADE.—A CHARGE AGAINST A MEMBER** of a board of trade is not to be tested by the strict rules of criminal pleading. Hence, a charge of bad faith and dishonorable conduct in not carrying out an agreement is sufficient, where a copy of the agreement is attached, thus informing the accused of what the charge consists. (Board of Trade v. Nelson, 312.)

9. **BOARDS OF TRADE—DISCIPLINARY POWERS.—COURTS** of equity, as well as courts of law, will refuse to interfere with the disciplinary powers of a board of trade. (Board of Trade v. Nelson, 312.)

10. **BOARDS OF TRADE—SUSPENSION—REVIEW OF EVIDENCE.—COURTS** will not review the evidence upon which a board of trade acted in suspending one of its members for dishonorable conduct. (Board of Trade v. Nelson, 312.)

BONA FIDE PURCHASERS.

See Sales, 11; Trusts, 9.

BONDS.

See Sheriffs, 3; Suretyship.

BOUNDARIES.

1. **BOUNDARIES—EVIDENCE OF STATUTE OF FRAUDS.**—If the true boundaries of lots about to be sold by an executor are unknown, and he causes boundaries to be laid off and marked by visible monuments on the face of the ground, and then sells the lots to parties who purchase with notice of, and in view of, the boundaries so marked, the purchasers establish such boundaries between themselves by agreement, regardless of the true boundaries, and parol evidence is admissible to prove the boundaries as thus fixed at the time of the purchase. (Diggs v. Kurtz, 488.)

2. **BOUNDARIES—STATUTE OF FRAUDS—EVIDENCE.**—A parol agreement establishing a boundary line between contiguous

proprietors, where the parties have paid money, taken possession, and made improvements on the faith of such agreement, although it may change the line called for in their title deeds, is not obnoxious to the statute of frauds, nor to the rule forbidding the introduction of parol evidence to contradict a written instrument, but is binding upon the parties, and may be given in evidence under the general issue. (*Diggs v. Kurtz*, 488.)

3. **BOUNDARIES.—PAROL EVIDENCE IS ADMISSIBLE** to show the boundaries by which a lot was purchased, when the deed does not in any way give a specific description thereof. (*Diggs v. Kurtz*, 488.)

BUILDING AND LOAN ASSOCIATIONS.

1. **BUILDING AND LOAN ASSOCIATIONS—STOCK FULLY PAID.**—When the aggregate dues, with the credited earnings, equal in amount the par value of a share of stock, it is paid up, and the owner for that share ceases to be a stockholder, and his relation to the corporation becomes simply that of a creditor until he is paid. (*Eversmann v. Schmitt*, 632.)

2. **BUILDING AND LOAN ASSOCIATIONS.—WHEN LOSSES OCCUR**, the burden must be borne by the stockholders according to the amount of their stock, whether they are borrowers or not. (*Eversmann v. Schmitt*, 632.)

3. **BUILDING AND LOAN ASSOCIATIONS.—A BORROWER REMAINS A STOCKHOLDER**, and participates in the benefits, and is subject to the obligations, of a stockholder until his shares, taking into account all profits and losses, reach their par value, and his loan thereby becomes liquidated, whereupon he ceases to be a member, as he would if he had not borrowed at all. (*Eversmann v. Schmitt*, 632.)

4. **BUILDING AND LOAN ASSOCIATIONS.—MEMBERS OR STOCKHOLDERS** of a building and loan association need not be made parties to a suit for the appointment of a receiver therefor, and though they are not formal parties to such suit, a receiver, if duly appointed therein, may make and collect from them such assessments as will satisfy the obligations of the corporation. (*Eversmann v. Schmitt*, 632.)

5. **BUILDING AND LOAN ASSOCIATIONS, MORTGAGE TO, WHEN CANCELED.**—A borrower is entitled to call for a cancellation of his mortgage when he would have been entitled to call for the par value of his stock, had no loan been made to him, and not otherwise. Though he has paid the entire sum contemplated by the mortgage and the constitution and by-laws of the association, if dividends have been declared and paid to him, and, partly because such dividends were not earned, and partly because of the misapplication of moneys by the officers of the association, it is in debt and insolvent, he is answerable for his proportion of its liability, and is, therefore, not entitled to the cancellation of his mortgage. (*Eversmann v. Schmitt*, 632.)

6. **BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—RIGHTS OF MEMBERS.**—In a settlement of the affairs of an insolvent building and loan society, each borrowing member indebted to it must be charged with the amount received by him, with legal interest from the time of the loan, and must be credited with all payments made by him, whether as fines, penalties, dues, or otherwise; and each nonborrowing member must be credited with the sums paid in by him, with legal interest from the date of payment. (*Strauss v. Carrollna etc. Loan Assn.*, 585.)

7. **BUILDING AND LOAN ASSOCIATIONS.—MEMBERS WHO HAVE WITHDRAWN** according to the by-laws and constitution cannot be again brought before the association for the settlement of

losses, when the withdrawal was made in good faith. The members remaining are liable to such assessments as will satisfy the corporate obligations. (*Eversmann v. Schmitt*, 632.)

8. BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY.—Every person having stock in an insolvent building and loan society, whether as creditor or debtor, must be considered as a corporator, and each member indebted to the concern must be considered as a debtor, for the purpose of winding up its affairs. (*Strauss v. Carolina etc. Loan Assn.*, 585.)

9. BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—DISTRIBUTION OF ASSETS.—A court cannot instruct the receiver for an insolvent building and loan society how to distribute its funds until they are in court. (*Strauss v. Carolina etc. Loan Assn.*, 585.)

10. BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY.—THE APPOINTMENT OF A RECEIVER for an insolvent building and loan society causes the debts and mortgages due the concern to mature, and they may be collected at once. (*Strauss v. Carolina etc. Loan Assn.*, 585.)

11. BUILDING AND LOAN ASSOCIATIONS—RECEIVER—MORTGAGES—POWER OF SALE.—A receiver appointed for an insolvent building and loan society cannot enforce a power of sale contained in mortgages made to the association, except by order of court. (*Strauss v. Carolina etc. Loan Assn.*, 585.)

See Receivers, 4.

BURDEN OF PROOF.

See Fraud, 1.

BURGLARY.

BURGLARY—ATTEMPT TO COMMIT—CONSENT OF PROPERTY OWNER.—It is not consent to the taking of his property for the owner to obtain the aid of a confederate of the accused, who, for the purpose of detection, joins the accused in the criminal act designed by the accused, and attempted to be carried into execution by him. (*Robinson v. State*, 701.)

BY-LAWS.

See Boards of Trade, 2-4.

CARRIERS.

1. CARRIERS—ACT OF GOD, WHAT IS.—An unprecedented flood, causing the baggage of a passenger to be swept away from the charge of a common carrier, is an act of God. The "Johnstown flood," as it was called, was *actus dei*. (*Wald v. Pittsburg etc. R. R. Co.*, 332.)

2. CARRIERS—ACT OF GOD.—A LOSS OR INJURY is due to the act of God, when it is occasioned exclusively by natural causes such as cannot be prevented by human care, skill, and foresight. (*Wald v. Pittsburg etc. R. R. Co.*, 332.)

3. CARRIERS—NEGLIGENCE CONCURRING WITH ACT OF GOD.—A common carrier is excused for a loss occurring solely through an act of God; but he is liable for damage caused by the concurring force of his own negligence and some other cause for which he is not responsible, including the act of God. (*Wald v. Pittsburg etc. R. R. Co.*, 332.)

4. CARRIERS—NEGLIGENCE CONCURRING WITH ACT OF GOD.—If a common carrier negligently exposes property in his care

to loss from natural causes, or negligently brings it directly into contact with forces of nature that work its destruction, he is liable. Hence, unnecessary delay on his part, subjecting goods in his possession to loss by an act of God, which would not have happened, had the carrier been diligent, is of itself negligence that makes him liable for the loss. (*Wald v. Pittsburg etc. R. R. Co.*, 332.)

5. CARRIERS—BILLS OF LADING—LIABILITY FOR MISDELIVERY.—A common carrier who issues an original bill of lading calling for delivery to the shipper or his order, and who, in good faith delivers the consignment to the shipper upon his surrender of a duplicate bill of lading, is not thereby relieved from obligation to deliver the consignment to the indorsee for value of the original bill of lading, in the absence of any restriction or limitation or the negotiable character of such bill. (*Midland Nat. Bank v. Missouri Pac. Ry. Co.*, 505.)

6. CARRIERS—BILLS OF LADING—DELIVERY.—The direction in a bill of lading to notify the shipper of the arrival of goods at their destination, can in no way change, modify, or qualify the duty of the carrier to deliver the goods to the shipper's order as provided by the bill of lading. (*Midland Nat. Bank v. Missouri Pac. Ry. Co.*, 505.)

7. CARRIERS—BILLS OF LADING—CUSTOM—MISDELIVERY.—The failure of a consignee to observe a custom, requiring him to take possession of a consignment of goods within a certain time after its arrival at its destination does not justify or excuse the misdelivery of the goods by the carrier, nor relieve against the express language of the bill of lading to deliver only to the shipper's order. (*Midland Nat. Bank v. Missouri Pac. Ry. Co.*, 505.)

8. CARRIERS—BILLS OF LADING.—NO CUSTOM PRACTICED AND MAINTAINED by a carrier can prevail against the express language of his contract of affreightment, to affect the rights of the holder by indorsement thereof, or in anywise limit the liability of the carrier thereon, unless such custom has been exercised, and the indorsee has purchased or received the contract with knowledge of that fact. (*Midland Nat. Bank v. Missouri Pac. Ry. Co.*, 505.)

9. CARRIERS—LIMITATIONS OF LIABILITY—BURDEN OF PROOF—FIRE.—A carrier may restrict its liability by special contract, although it cannot thus exonerate itself from the consequences of its own negligence, and when the loss happens from one of the excepted causes, the burden is on the owner of the goods shipped to prove the negligence of the carrier. Fire is a casualty against which a carrier may protect itself by special contract. (*Reid v. Evansville etc. R. R. Co.*, 291.)

10. CARRIERS—WHEN BECOME WAREHOUSEMEN.—Until a carrier's liability as carrier is terminated by its performance of all duties as such, its rights as a warehouseman cannot begin. (*Grand Rapids etc. R. R. Co. v. Diether*, 385.)

11. CARRIERS—FREIGHT—WHEN EARNED.—A common carrier receiving goods for carriage without requiring prepayment of freight charges is not entitled to demand such charges until its duty of carriage has been performed, either by delivery or an offer to deliver at the place of destination. (*Grand Rapids etc. R. R. Co. v. Diether*, 385.)

12. CARRIERS—CONNECTING—FREIGHT CHARGES, WHEN EARNED.—If a carrier receives goods to be delivered to a connecting carrier without demanding prepayment of freight charges, it cannot demand payment of such charges until it has carried the goods to the end of its line and is ready to deliver them to the succeeding carrier, or can show a good excuse for its not being done. (*Grand Rapids etc. R. R. Co. v. Diether*, 385.)

13. CARRIERS—TERMINATION OF LIABILITY—REFUSAL OF CONNECTING CARRIER TO RECEIVE GOODS—NOTICE.—The refusal of a connecting carrier to receive goods and assume the freight charges accrued, without notice thereof to the shipper or consignee, does not relieve the original carrier from any further attempt to deliver, or the performance of other duties on its part, nor terminate its liability as a carrier. (*Grand Rapids etc. R. R. Co. v. Dlether*, 385.)

See Bills of Lading; Railroads, 8-14.

CASHIER.

See Banks, 8, 9.

CHARACTER.

See Evidence, 18; Homicide, 4-6.

CHARITIES.

See Bequest

CHATTEL MORTGAGES.

1. CHATTEL MORTGAGE, LIEN OF ON PROCEEDS, WHEN DOES NOT EXIST.—If a mortgagee of chattels authorizes the mortgagor as his agent to sell the mortgaged property, and to deposit the proceeds in a bank, to be applied on the mortgage debt, and a sale is made under such authorization, the lien of the mortgage does not attach to the proceeds, and they are subject to attachment by the other creditors of the mortgagor. (*Maier v. Freeman*, 151.)

2. CHATTEL MORTGAGES—PROCEEDS OF SALE—APPLICATION OF, AS A PAYMENT.—If a sheriff, on execution, seizes mortgaged chattels, and the mortgagee replevies them from the sheriff and sells under a power in his mortgage, the mortgagee must, in a proceeding by him to prove up the mortgage debt against the estate of his deceased joint debtor, be charged with the proceeds of the sale, although the action pending, involving the title, is undecided. The money received from such a sale is not in the custody of the law, and should be applied as a payment on the mortgage indebtedness. (*Boynton v. Spafford*, 274.)

3. NEITHER A TRUST NOR AN EQUITABLE ASSIGNMENT is created in favor of a mortgagee of chattels on the proceeds of their sale when he authorizes the mortgagor to sell them, to collect the proceeds of the sale, and to deposit them in a bank, to be applied on the mortgage debt. (*Maier v. Freeman*, 151.)

See Insurance, 13.

CHILDREN.

See Descent, 2; Marriage and Divorce, 1, 3; Negligence, 21-25; Railroads, 23, 24.

CHECKS.

BANKING—CHECK AND GARNISHMENT, CONFLICT BETWEEN.—A check drawn on a bank does not, until accepted, operate as a transfer of the funds of the drawer therein, and therefore is subject to a garnishment served after the drawing and delivery of the check and before its payment or acceptance by the bank. (*Commercial Bank v. Chilberg*, 873.)

CHURCHES.

See Bequest.

CIRCUMSTANTIAL.

See Evidence, 2.

CLERKS.

See Injunctions; Innkeepers; Insurance, 25, 26.

COHABITATION.

See Adultery.

COLLATERAL ATTACK.

See Executors and Administrators, 1-4; Guardian and Ward, 2, 3.

COLLATERAL SECURITY.

See Bills of Lading.

COLOR OF TITLE.

See Adverse Possession, 2.

COMITY.

See States, 1.

COMMON LAW.

See Legislature, 2.

COMMUNITY PROPERTY.

See Husband and Wife, 3.

COMPROMISE.

See Instructions, 4; Insurance, 6.

CONCEALED WEAPONS.

See Trial, 2.

CONFESSIONS.

See Evidence, 6-8; Larceny, 6.

CONFLICT OF LAWS.

1. CONFLICT OF LAWS.—THE FORM OF REMEDIES and the order of judicial proceedings are to be according to the law of the state where the action is instituted, without regard to the domicile of the parties, the origin of the right, or the country of the act. (*La Selle v. Woolery*, 855.)

2. CONFLICT OF LAWS.—REAL PROPERTY is exclusively subject to the laws of the country of which it is a part, and title therein can only be acquired or lost agreeable to those laws. (*La Selle v. Woolery*, 855.)

See Evidence, 2, 3; Husband and Wife, 2; Trial, 1; States, 1.

CONSPIRACY.

CONSPIRACY, LIABILITY OF CONSPIRATORS.—If several persons combine to carry out a fraudulent conspiracy to cheat another, each and all are liable to him without reference to the amount of the fruits of the transaction each obtains, or the degree of his activity in the scheme. (*Fountain Spring Park Co. v. Roberts*, 917.)

CONSTITUTIONAL LAW.

See Constitutions; Legislature, 1, 3, 4, 7; Limitations of Actions, 9; Statutes, 1-7, 20-27.

CONSTITUTIONS.

1. **CONSTITUTIONAL LAW.**—The term “laws of a general nature,” when employed in a constitution, includes those laws which, before its adoption, experience had shown ought to have a uniform operation throughout the state. Statutes providing for the relief of the poor are of this character. (*State v. Bargus*, 628.)

2. **CONSTITUTIONAL LAW.—DUE PROCESS OF LAW** means that notice or summons by which a party is tendered his day in court, with the right to frame an issue and be heard before a judgment can be rendered or execution issued which shall take away his liberty or property. (*Rouse v. Donovan*, 457.)

3. **CONSTITUTIONAL LAW—HEARING.**—“DUE PROCESS OF LAW,” like the term “police power of the state,” is not susceptible of a precise definition; but the constitutional requirement as to “due process of law” does imply a hearing according to the established practice in courts of common law or equity, and is satisfied, if the citizen, whose property is taken or damaged for public use, is afforded an adequate remedy therefor in a court of competent jurisdiction. (*Chicago etc. R. R. Co. v. State*, 557.)

4. **CONSTITUTIONAL LAW—RESERVED POWERS.**—To require persons and corporations to so exercise and enjoy their rights as not unnecessarily to injure others is one of the powers which has been reserved by the people of the state, and which cannot be surrendered; and the principle is especially applicable to existing rights, without regard to the time of their acquirement, or to the source whence they are derived. (*Chicago etc. R. R. Co. v. State*, 557.)

5. **CONSTITUTIONAL LAW, MANDATORY PROVISIONS.**—A provision of the constitution that all laws of a general nature shall have a uniform operation throughout the state is mandatory. (*State v. Bargus*, 628.)

6. **CONSTITUTIONAL LAW, THEATRICAL REPRESENTATION, RESTRAINT OF IS A RESTRAINT OF LIBERTY OF THE PRESS.**—A play purporting to represent the facts involved in a criminal case then pending in the courts, and which, if produced, it is alleged, will deprive the accused of a fair trial, cannot be prohibited by the court having jurisdiction of the case, and its order purporting to impose such prohibition is void, if the constitution of the state guarantees to every citizen the right to freely speak, write, and publish his sentiments on all subjects. (*Dailey v. Superior Court*, 160.)

CONSTRUCTION.

See Statutes, 8-13; Trusts, 2, 3.

CONTEMPT.

1. **A CONTEMPT OF COURT CANNOT BE RESTRAINED** by an order of court made in advance. Hence a court has no power by order to prevent a theatrical representation which it is alleged will, if allowed to be produced, prevent the accused from having a fair and impartial trial on a capital offense for which he has been indicted. (*Dailey v. Superior Court*, 160.)

2. **CONTEMPTS.—THE INHERENT POWER OF COURTS** TO punish summarily for contempt any act committed in their presence, or so near their sittings as to disturb their proceedings, or that is calculated to disturb their business or impair their usefulness or bring

them into disrespect or contempt cannot be taken away by legislation. (In re Robinson, 596.)

3. CONTEMPTS—POWER OF LEGISLATURE TO REGULATE.—The common-law power of courts to punish, for contempt, acts not committed in their presence, but calculated and intended to impair their usefulness and bring them into disrespect, may be regulated by the legislature. (In re Robinson, 596.)

4. CONTEMPT—INTENT—CONCLUSIVENESS OF ANSWER. In a proceeding to punish a person for contempt for a publication made in a newspaper, the answer of the respondent, as to the intent with which the publication was made, is conclusive. (In re Robinson, 596.)

5. CONTEMPT—RIGHT TO TRIAL.—PUBLICATION OF COURT PROCEEDINGS.—Under a statute providing that "no person can be punished as for contempt for publishing a true, full, and fair report of any trial, argument, decision or proceeding had in court," a person cited to show cause why he should not be punished for contempt in publishing a report of a case tried in court, who answers, stating that he believed his publication to be correct and fair, and that it was not made to bring the court into contempt or ridicule, is entitled to have the issue tried, either by the court or by a jury, if there is nothing on the face of the publication showing it to be grossly incorrect, or calculated to bring the court into contempt or disrespect. (In re Robinson, 596.)

CONTINUANCE.

See Appeal, 3.

CONTRACTS.

1. CONTRACT.—TIME IS NOT REGARDED as of the essence of a contract in equity, unless expressly made so by the contract itself. (Tate v. Pensacola Gulf etc. Co., 251.)

2. A CONTRACT IS TO BE CONSTRUED AS A WHOLE and according to its general effect, and not by the name which the parties give it, and the purpose declared in one clause cannot overcome or alter the whole contract or change its manifest purpose apparent from all the parts taken together. (Stockton Savings Soc. v. Purvis, 210.)

3. CONTRACT, PLACE OF PERFORMANCE.—If in a contract no place for its performance is mentioned, it is to be performed to the obligee in person, who may designate any reasonable place of performance. (Tuttle v. Burgett, 649.)

4. CONTRACT, PLACE OF PERFORMANCE OF AGREEMENT TO SUPPORT ANOTHER.—One who, by virtue of an agreement, is entitled to receive support from another, and to be furnished with comfortable rooms, food, clothing, medicines, and medical attendance, cannot be required to receive them at the house of the promisor. The obligation of the latter is to supply them at any reasonable place designated by the former. (Tuttle v. Burgett, 649.)

5. CONTRACTS FOR SUPPORT, made by and in favor of persons of declining years with children or relatives, upon adequate consideration, should receive a liberal construction in favor of the obligees, and must be understood as entitling them to be comfortably situated, as well as to be supplied with adequate food, clothing, and other necessities. They should be allowed reasonable liberty in the choice of their situation and surroundings, and not compelled to remain under the roof and within the control of the parties whose pecuniary interest it is to be relieved of the burden at the earliest moment. (Tuttle v. Burgett, 649.)

6. CONTRACT FOR SUPPORT. ATTEMPT TO RESCIND DOES NOT WAIVE RIGHT TO ENFORCE.—The fact that the mortgagee of a mortgage conditioned for his support during life brings suit to set it aside and a conveyance preceding it on the ground of alleged fraud and undue influence does not preclude him from subsequently maintaining a suit to foreclose the mortgage. (*Tuttle v. Burgett*, 649.)

See Damages, 1, 2, 4; Equity, 6-8; Fraud; Instructions, 5; Mechanic's Lien, 7; Mistake, 2; Municipal Corporations, 10.

CONTRACTORS.

See Negligence, 3-8; Suretyship, 2.

CONTRIBUTION.

See Negotiable Instruments, 1.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 7, 8; Negligence, 19-25.

CONVERSION.

See Trover.

CORPORATIONS.

1. CORPORATIONS.—PROMOTERS OF A CORPORATION CANNOT LEGALLY TAKE ANY ADVANTAGE over the members thereof, and are accountable to it for any profits realized from a violation of their duty in this regard. (*Fountain Spring Park Co. v. Roberts*, 917.)

2. CORPORATIONS—PROMOTERS, PERSON CONSPIRING WITH.—Persons who conspire with promoters of a corporation to procure it to take property at a designated price, upon the representation that such is a reasonable price and the one which is agreed to be paid therefor, whereas it is greatly in excess of the sum agreed to be paid, are, equally with such promoters, liable for the profits realized on the sale of the property to the corporation at such extravagant price, though it is not alleged that such persons, other than the promoters, had any dealings with the corporation or its members, or occupied fiduciary relations toward them, or that they made misrepresentations to the stockholders, or personally knew that any were made. (*Fountain Spring Park Co. v. Roberts*, 917.)

3. CORPORATIONS—EXERCISE OF POWERS.—While corporations are creatures of the law and can exercise such powers only as are granted by the law of their creation, an express grant of power is not necessary. (*Northside Ry. Co. v. Worthington*, 778.)

4. CORPORATIONS—LIMIT OF IMPLIED POWERS.—A business corporation has implied power to do that which is reasonably necessary to the business, or that which is usually incident to its prosecution, but this is the limit of its implied power. It cannot exercise abnormal and extraordinary powers to carry out its purpose. (*Northside Ry. Co. v. Worthington*, 778.)

5. CORPORATIONS—IMPLIED POWERS.—In every express grant of power to a corporation there is implied a power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. (*Northside Ry. Co. v. Worthington*, 778.)

6. CORPORATIONS—IMPLIED POWERS—BUSINESS STATED BY STATUTE.—A corporation created for the purpose of carrying on a business under a statute which merely states the nature of the business, and does not further define its powers, may exercise such

powers as are reasonably necessary to accomplish the purpose of its creation. It may exercise such powers as are usually incidental in practice to the prosecution of the business, but no more. (*Northside Ry. Co. v. Worthington*, 778.)

7. CORPORATIONS—IMPLIED POWERS.—A company may foster its legitimate business, whatever it is, by all the usual means, but it can go no further. If the means are such as are usually resorted to, and a direct method of accomplishing the purpose of the incorporation, they are within its powers; but if they are unusual, and tend in an indirect manner only to promote its interests, they are *ultra vires*. (*Northside Ry. Co. v. Worthington*, 778.)

8. CORPORATIONS—ULTRA VIRES CONTRACT—LIABILITY A company organized to purchase and subdivide lands and to sell them in lots is not liable upon its joint obligation with a street-car company for the cost of street-cars furnished the railway company as the charter purposes of the two companies are different, and neither can aid the interests of the other. (*Northside Ry. Co. v. Worthington*, 778.)

9. CORPORATIONS—BECOMING SURETY FOR EACH OTHER.—If two business corporations have different charter purposes, and have, therefore, no lawful right to aid or assist each other in business, one cannot, in the absence of statutory authority, become surety for the other. Hence, one of the corporations is not liable upon its indorsement of a promissory note given by the other corporation for machinery furnished to the latter for its own use. (*Northside Ry. Co. v. Worthington*, 778.)

10. CORPORATIONS—AIDING, AND BECOMING SURETY FOR, EACH OTHER—LIABILITY ON BONDS—ULTRA VIRES.—If two business corporations, such as a street railway company, and a company organized to purchase and subdivide lands and to sell them in lots, borrow a sum of money, to be divided between them, and bind themselves jointly and severally for the payment thereof by the issuance of bonds which are sold below par, the bonds are not necessarily *ultra vires* and void as a whole because of the fact that neither corporation can lawfully divert its capital or extend its credit in aid of the other, where there is no fraud in the transaction and a fair equivalent is given for the obligations; but each company is liable for such proportion of the bonded indebtedness as the amount actually received by it bears to the amount paid for the bonds; and is not liable for more than its proportionate amount of the debt incurred. (*Northside Ry. Co. v. Worthington*, 778.)

11. CORPORATIONS—AIDING EACH OTHER—IMPLIED POWERS.—The law does not recognize a street railway company as a usual means of carrying out the purpose of a corporation organized to purchase and subdivide lands and to sell them in lots; neither can the latter corporation, without statutory authority, embark its capital in a street railway enterprise. Neither corporation has lawful power to aid the other, though it might be mutually beneficial, as the furtherance of the interests of one is not necessary to the business of the other; but each should confine itself to its proper business, and not divert its capital or extend its credit to the assistance of the other. (*Northside Ry. Co. v. Worthington*, 778.)

12. CORPORATIONS.—THE CORPORATE SEAL is not essential to the validity of an instrument authorizing the confession of judgment against a corporation. The corporation may act without a seal very much as individuals may, except when otherwise provided by statute or their articles of incorporation. (*Ford v. Hill*, 902.)

13. THE INSOLVENCY OF A CORPORATION DOES NOT CONVERT ITS PROPERTY INTO A TRUST FUND for the benefit of its creditors, so as to prevent it from confessing a judgment, and

thereby giving a preference to one of such creditors. (*Ford v. Hill*, 902.)

14. CORPORATIONS—POWER OF OFFICERS.—The president of a corporation, being its chief officer, is presumably authorized to carry out its lawful contracts. (*Board of Trade v. Nelson*, 312.)

15. CORPORATIONS, IMPLIED AUTHORITY OF MANAGING OFFICERS.—If a corporation allows its managing officer to so conduct himself in his dealings and transactions on its part as to lead the public or those dealing with him to reasonably believe he possessed certain powers, the corporation will not be allowed to question such apparent authority against one relying in good faith on the same. (*Ford v. Hill*, 902.)

16. CORPORATIONS—NEGOTIABLE INSTRUMENTS—WORD "PRESIDENT" AS DESCRIPTIO PERSONAE.—If a note of a corporation is made payable to the order of "Adolph Pike, President," and is so indorsed, the word "president," in each instance, is mere descriptio personae. The note is, therefore, not payable to the order of the corporation, but to the president individually, and the indorsement is his individual indorsement. (*Hately v. Pike*, 304.)

17. CORPORATIONS—PRESUMPTION OF AUTHORITY TO TRANSFER NOTE OF.—The possession by a third person of a negotiable note payable to a corporation, and bearing what purports to be its indorsement by its general manager, raises a presumption that he was authorized to so indorse it, and that the holder is the owner thereof. (*Citizen's Nat. Bank v. Wintler*, 890.)

18. CORPORATION.—THE AUTHORITY OF THE PRESIDENT of a corporation to do the act in question need not appear by the record or by any formal vote or resolution, but may be implied from acquiescence and from the nature and course of business transacted by the corporation, as where the doing of the act was known to the directors, and no objection was made to it at any time, and the president had been in the habit of exercising extraordinary powers. (*Ford v. Hill*, 902.)

19. CORPORATION.—THE AUTHORITY OF THE PRESIDENT OF A CORPORATION TO EXECUTE A WARRANT OF ATTORNEY to confess a judgment against it may be inferred from the fact that such execution was known to the directors, who did not object thereto, and from the fact that the president was in the habit of practically exercising the whole power of the corporation, with the knowledge and concurrence of the directors and persons directly interested, whose duties required them to object if he was exceeding his authority. (*Ford v. Hill*, 902.)

20. CORPORATIONS.—DOMICILE OF A CORPORATION belongs exclusively to the state or sovereignty under whose laws it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate and is no longer obligatory, the corporation can have no legal existence. (*Duke v. Taylor*, 232.)

21. CORPORATIONS—DOMICILE—POWER TO CONTRACT.—Although the domicile of a corporation is exclusively in the state creating it, this fact creates no insuperable objection to its power of contracting in another state. (*Duke v. Taylor*, 232.)

22. CORPORATIONS—POWER TO DO BUSINESS IN SISTER STATES.—A corporation legally created and organized under the laws of one state for the transaction of business there, may, by comity between the states, transact business in another state not in contravention of the laws or public policy of the latter. (*Duke v. Taylor*, 232.)

23. CORPORATIONS—MEETINGS.—A corporation created under

the laws of one state, cannot hold corporate meetings in another for the purpose of organizing the corporation, electing its officers, or performing any strictly corporate functions. (Duke v. Taylor, 232.)

24. CORPORATIONS—PROOF OF CREATION.—Courts cannot take judicial knowledge of the laws of another state under which a corporation is claimed to have been created. Proof of such laws must be made in order that the court may see the legal warrant for the creation of the corporation. (Duke v. Taylor, 232.)

25. CORPORATIONS—ILLEGAL CREATION—LIABILITY OF STOCKHOLDERS AS PARTNERS.—A corporation creditor seeking to enforce the payment of his debt may ignore the existence of the corporation, and proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated has not been complied with. (Duke v. Taylor, 232.)

26. CORPORATIONS—ESTOPPEL TO DENY EXISTENCE OF. One must contract or deal with a company as a corporation before he can be estopped from denying its corporate existence. (Duke v. Taylor, 232.)

27. CORPORATIONS—PRESUMPTION AS TO EXISTENCE.—The fact that a note indorsed to its holder before maturity is executed by persons as president and secretary of a company, does not create a presumption that it is a legally created corporation. (Duke v. Taylor, 232.)

28. CORPORATIONS DE FACTO exist when there is a law authorizing such corporation, and when the company has made an effort, though irregular and imperfect, to organize under the law, and is transacting business in a corporate name. The stockholders in such a corporation cannot be held liable as partners, but an association of persons cannot exist as a corporation de facto unless they can legally become a corporation de jure. (Duke v. Taylor, 232.)

See Evidence, 15, 16; Negligence, 3.

CORPUS DELICTI.

See Criminal Law, 3; Evidence, 6; Homicide, 2.

COSTS.

COSTS, LIMITING AMOUNT OF.—If a court of equity determines that a plaintiff is entitled to costs, it cannot limit the amount thereof. The law determines that question. (Hayes v. Douglass County, 926.)

See Statutes, 21-23.

COTENANCY.

1. COTENANTS, RIGHT OF TO SHARE IN PURCHASE OF ADVERSE TITLE.—If one cotenant purchases an adverse title without informing the others of the purchase, and in the conveyance which he takes has the consideration falsely stated, they cannot be regarded as in default in not offering to pay their proportion of the expense of the purchase, and he cannot rely upon mere lapse of time to defeat their right to share in the purchase. (Pillow v. Southwestern etc. Imp. Co., 804.)

2. ADVERSE POSSESSION BY ONE COTENANT is not sufficient to create a title by prescription against the others, unless there is a clear, positive, and continued disclaimer of title, and the assertion of an adverse right brought home to the knowledge of the others, although great lapse of time with other circumstances may warrant the presumption of a disseisin or ouster by one cotenant or other joint owner. (Pillow v. Southwestern etc. Imp. Co., 804.)

3. COTENANCY—ADVERSE POSSESSION.—As between coparceners and others claiming in privity, the entry and possession of one is always to be presumed to be in maintenance of the right of all; and this presumption must prevail in favor of all, unless some notorious act of ouster or adverse possession is brought home to the knowledge of the others, or it is clearly shown that he has become the owner by purchase. (*Pillow v. Southwestern etc. Imp. Co.*, 804.)

4. COPARCENERS, ESTOPPEL TO ASSERT ADVERSE TITLE.—Where the rights of an ancestor in possession of land descend to his heirs, each of them is estopped, whether his title was good or bad, from acquiring and asserting any adverse title to the property, and, if either acquires any paramount title, he holds it for the benefit of all. (*Pillow v. Southwestern etc. Imp. Co.*, 804.)

COUNTIES.

See Attachment, 11-13; Statutes, 16.

COURTS.

See Contempt.

COVENANTS.

CONVEYANCES—COVENANTS FOR QUIET ENJOYMENT.—In actions on covenants for quiet enjoyment the breach must be set forth particularly, and it is not sufficient to negative the words of the undertaking or to merely aver that the defendant has failed to comply with the undertaking. (*Chestnut v. Tyson*, 101.)

See Landlord and Tenant, 1-6, 9.

CREDITORS' SUITS.

CREDITOR'S SUIT—ONE SUIT AS A BAR TO ANOTHER.—A pending creditor's bill, filed by the complainant for himself, and all other creditors who may join therein, is no bar to another bill, filed afterward, but before a decree has been rendered in the cause, by another creditor of the same debtor, who did not make himself a party to the first bill; and a plea setting up the pendency of the first bill as a bar to the second is bad. (*Hall v. Alabama Terminal etc. Co.*, 87.)

CRIME AGAINST NATURE.

CRIME AGAINST NATURE—ATTEMPT—INDICTMENT.—An indictment charging that the defendant, "against the order of nature, attempted to carnally know a certain beast, to wit, a cow," is sufficient, without stating any particular act constituting the attempt. (*Bradford v. State*, 24.)

CRIMINAL LAW.

1. CRIMINAL LAW—ABSENCE OF ACCUSED—MISTRIAL.—If a defendant absconds before verdict returned in a trial for felony no legal verdict can be received or rendered during his absence, and a judgment entered subsequently upon a verdict so received, is null and void, and renders the whole proceeding a mistrial. (*Summeralls v. State*, 247.)

2. CRIMINAL LAW—ABSENCE OF ACCUSED—PRACTICE.—If a defendant on trial for a crime absconds before a verdict is rendered, the proper practice is for the court to declare a mistrial and discharge the jury without any verdict, after becoming satisfied that the defendant cannot be produced in court within a reasonable time. (*Summeralls v. State*, 247.)

3. CORPUS DELICTI—PROOF OF.—The corpus delicti cannot be established by the confession of defendant alone, but, taken in

connection with evidence of his flight and other facts connecting him with the crime, the proof may be sufficient. (*Dunn v. State*, 714.)
See Adultery; Arrest; Assault; Forgery; Instructions, 6-8; Larceny; Slander, 6-11; Trial.

CROPS.

See Landlord and Tenant, 8; Mortgages, 1-3.

CUSTOM.

EVIDENCE—CUSTOM—NEGLIGENCE.—Evidence of a custom on the part of a truckman to pass through a store to get his receipts for goods delivered at the back door of such store is competent to go to the jury to aid in determining whether the truckman, in obtaining his receipts, was a trespasser or a licensee. (*Pelton v. Schmidt*, 462.)

See Carriers, 7, 8; Witnesses, 2.

DAMAGES.

1. **DAMAGES FOR BREACH OF CONTRACT.**—The rule that one damaged by a breach of contract must do all that reasonably lies within his power to protect himself from loss, by seeking another contract of like character, the profits of which are to be applied in mitigation of such damages, has especial reference to contracts for personal services, or for the use of some special instrumentality, either with or without connection with such personal services, but does not apply to a contract to deliver certain logs at a designated place, which might have been performed by the parties with their own teams and personal labor, or by any other means or agency to which they might have resorted, and there is nothing to show that the execution of the contract required all or any great portion of the time or personal attention of the parties, to the exclusion of their engagement in other business and the performance of other contracts at the same time. (*Sullivan v. McMillan*, 239.)

2. **DAMAGES FOR BREACH OF CONTRACT.**—The rule that one who is injured by breach of contract must do all that is reasonably within his power to mitigate the damages caused thereby, does not prevail to the extent that one who has been injured by a violation of an agreement to do a specific act, not necessarily involving personal services, must seek and perform other contracts for the benefit of one who, by breaking faith with him, has caused the injury. (*Sullivan v. McMillan*, 239.)

3. **DAMAGES.—PROFITS** which the purchaser of a chattel expects to make by its use are not recoverable in an action for damages against the seller for its nondelivery according to the terms of sale, or for its want of capacity to fulfill the uses or purposes for which it was intended. Such profits are too remote and speculative. (*Moulthrop v. Hyett*, 139.)

4. **DAMAGES.—LOSS OF PROFITS** cannot be made the measure of damages for breach of contract, when the profits are speculative, conjectural, dependent on chances, or have no reference to the nature of the contract and the breach; nor when the damages largely exceed the contract price, unless such a result was within the contemplation of the parties. (*Moulthrop v. Hyett*, 139.)

5. **DAMAGES.—LOSS OF PROFITS AS.**—It is only when the loss is indisputable and the amount can be estimated with almost absolute certainty, that loss of profits forms the proper measure of damages. (*Moulthrop v. Hyett*, 139.)

6. **DAMAGES.—LOSS OF PROFITS—BREACH OF WARRANTY.**—In an action to recover the purchase price of machinery, the pur-

chaser cannot recoup as damages the prospective profits which he could have made, if the capacity of the machinery had been as warranted. (*Moulthrop v. Hyett*, 139.)

7. **DAMAGES—MEASURE OF FOR NEGLIGENCE RESULTING IN DEATH.**—The measure of damages for the loss of human life, resulting from negligence, is the present value of the net income, ascertained by deducting the cost of living, and expenditures, from the gross income; and no more can be allowed than the present value of accumulation arising from such net income, based upon the expectancy of life. (*Pickett v. Wilmington etc. R. R. Co.*, 611.)

8. **DAMAGES, MEASURE OF.—IF PROPERTY IS WRONGFULLY TAKEN BY AN OFFICER,** but not under such circumstances as to support the presumption of malice or a desire to oppress on his part, the value of the property when taken, or at such time as plaintiff may elect between the time of taking and the bringing of the action, with interest thereon, is the measure of damages. (*Fish v. Nethercutt*, 892.)

9. **DAMAGES—PUNITIVE, FOUNDED ONLY ON TORT.**—Unless one has a right to maintain an action of tort, he cannot recover punitive or exemplary damages. (*Hansley v. Janesville etc. R. R. Co.*, 600.)

10. **VERDICT, WHEN NOT EXCESSIVE.**—A verdict for one thousand dollars for being wrongfully ejected from a railway car while it was in motion is not so large as to necessarily indicate that it was due to prejudice or passion. (*Chesapeake etc. Ry. Co. v. Osborne*, 407.)

See Highways; Interest, 3-5; New Trial, 3-5; Railroads, 9, 10; Sales, 7, 8; Sheriffs, 2; Slander, 3-5; Telegraph Companies; Waters, 3, 4.

DEATH.

See Damages, 7.

DECLARATIONS.

See Agency, 2.

DEEDS.

1. **DEEDS.—THE TERM "EXECUTION,"** in conveyancing, denotes the final consummation of a contract of sale, and includes only those acts which are necessary to the full completion of an instrument. These are the signature of the disposing party, the affixing of his seal, where that is required by law, to give character to the instrument, and its delivery to the grantee. (*Brown v. Westerfield*, 532.)

2. **DEEDS, THOUGH UNACKNOWLEDGED, PASS TITLE, WHEN.**—As an acknowledgment, under the laws of Nebraska, is no part of a deed conveying land other than the grantor's homestead, an unacknowledged deed to real estate, otherwise perfect, passes the title. (*Brown v. Westerfield*, 532.)

3. **DEEDS—SEAL.**—Under the laws of Nebraska, the seal of the grantor in a deed is unnecessary. (*Brown v. Westerfield*, 532.)

4. **DEEDS.—THE DELIVERY** of a deed is indispensable to its validity. (*Brown v. Westerfield*, 532.)

5. **DEEDS—DELIVERY, WHAT CONSTITUTES.**—It is not essential to the validity of a deed that it should be delivered to the grantee personally. If the grantor, without reserving any control over the instrument, delivers it to a third person, unconditionally, for the use of the grantee, and with the intent that it shall take effect

immediately, such delivery is sufficient, and title to the property passes to the grantee. (*Brown v. Westerfield*, 532.)

6. **DEEDS—DELIVERY AND INTENT—HOW DETERMINED.** The delivery of a written instrument is largely a question of intent, to be determined by the facts and circumstances of each particular case. No particular act or form of words is necessary to constitute such a delivery; but anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. (*Brown v. Westerfield*, 532.)

7. **DEEDS—DELIVERY, WHEN SUFFICIENT—ILLUSTRATION.**—If a mother signs and acknowledges a deed before a justice of the peace, conveying to her minor daughter certain real estate, and delivers the deed to the justice, for the use and benefit of the grantee, without reserving any control over it, with the intention and understanding that he is to keep it until the mother's death, when he is to file it for record, and the grantor subsequently tells her daughter that the property belongs to the latter, and that it has been fixed so that she will have a home, the delivery is complete, and the deed passes title at the date of such delivery, though it is afterward lost or destroyed. (*Brown v. Westerfield*, 532.)

8. **DEEDS—DELIVERY—PLEADING.**—An averment, in a petition to quiet title, that the grantor "made and executed" a deed, includes not only his signature, but all other acts essential to the completion of the muniment of title, such as the delivery of the instrument to the grantee. (*Brown v. Westerfield*, 532.)

9. **DEEDS—CONVEYANCE OF GROWING TREES.**—Growing trees are such a part of the realty that the title to, or interest in, the same can be conveyed or transferred, as a general rule, only by a written instrument. (*Magnetic Ore Co. v. Markbury Lumber Co.*, 73.)

10. **DEEDS—CONVEYANCE OF STANDING TIMBER.**—If "saw timber," growing on certain lands, is sold and conveyed by deed regularly executed, without condition or limitation, no mention being made as to when the timber is to be cut and removed, the title to it, independently of the land, vests absolutely in the grantee, and is not lost or forfeited in favor of the vendor, or of a subsequent purchaser of the land whose deed expressly reserved such timber, by the fact that the timber was not cut and removed within a reasonable time after it was conveyed. (*Magnetic Ore Co. v. Markbury Lumber Co.*, 73.)

11. **DEEDS—EVIDENCE OF TITLE—LOSS OR DESTRUCTION.** A deed, being merely evidence of the grantee's title, its loss or destruction, after delivery, does not divest the title of the grantee. (*Brown v. Westerfield*, 532.)

12. **DEED TO DEAD PERSON—WORDS OF LIMITATION.**—A deed executed to a person not then living "and his heirs" is void, because the word "heirs" is a word of limitation and not of purchase. (*Neal v. Nelson*, 590.)

13. **DEEDS TO DEAD PERSON—HEIRS.**—A deed executed to one who is at the time dead, "or his heirs," is good, if his heirs can be identified, for the reason that he will take if living, and he has no heirs until his death. (*Neal v. Nelson*, 590.)

See Alteration of Instruments, 2, 3; Trusts, 1.

DEFINITIONS.

"Children." (*Estate of Chapoton*, 454.)

"Disease." (*Mutual etc. Ins. Co. v. Simpson*, 757.)

"Execution." (*Brown v. Westerfield*, 532.)

"Forfeiture." (*Webster v. Dwelling-House Ins. Co.*, 658.)

"Heirs." (*Neal v. Nelson*, 590.)

THE WORD "INCEPTION" means "initial stage." It does not refer to a state of actual existence, but to a condition of things or circumstances from which the thing may develop, as where a building has been projected and its construction commenced. (*Oriental Hotel Co. v. Griffiths*, 790.)

"Kicked." (*Chicago etc. R. R. Co. v. Champlon*, 357.)

"Surety." (*O'Connor v. Morse*, 155.)

The word "swindling" has no legal or technical meaning. (*Cunningham v. Baker*, 27.)

"To represent" means "to stand in the place of." (*Chase v. Swayne*, 742.)

"Watercourse." (*Tampa Water Works Co. v. Cline*, 262.)

DELIVERY.

See Deeds, 4-8; Sales, 2, 3.

DEMURRER TO EVIDENCE.

See Trial, 6.

DEPUTIES.

See Officers, 3.

DESCENT.

1. **DESCENT.**—When one dies intestate in the state of Texas, the statute casts the title of all his property, both real and personal, directly upon his heirs. (*Powers v. Morrison*, 738.)

2. **DESCENT—CHILDREN, WHO ARE.**—The word "children," as used in a statute providing that if the intestate shall leave no issue, father, or mother, his or her estate shall descend, subject to the provision therein made for the widow or husband, in equal shares to his or her brothers and sisters, and the "children" of deceased brothers and sisters, by right of representation, does not include the grandchildren of a deceased brother or sister of the intestate. (*Estate of Chapoton*, 454.)

DIRECTING VERDICT.

See Appeal, 14.

DISTRIBUTION.

DISTRIBUTION—LIABILITY OF HEIRS FOR DEBTS OF ANCESTOR.—If an intestate leaves, as heirs, children and a grandson, whose father, the son of the intestate, is dead, the grandson is not chargeable with a debt due from his father to his grandfather, in proceedings for the partition and distribution of the estate under a statute providing that "when the intestate's children, or brothers and sisters, uncles and aunts, or other relations of the deceased, standing in the same degree alone, come into the partition, they shall take per capita, that is to say, by persons; and when a part of them being dead and a part living, the descendants of those dead have a right to partition, and such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive"; and this is true, although the deceased son, at the time of his death, was indebted to his father in a sum which was found to exceed the interest he would have inherited in the estate, had he survived his father. (*Powers v. Morrison*, 738.)

DOMICILE.

See Corporations, 20, 21.

DOWER.

DOWER.—IF LANDS ARE SOLD BY AN UNMARRIED MAN, his subsequent marriage does not create any right to dower therein, though they are not conveyed to the purchaser until after the vendor's marriage. His conveyance, therefore, passes a perfect title, notwithstanding his wife refuses to join therein. Nor is it material that the purchase money was not paid until after the marriage. This rule is not affected by a statute declaring that when a husband, or anyone to his use, shall have been entitled to a right of entry, or action in any land, and his widow would have been entitled to dower had the husband or such other recovered possession thereof, she shall be entitled to such dower, although there shall have been no such recovery. (*Chapman v. Chapman*, 823.)

DRUNKENNESS.

See Negligence, 19.

DUE PROCESS OF LAW.

See Constitutions, 2, 3; Statutes, 24.

ELECTIONS.

ELECTION—EVIDENCE OF.—A person claiming to have been elected to an office by the state legislature may introduce in evidence the record of such legislature for the purpose of proving his election and right to the office he is claiming. (*State v. Ellington*, 580.)

ELECTRIC.

See Railroads, 27-30.

EQUITY.

1. JUDGMENT—RELIEF IN EQUITY FROM.—Before relief will be granted in equity against a judgment at law, it must appear that there was a good defense to the action, which the defendant was prevented from making by fraud, accident, mistake, or surprise, unmixed with laches or negligence on his part. (*Nye v. Sochor*, 896.)

2. JUDGMENTS, RELIEF AGAINST.—IF A JUDGMENT IS JUST, equity will not relieve against it, though the plaintiff had no right to take it. Hence, relief in equity will not be granted against a judgment by confession against a corporation, on the ground that its president, who had executed the power of attorney authorizing such confession, had no authority to do so. Under such circumstances, the defendant will be left to contend against the judgment as best it can at law. (*Ford v. Hill*, 902.)

3. JUDGMENT, RELIEF AGAINST FOR FORGETFULNESS.—The fact that a defendant against whom an action was pending utterly forgot all about it, and for that reason failed to take an appeal until the time within which it could be taken had expired, does not entitle him to relief from the judgment in a suit in equity, though he had a good defense to the action, and the judgment against him is inequitable and such that relief therefrom would have been granted had he not been guilty of negligence. (*Nye v. Sochor*, 896.)

4. MARRIED WOMAN, REFORMATION OF INSTRUMENTS EXECUTED BY.—If a married woman executes in the manner prescribed by law a conveyance or other writing, she bears the same relation to it and to the rights and remedies under it as any other contractor, including the right of the other contracting party to have it reformed under the same circumstances which would entitle him to such reformation had the writing been executed only by a man or by an unmarried woman. (*Stevens v. Holman*, 216.)

5. HOMESTEAD, REFORMATION OF MORTGAGE UPON.—If a husband and wife agreed to mortgage their homestead, and executed a mortgage which they knew did not include the whole thereof, but which they knew was accepted by the mortgagee in the belief that it included all such homestead, such mortgage may be reformed in equity so as to include all the land which was agreed to be mortgaged. (*Stevens v. Holman*, 216.)

6. CONTRACTS—RESCISSION.—The power of equity to compel the cancellation of a contract is never exercised to interfere with the freedom to contract or with proper legal liability for bad bargains, but only to supplement the powers of courts of law when there is exceptional equity, of a settled and recognized kind. (*Du Bois Borough v. Du Bois etc. Water Works Co.*, 678.)

7. CONTRACTS—RESCISSION.—The grounds on which equity interferes for the rescission of contracts are distinctly marked, and every case proper for this branch of its jurisdiction is reducible to a particular head. They are principally fraud, mistake, turpitude of consideration, and circumstances entitling to relief on the principle of *quia timet*, and do not include inadequacy of price, improvidence, surprise, and mere hardship. (*Du Bois Borough v. Du Bois etc. Water Works Co.*, 678.)

8. CONTRACTS—RESCISSION.—A contract cannot be rescinded in equity simply because it calls for the performance of an impossibility, by reason of a mutual mistake of fact as to the capacity of the stipulated source of supply. (*Du Bois Borough v. Du Bois etc. Water Works Co.*, 678.)

9. PRACTICE—RELIEF FROM ORDER OF SUBMISSION.—A chancellor is justified in refusing to set aside an order for the submission of a cause for judgment, where the complainant had failed to reply to the defendant's answer, on the ground that the counsel for the complainant did not know of such answer when the order for submission was made, if such counsel could have known that fact by the exercise of ordinary diligence. (*Payton v. McQuown*, 437.)

See Costs; Insurance, 6; Partition, 1, 3.

ESTOPPEL.

ESTOPPEL FROM SILENCE.—One of the essential elements of an estoppel is change in the position of the person who claims the benefit thereof. Therefore, one cannot be held to be estopped by his silence, where the person who relies upon such silence has not changed his position on account thereof, and will, therefore, suffer no substantial injury if not permitted to rely on the estoppel. (*Shakman v. United States etc. Co.*, 920.)

See Corporations, 26; Cotenancy, 4.

EVICTION.

See Landlord and Tenant, 2, 4.

EVIDENCE.

1. EVIDENCE—TESTS OR EXPERIMENTS.—When experiments or tests are shown to have been made under essentially the same conditions, evidence of the result of such experiments or tests is admissible to prove a fact; but, unless this foundation is laid, it is not error to exclude it. (*Chicago etc. R. R. Co. v. Champion*, 357.)

2. EVIDENCE, CIRCUMSTANTIAL—INSTRUCTIONS.—In order to warrant a conviction on circumstantial evidence, all the necessary facts must be consistent with one another and with the main fact sought to be established, and they must be of so conclusive a nature that, when considered in connection, they lead reasonably

and with moral certainty to the conclusion that the defendant did commit the offense of which he is accused, and exclude any reasonable hypothesis except the guilt of the defendant. (*Hocker v. State*, 716.)

3. EVIDENCE—JUDICIAL NOTICE—PLACE OF DANGER.—A grade crossing, on a railroad, is judicially recognized as a place of danger. (*Chicago etc. R. R. Co. v. State*, 557.)

4. EVIDENCE TO PROVE DELIVERY OF TELEGRAM.—From the testimony of a witness that he wrote and sent a telegram it will be presumed that he sent it in the ordinary manner, to wit, by delivering it to a telegraph company for transmission. (*Eppinger v. Scott*, 220.)

5. EVIDENCE.—A TELEGRAM IS PRESUMED TO HAVE BEEN DELIVERED in the regular course of business to the person to whom it was directed. The fact that the telegram was sent is therefore admissible in evidence, and tends to prove that it was received. (*Eppinger v. Scott*, 220.)

6. EVIDENCE—CONFESSIONS — ADMISSIBILITY — CORPUS DELICTI.—Confessions are not admissible in evidence, in a criminal case, until the corpus delicti has been proved. (*Bradford v. State*, 24.)

7. EVIDENCE—CONFESSIONS—WAIVER OF PROOF AS TO THEIR BEING VOLUNTARY.—In criminal cases, where confessions are offered in evidence, and the defendant objects that such evidence is "incompetent and illegal," the court ought to require satisfactory proof that the confessions were voluntarily made before admitting them. Such objection is not so general as to waive the required preliminary proof. (*Bradford v. State*, 24.)

8. EVIDENCE — CONFESSIONS—ADMISSIBILITY.—In criminal cases, confessions are prima facie inadmissible, and will not be received in evidence until it is shown to the court that they were voluntarily made, unless the objection is waived. (*Bradford v. State*, 24.)

9. EVIDENCE—FRAUDULENT TRANSFER—RES GESTAE.—Statements made by a vendor before the sale had become complete by delivery and while delivery was in process are admissible for the purpose of throwing light upon the character of the sale by enabling the jury to determine whether it was bona fide or with intent to defraud creditors. (*Eppinger v. Scott*, 220.)

10. EVIDENCE, PAROL TO CONTROL AGREEMENT FOR SUPPORT.—Testimony as to what was said prior to the execution of a mortgage conditioned for the support of the mortgagees as to where they were to live after such execution is not admissible to vary the effect of the mortgage, so as to obligate the mortgagor to furnish such support only at his own residence. (*Tuttle v. Burgett*, 649.)

11. ELECTION, BALLOTS, LATENT AMBIGUITY—Where there are two men in the same town with the same name, one of whom is a candidate for office at an election and the other is not, and there are ballots which do not designate which of these persons are voted for thereon, parol evidence may be received to show for which the votes were intended. (*State v. Steinborn*, 938.)

12. ELECTIONS—BALLOTS, CONTRADICTION.—Where there are two persons in the same town, one commonly known as "C. H. C., Sr.," and the other as "C. H. C., Jr.," both being eligible to an office for which the former only is a candidate, parol evidence is not admissible to prove that ballots on which the name "C. H. C., Jr.," appeared were intended for "C. H. C., Sr." (*State v. Steinborn*, 938.)

13. **ELECTIONS, EVIDENCE OF INTENTION OF THE VOTERS.**—Parol evidence is not receivable to explain what is placed upon a ballot, nor to contradict or vary it, nor can the intention of the voter as expressed upon his ballot be explained by parol evidence, except for the same general purpose that such evidence might be received to explain any other written instrument. (*State v. Steinborn*, 938.)

14. **NEGOTIABLE INSTRUMENTS — GUARANTY—INSTRUCTIONS.**—As parol evidence is inadmissible to contradict a contract of indorsement, or to prove a contract of guaranty, instructions authorizing the jury to find from such evidence whether or not the payee of a note put his signature upon the back of it for the purpose of guaranteeing its payment are improperly given. (*Hately v. Pike*, 304.)

15. **EVIDENCE — INDORSEMENT—GUARANTY—PAROL EXPLANATION OF INTENTION.**—If a note of a corporation, payable to the order of its president, is indorsed by him twice, the first signature having the word "president" attached to it, and the second one not having it, parol evidence is inadmissible to vary the contract of indorsement, as shown by the first signature, or to prove that the indorser, by his second signature, intended and agreed to guarantee the payment of the note. (*Hately v. Pike*, 304.)

16. **CORPORATIONS—TWO INDORSEMENTS OF NOTE BY PRESIDENT—PAROL EVIDENCE.**—If a note of a corporation, payable to the order of its president, is to be regarded as payable to its own order, the president's name in blank, upon the back of the note, under a preceding signature of his, to which is attached the word "president," renders him liable as second indorser, and parol evidence is inadmissible to show the contract to be one of guaranty. (*Hately v. Pike*, 304.)

17. **EVIDENCE — CONTRACT OF INDORSEMENT.— PAROL EVIDENCE** is not admissible to alter or vary the liability created by a contract of indorsement, by showing that it was a contract of guaranty, or any other kind of a contract than one of indorsement, and this is true, whether the indorsement consists merely of the indorser's signature, or whether the agreement imported by the signature is written over it in full. (*Hately v. Pike*, 304.)

18. **EVIDENCE OF GOOD CHARACTER** is always admissible in a criminal case, and should be considered in connection with all the other evidence, but never independent of it, to generate a doubt of the guilt of the accused. (*Scott v. State*, 100.)

See Appeal, 8-12; Boundaries; Homicide, 3-8; Larceny, 6-9; Motions; New Trial, 2; Trial, 2-5.

EXCEPTIONS.

See Appeal, 5.

EXCESSIVE VERDICT.

See Damages, 10; New Trial, 5.

EXCURSIONS.

See Railroads, 14.

EXECUTION.

1. **EXECUTION SALES.—EVERY PRESUMPTION** is indulged in favor of the regularity and validity of execution sales. (*Neal v. Nelson*, 590.)

2. EXEMPTION LAWS—CONFLICT OF.—If property of a debtor is seized under attachment or execution, its exemption from the writ must be determined by the laws of the state where the seizure is made, and its release cannot be procured by establishing its exemption in the state where the debt was contracted and the debtor and creditor both reside, but this will not prevent the debtor from maintaining an action in the state of his residence against his creditor for resorting to the courts of the other state for the purpose of evading the exemption laws of the state of their residence. (*Stewart v. Thomson*, 431.)

3. EXEMPTION LAWS, SUITS FOR, BRINGING PROCEEDING IN ANOTHER STATE FOR PURPOSE OF AVOIDING.—If a debtor, having property exempt from execution by the laws of the state in which he and his creditor reside, goes temporarily into another state for a business purpose, to which such property is necessary, and therefore takes it with him, and his creditor resorts to the courts of that state for the purpose of subjecting such property to execution, it not being there exempt, and afterward sells it under execution in defiance of an injunction issued in the state of their domicile, he is liable to an action by the debtor to recover the value of the property. (*Stewart v. Thomson*, 431.)

See *Adverse Possession*, 2; *Attachment*, 4; *Chattel Mortgages*, 2; *Sheriff*, 2; *Statutes*, 24.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—GRANT OF ADMINISTRATION—ATTACK UPON.—If an administrator appointed by the probate court of the wrong county accepts the appointment, and, acting thereunder, obtains possession of the assets of an estate and converts them, neither he nor his sureties can question the validity of his appointment. The fact that the administration bond was signed several years before the grant of administration is immaterial, if the obligors signed it with reference to the administration of all estates that might be committed to the hands of the administrator by the order of the court of that county. (*Kling v. Connell*, 144.)

2. EXECUTORS AND ADMINISTRATORS—GRANT OF ADMINISTRATION—COLLATERAL ATTACK.—It is presumed that the probate court before making an appointment of an administrator of the estate of a deceased person has ascertained the existence of the jurisdictional facts, without which the power of appointment could not be legally exercised. Such grant of administration, when made, cannot be collaterally assailed otherwise than in a direct proceeding. (*Kling v. Connell*, 144.)

3. EXECUTORS AND ADMINISTRATORS—COLLATERAL ATTACK.—A GRANT of letters of administration by the probate court of one county on the estate of a decedent who resided in another county at the time of his death, is not void, but merely voidable, and cannot be collaterally attacked nor questioned otherwise than in a direct proceeding brought for that purpose. A motion by sureties on the bond for such administration to quash executions issued against them as sureties, on the ground that the grant of administration was made in the wrong county, is a collateral attack. (*Kling v. Connell*, 144.)

4. PROBATE SALES—COLLATERAL ATTACK UPON.—In the absence of fraud or collusion, the judicial determination by a probate court, that there are debts against an estate over which it has jurisdiction, and that a sale of the land is necessary, is conclusive against all who are parties to that proceeding and upon a chancery or other court in any collateral proceeding or suit, so far as the rights

of bona fide purchasers are concerned. Parties to such decree cannot impeach the sale collaterally on the ground that they were ignorant of their rights, that such debts were barred by the statute of limitations, and for fraud, the facts of which are not stated. (*Cobb v. Garner*, 136.)

5. EXECUTORS AND ADMINISTRATORS—ESTATE OF DECEDENT IS NOT LIABLE FOR ADMINISTRATOR'S MISREPRESENTATIONS, TORT, OR BREACH OF CONTRACT.—Neither an action of tort nor of contract can be maintained against the estate of a deceased person for damages growing out of alleged representations, warranties, or statements made to a purchaser of the trust property, by an administrator, or other representative of the decedent, at an administrator's sale. Hence, if the purchaser at such sale buys two cows represented to be with calf from a thoroughbred bull, and it turns out that one is barren and the other not with calf, thus decreasing their value, the estate is not liable for the damage. (*Huffman v. Hendry*, 351.)

6. EXECUTORS AND ADMINISTRATORS—MUTUAL MISTAKE—EQUITABLE RELIEF.—If a purchaser at an administrator's sale and the administrator, acting in good faith, make a mutual mistake, either of fact or of law, the result of which is to benefit the estate under the control of the court, the court, having jurisdiction of the trust, may, in a proper case, in the exercise of a sound discretion, grant the injured party equitable relief, but he must first restore, or offer to return to the estate, what he has received, or show a good reason for his failure to do so. (*Huffman v. Hendry*, 351.)

See Fraudulent Conveyances, 7-9.

EXEMPTION.

See Attachment, 10; Execution, 2, 3; Homestead, 1.

EXPERIMENTS.

See Evidence, 1.

EXPERTS.

See Witnesses, 10.

FELLOW-SERVANTS.

See Master and Servant, 2-5; Witnesses, 2.

FENCES.

See Railroads, 2.

FIRES.

See Railroads, 4; Carriers, 9.

FIXTURES.

1. FIXTURES.—WHERE MACHINERY IS PERMANENT in its character and essential to the purposes for which a building is occupied, it must be regarded as realty and as passing with the building; and whatever is essential to the purposes for which the building is used will be considered a fixture, although the connection between them is such that it can be severed without physical or lasting injury. (*Morotock Ins. Co. v. Rodefer*, 846.)

2. FIXTURES.—A "steam-feed" machine, attached by bolts to the sills of a sawmill resting on piling driven in the ground, is a fixture

as between the mortgagor and mortgagee of the land on which the mill is located. (Clark v. Hill, 574.)

FORFEITURES.

1. **FORFEITURES ARE NOT FAVORED** either in law or in equity. (Webster v. Dwelling House Ins. Co., 658.)

2. **FORFEITURES ARE TO RECEIVE A STRICT CONSTRUCTION**, when the intent is doubtful, against those for whose benefit they are introduced. (Webster v. Dwelling House Ins. Co., 658.)

3. **A FORFEITURE IS a deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition.** (Webster v. Dwelling House Ins. Co., 658.)

See Insurance, 4, 5; Landlord and Tenant, 9, 10.

FORGERY.

1. **FORGERY—FICTITIOUS PERSON.**—The signing of a fictitious name to a written instrument with fraudulent intent constitutes forgery. (Hocker v. State, 716.)

2. **FORGERY—VENIRE.**—Under a statute providing that "the offense of forgery may be prosecuted in any county where the written instrument was forged, or where the same was used or passed, or attempted to be used or passed," the forger may be prosecuted in the county where the forged instrument was passed, although it purported to be executed in another county. In such case, although the indictment alleges that the instrument was made in the county where it was passed, it is not necessary for the prosecution to prove such allegation as a prerequisite to conviction. (Hocker v. State, 716.)

3. **INDICTMENT—VARIANCE.**—An indictment for forgery alleging that the instrument uttered by the accused purported to be the act of another, "a fictitious person," which instrument was to the tenor of the following, then setting out the instrument signed by such other, does not contain a variance. The purport clause of the indictment simply describes such other party as a fictitious person, and does not allege that the act was that of a fictitious person. (Hocker v. State, 716.)

FRAUD.

1. **FRAUD IN PROCURING CONTRACT—BURDEN OF PROOF.**—The burden of proof is on the party who undertakes to impeach a written instrument for fraud to establish the fraud by clear and satisfactory evidence. (Beck etc. Lithographing Co. v. Houppert, 77.)

2. **FRAUD IN PROCURING CONTRACT—EFFECT OF.**—If a party is induced by fraud and misrepresentation to sign a written instrument, which he did not know he was signing, and which he did not intend to sign, such instrument is void, although he did not read it, or have it read. (Beck etc. Lithographing Co. v. Houppert, 77.)

3. **FRAUD IN PROCURING CONTRACT—SUFFICIENCY OF PLEA.**—In an action to recover the price of goods sold under a written contract, a plea that the contract was procured by fraud is sufficient, and not demurrable, where it avers that the plaintiff's agent drew up the contract sued on, read it over to the defendant in the terms agreed upon, and, believing that the instrument was written as read, the defendant executed it, and where the plea then sets out the difference between the instrument the defendant signed and the one he meant to sign. (Beck etc. Lithographing Co. v. Houppert, 77.)

4. **FRAUD—PLEADING.**—When it becomes necessary to plead

fraud, a general allegation is insufficient. The facts must be specially pleaded. (*Phenix Iron Works Co. v. McEvony*, 527.)

See Judgments, 3; Replevin.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCES—CONSIDERATION MERELY "GOOD."**—If one makes a conveyance of his property on a consideration which is merely good, as contradistinguished from one which is valuable, it is without effect, inoperative and voidable against any debt the grantor may owe at the time of its execution; and this without reference to the good intentions of the parties, and the solvency or insolvency of the grantor, at the time of the execution of the conveyance. Such a conveyance, when not tainted with actual fraud, is void only as to antecedent debts; but if made with an intent to hinder, delay, and defraud creditors, which is actual fraud, it is void as to subsequent, as well as to existing creditors. (*Yeend v. Weeks*, 50.)

2. **FRAUDULENT CONVEYANCES—WHO MAY ATTACK.—HOW FAR VALID.**—It is only those persons whose rights are interfered with, those who are injured by conveyances alleged to be fraudulent, that have the right to interfere to set them aside. Strangers have no interest, and therefore no right to question their validity; and, between the parties and their privies, they are valid. (*Yeend v. Weeks*, 50.)

3. **FRAUDULENT CONVEYANCES—ASSAILANT OF. MUST PROVE EXISTENCE OF DEBT TO HIM.**—If one aggrieved by a conveyance calls its validity in question, and moves to set it aside, the parties claiming under it may dispute his claim by demanding that he shall prove himself to be a creditor of the grantor, with a valid, subsisting debt against him. The fact of primary importance in such a proceeding, whether it be to set aside the conveyance, as constructively fraudulent and therefore voidable as against past due debts, or actually fraudulent, and voidable as to future, as well as to past, obligations, is the existence of a debt, for the payment of which, except for the conveyance, the property transferred could be made liable. The grantee in the conveyance must have an opportunity to dispute the debt, and may plead any defense, not merely personal, which the grantor or debtor could have made against it. (*Yeend v. Weeks*, 50.)

4. **FRAUDULENT CONVEYANCES—JUDGMENT AS EVIDENCE OF DEBT.**—A judgment rendered by a court of competent jurisdiction, in the regular course of judicial proceedings, without fraud or collusion, is conclusive evidence of the amount and existence of a debt, at the time of its rendition, though it is not evidence of an indebtedness existing at any time anterior to its rendition. Therefore, in a proceeding by the plaintiff against the defendant and his grantee, to set aside an alleged fraudulent conveyance, such judgment, whether rendered prior or subsequent to the conveyance, is competent evidence of the debt, and the plaintiff is entitled to ask that the conveyance be set aside as he may be affected or injured thereby. (*Yeend v. Weeks*, 50.)

5. **FRAUDULENT CONVEYANCES—WHEN JUDGMENT IS SUFFICIENT EVIDENCE OF DEBT—BURDEN OF PROOF.**—If a creditor files a bill to set aside a conveyance made by his debtor, on the ground of actual fraud, a judgment recovered by the complainant against the debtor, after the execution of the alleged fraudulent conveyance, is, of itself, competent and sufficient evidence of the existence of the debt, and establishes the creditor's right to attack the conveyance; but the burden of proving the actual fraud is upon the complainant. (*Yeend v. Weeks*, 50.)

6. FRAUDULENT CONVEYANCES—WHEN JUDGMENT IS INSUFFICIENT EVIDENCE OF DEBT—BURDEN OF PROOF.—If a creditor files a bill to set aside a conveyance made by his debtor, on the ground that it was merely voluntary, and, therefore, only constructively fraudulent, the judgment, having been rendered subsequent to the execution of the conveyance, is not, of itself, sufficient evidence as to the existence of the debt; but there must be independent, distinct evidence of facts showing that the cause of action authorizing the rendition of the judgment is older than the conveyance. If this is proved, the conveyance must yield to the judgment; and the burden is on the grantee to prove that he paid an adequate and valuable consideration. (*Yeend v. Weeks*, 50.)

7. FRAUDULENT CONVEYANCES BY SURETY ON ADMINISTRATOR'S BOND.—If it appears, upon a creditor's bill filed to set aside a conveyance alleged to be fraudulent and void as to creditors, that the grantor in the conveyance, who was a cosurety with the complainant on an administrator's bond, owned a farm, and was engaged with his brother in raising sheep; that two years before a suit against him as surety on such bond was commenced, he executed a bill of sale for his share of the sheep to his wife, without dissolving partnership, and without any apparent change of possession or management of the property; that a few days before this sale, he conveyed his land to a person who, within a short time, reconveyed it to the grantor's wife; that the bill of sale and the deed for the lands to the grantor's wife were not recorded until after suit was commenced against the grantor; that no explanation of such failure was made; and where neither the grantor nor his wife testifies as to the good faith of the conveyance of the lands, but both do testify that the consideration for the sale of the sheep was a debt which the husband had owed the wife for about twenty years, and it is not shown that the wife had any money at the time of the conveyance to her, such transfers of property must be held to have been made with the intent to hinder, delay, and defraud the husband's cosurety on the bond, and they are, therefore, void. (*Yeend v. Weeks*, 50.)

8. FRAUDULENT CONVEYANCES—SURETY ON ADMINISTRATOR'S BOND AS A CREDITOR—SUBROGATION.—The liability of the surety on an administrator's bond, or other contingent obligation, makes him a creditor, within the provisions of the statute of frauds, from the date of the contract, and, though he has no cause of action until he has paid the debt, he is entitled to protection against fraudulent conveyances executed by the principal debtor in the meantime. Therefore, the payment of a judgment recovered on the administrator's bond, made by a surety on such bond, subrogates him to the rights of the judgment creditor, with the right to have set aside a fraudulent and voluntary conveyance made by his cosurety before the judgment but after the execution of the bond. (*Yeend v. Weeks*, 50.)

9. FRAUDULENT CONVEYANCES—OBLIGATION OF ADMINISTRATOR'S BOND—ONE CONTINGENTLY LIABLE IS A CREDITOR—STATUTE OF FRAUDS—PROTECTION OF CONTINGENT LIABILITY.—An administration bond is a continuing obligation of security from the day of its execution to the termination of the administrator's authority to act; and though it antedates a voluntary conveyance, yet the ascertainment of its breach, by proper judicial proceedings, begun and concluded after the execution of such conveyance, will, as between the judgment creditor and the grantor in the conveyance, relate back to the date of the bond, and be held to be a debt existing at that time. A person contingently liable is a creditor, within the meaning of the statute of frauds, and that statute protects a contingent liability against fraudulent and voluntary con-

veyances, as fully as a debt which is certain and absolute. (*Yeend v. Weeks*, 50.)

See Evidence, 9.

FREIGHT.

See Carriers, 11-13.

GARNISHMENT.

See Attachment; Check.

GIFTS.

See Trusts, 1.

GUARANTY.

See Negotiable Instruments, 5, 6.

GUARDIAN AND WARD.

1. PROBATE SALES—GUARDIAN AD LITEM.—Probate sales of a ward's property made by the probate court on proper application and showing by the guardian are proceedings in rem, in which the appointment of a guardian ad litem to represent the ward is not required or authorized. (*Daughtry v. Thweatt*, 146.)

2. PROBATE SALES—COLLATERAL ATTACK.—A proceeding in a probate court for the sale of a ward's property is a proceeding in rem, and the jurisdiction of the court attaches when the application for an order of sale, made by the proper party, and disclosing a statutory ground for the sale, is presented to, and recognized by, the court. Whatever of error or irregularity may thereafter intervene, must be corrected by an appropriate revisory remedy, and is not a ground for collateral attack on either the decree or the sale made thereunder. (*Daughtry v. Thweatt*, 146.)

3. PROBATE SALES—COLLATERAL ATTACK.—A probate sale of a ward's property for the purpose of reinvestment, made on proper application and showing by the guardian, cannot be collaterally attacked on the ground that it was made without notice to the ward and without the appointment of a guardian ad litem for him. (*Daughtry v. Thweatt*, 146.)

See Landlord and Tenant, 1.

HABEAS CORPUS.

HABEAS CORPUS—JURISDICTION.—Under the Missouri statute the St. Louis court of criminal correction has no jurisdiction, provided either of the judges of the criminal court are in the city, to entertain an application to release on habeas corpus a person held in custody on a charge of murder. (*State v. Murphy*, 491.)

See Prohibition.

HACKS.

See Municipal Corporations, 4, 5.

HEIRS.

See Deeds, 12, 13; Descent, 1; Distribution.

HIGHWAYS.

HIGHWAYS — OBSTRUCTION — DAMAGES — SPECIAL INJURY.—Damages recoverable in a civil action founded upon an obstruction of a public highway must be such as is not common to the

whole public, or to everyone who actually does pass, or may travel, over the highway. It must be special, unusual, or extraordinary, but not necessarily singular, and may be the common misfortune of a number, or even a class, of persons, and give to each a right of redress. (*Farmers' etc. Mfg. Co. v. Albemarle etc. R. R. Co.*, 606.)

See Railroads, 1.

HOMESTEADS.

1. **HOMESTEAD—EXEMPTION—INSURANCE MONEY.**—Insurance money derived from a policy on the homestead improvements is all exempt, as the courts have no power to say that only a reasonable portion of such a fund shall be exempt. (*Chase v. Swayne*, 742.)

2. **HOMESTEAD—EXEMPTION OF FROM ASSESSMENT FOR SIDEWALK.**—A constitutional provision exempting a homestead from forced sale for all debts, except for the purchase money or a part of it, or for an improvement thereon, under a contract made as required by the constitution, or for taxes due thereon, exempts it from forced sale for the payment of an assessment for building a sidewalk in a city, as such indebtedness is not embraced in any of the three classes of debts named. The cost of the sidewalk is not a tax, general or special, the term "taxes due thereon" does not include such assessment; and the legislature cannot, therefore, give a lien upon a homestead for it. (*Higgins v. Bordages*, 770.)

3. **HOMESTEAD—IMPROVEMENTS—INSOLVENT DEBTORS.** A debtor, though insolvent, may apply his funds to improvements upon his homestead, and, if the constitution places no limit in value upon the improvements which he may make thereon, his investment, though large, does not constitute a fraud upon creditors for which they may get relief, as the object of the constitutional provision exempting homesteads is to protect the homes of insolvent debtors from forced sale (*Chase v. Swayne*, 742.)

See Attachment, 2.

HOMICIDE.

1. **HOMICIDE, DUTY TO RETREAT WHEN ON ONE'S OWN PREMISES.**—If, while one is lawfully on his own premises, another advances in a threatening manner and under such circumstances that the former believes, and has reasonable ground to believe, that he is in danger of losing his life or of suffering great bodily harm, he is not obliged to retreat, but may stand his ground, and meet any attack made upon him in such a way, and with such force, as, under all the circumstances, he at the moment believes, and has reasonable ground to believe, is necessary to save his own life or to protect himself from great bodily harm. (*State v. Cushing*, 883.)

2. **MURDER—CORPUS DELICTI—PROOF OF.**—If in a murder case it is shown that the body of the deceased, or portions thereof, have been found or seen, and identified, and that the death was caused by the culpable act or agency of another, the corpus delicti may be established by the confession of the accused, corroborated by the testimony of his accomplice. (*Anderson v. State*, 722.)

3. **MURDER—EVIDENCE.**—On a trial for murder, arising from an illegal arrest, evidence of the issuance of a capias from another county for the arrest of the defendant is not admissible, provided it was not in the hands of the deceased at the time he attempted to make the arrest. (*Miers v. State*, 705.)

4. **MURDER.—EVIDENCE OF GOOD CHARACTER OF DECEASED** is not admissible on a trial for murder, if his character has not been attacked. (*Miers v. State*, 705.)

5. MURDER—EVIDENCE OF CHARACTER OF DEFENDANT

On a trial for murder arising from an illegal arrest, evidence that deceased was informed a short time before the homicide that "you have a pretty bad man to arrest, and that they would all shoot," is irrelevant and inadmissible. (*Miers v. State*, 705.)

6. HOMICIDE.—EVIDENCE OF THE REPUTATION OF THE DEFENDANT on trial for murder, for peace and quietude, is admissible, to be considered by the jury in determining his guilt, and as bearing, in connection with all the other facts, upon the question of who was the aggressor in the affray. It is admissible, not only when doubt otherwise exists, but also for the purpose of creating doubt. (*State v. Cushing*, 883.)

7. HOMICIDE.—THREATS MADE BY THE DECEDENT a short time before the fatal encounter, both within and without the hearing of the defendant, are admissible in evidence on the trial of the latter for murder, as tending to show the feelings and interest of the decedent toward the defendant at the time of the encounter, and whether or not the deceased was the assailant, and whether or not he so acted as to induce in the mind of the defendant an honest belief of an intention to kill or to do him great bodily harm. (*State v. Cushing*, 883.)

8. HOMICIDE.—THREATS MADE BY A DECEDENT CANNOT BE EXCLUDED, on the trial of his slayer for murder, on the ground that there is no evidence, save the testimony of the defendant, that he was at the time of the killing in imminent danger. He has the right to have his testimony weighed by the jury, and the court cannot refuse an instruction on the assumption that such testimony is false. (*State v. Cushing*, 883.)

9. MURDER—ALIBI—INSTRUCTIONS.—It is reversible error for the court to fail to charge the jury with reference to an alibi, if the accused has testified that he was not at the place of the homicide when the deceased was killed, and had nothing to do with the killing. In such case the error is intensified if the jury is instructed upon the law of self-defense, when there is not the slightest circumstance presenting this defense. (*Anderson v. State*, 722.)

10. HOMICIDE — EVIDENCE — CLOTHING OF THE DECEDENT, TAKING TO THE JURYROOM.—The clothing worn by the decedent at the time he was shot, and the gun with which the shooting was done, are admissible in evidence against the defendant, and the court may permit the jury to take them to their room when they retire to consider their verdict. (*State v. Cushing*, 883.)

See Arrest, 3; Habeas Corpus.

HUSBAND AND WIFE.

1. COMMUNITY PROPERTY, FOR WHAT DEBTS ANSWERABLE.—The community real property is not liable for the separate, or individual, debts of the husband, whether contracted in this state or elsewhere. (*La Selle v. Woolery*, 855.)

2. CONFLICT OF LAWS—COMMUNITY PROPERTY.—A debt incurred in another state, where it is the individual debt of the husband, and enforceable only against his separate estate, retains the same character after it is removed to this state, and therefore the community property of himself and his wife afterward acquired in this state cannot be taken for its satisfaction. (*La Selle v. Woolery*, 855.)

See Dower; Equity, 5; Insurance, 21, 22; Slander, 6; Witnesses, 3, 4.

IDEM SONANS.

See Names.

IMPEACHMENT.

See Witnesses, 7-9.

IMPROVEMENTS.

See Homestead, 3.

INDEBTEDNESS.

See Municipal Corporations, 9.

INDICTMENT.

1. INDICTMENT—APPLYING VERDICT TO COUNTS IN.—If there are several counts in an indictment, on the bringing in by the jury of a general verdict the court may apply the verdict to any one of the several counts of the indictment, and order judgment and sentence accordingly. (*Southern v. State*, 702.)

2. INDICTMENT—APPLYING VERDICT TO COUNTS IN.—If the jury returns a general verdict of guilty upon an indictment containing different counts for distinct offenses, and the court, without objection, after interrogating the jury and with its consent, changes the verdict so as to make it apply to one of the counts in the indictment upon which the evidence justifies a conviction, the defendant is not prejudiced by the action of the court, nor entitled to a reversal of the judgment on the ground of such action. (*Southern v. State*, 702.)

3. INDICTMENT—COUNTS FOR DISTINCT OFFENSES—APPLYING VERDICT TO.—If the jury returns a general verdict of guilty upon an indictment containing counts for distinct offenses, the proper practice is to retire the jury, and require it to indicate by the verdict the count upon which the defendant is found guilty. (*Southern v. State*, 702.)

4. INDICTMENT—COUNTS IN FOR DISTINCT OFFENSES.—If an indictment contains two or more counts for two or more distinct offenses, a general verdict of guilty operates as a conviction upon all, but the defendant is, upon request, entitled to have separate findings, or at least to have the jury in some way pass upon each count by itself. (*Southern v. State*, 702.)

See Crime Against Nature; Forgery, 3; Slander, 7.

INDORSEMENT.

See Negotiable Instruments, 3-7.

INJUNCTIONS.

1. AN INJUNCTION GRANTED WITHOUT NOTICE, except in case of emergency shown in the complaint, is by the statute of Washington void, but the courts may grant a restraining order to be operative to keep things in statu quo until notice can be given and the application for injunction properly presented. (*Larsen v. Winder*, 864.)

2. JUDICIAL FUNCTIONS.—THE POWER TO GRANT AN INJUNCTION, though vested in the clerk of a court, is judicial, and therefore cannot be exercised by a deputy. (*Payton v. McQuown*, 437.)

3. PRACTICE.—AN INJUNCTION CANNOT BE GRANTED BY A DEPUTY CLERK of a circuit court in Kentucky, though the statute gives authority to grant injunctions to any circuit judge or to the clerk of the court or a county judge, if the judge of the court be absent from the county. (*Payton v. McQuown*, 437.)

4. **STATE, INJUNCTION AGAINST OFFICERS OF.**—Officers or agents of the state in charge of its insane asylum may be enjoined from interfering with the flow of a natural stream, and from throwing offal therein, whereby its waters become unfit for any purpose, and the air is rendered noxious and offensive. (*Herr v. Central Kentucky Lunatic Asylum*, 414.)

5. **TAXES, RELIEF AGAINST IN EQUITY.**—Though the manner of levying a tax is so irregular as to render it void, still, unless the tax is excessive or unequal or unjust, so as to affect its substantial justice, equity will not interfere to declare it invalid or to enjoin its enforcement. (*Hayes v. Douglas County*, 925.)

6. **ASSESSMENTS.—WHILE MERE ERRORS OF JUDGMENT** do not invalidate an assessment, it must appear to be a fair attempt at compliance with the statute, and an assessment made in entire disregard of the statute is presumed to be unequal, and to justify the interference of a court of equity to prevent its enforcement. (*Hayes v. Douglas County*, 925.)

7. **EQUITY.—AN ASSESSMENT MAY BE JOINED THOUGH THERE IS NO OFFER** to pay such part as may be rightfully due from the complainant, where such assessment is shown to be unequal and to be imposed upon a part only of the property rightfully subject thereto. (*Hayes v. Douglas County*, 925.)

8. **PROBATE SALES—INJUNCTION AGAINST JUDGMENT.**—In a suit to set aside a regular and authorized probate sale of land and to enjoin the purchaser from enforcing a judgment obtained by him in an action of unlawful detainer against the complainants in possession, an injunction should not be granted in the absence of an allegation of the purchaser's insolvency. (*Cobb v. Garner*, 136.)

9. **JUDGMENT, RELIEF FROM NEGLIGENCE AS A BAR TO.** An injunction will not be issued against a common-law judgment on the ground that the complainant had requested an attorney to prepare an answer for him, and, relying upon the attorney's promise to do so, had gone to another county under the supposition that the answer would be filed, and the cause continued to another term. (*Payton v. McQuown*, 437.)

10. **THE NEGLIGENCE OF AN ATTORNEY AT LAW** is treated as the negligence of his client, and, therefore, does not constitute a ground for enjoining a judgment alleged to be due to it. (*Payton v. McQuown*, 437.)

See Contempt, 1; Officers, 3.

INNKEEPERS.

1. **INNKEEPERS—LIABILITY FOR THEFT BY CLERK.**—If a regular boarder who has lived in a hotel for several months deposits money in the hotel safe, the proprietor, who has used ordinary care and diligence in the selection and employment of his hotel clerk, is not liable for the theft of such money by the latter. (*Taylor v. Downey*, 472.)

2. **INNKEEPERS—LIABILITY.**—Boarding-house keepers are liable as bailees for mutual benefit for the preservation of goods brought upon their premises by boarders. The nature of the liability is not changed by a deposit of money in the boarding-house safe, though the degree of care may be increased over that required when the boarder retains its custody. Still the boarding-house keeper owes the depositor only the duty of ordinary care, and is liable only for gross negligence. (*Taylor v. Downey*, 472.)

INNUENDO.

See Slander, 8-10.

INSOLVENCY.

See Building and Loan Associations, 8-10; Corporations, 13; Insurance, 23, 28, 29.

INSTRUCTIONS.

1. INSTRUCTIONS—FORM AND ACCURACY.—A court is not bound to give an instruction unless it is correct as written, and may refuse to give it, if it is not expressed in proper terms. (Chicago etc. R. R. Co. v. Champlon, 357.)

2. INSTRUCTIONS—GOOD IN PART—BAD IN PART.—The fact that part of an instruction is correct does not cure that part sitious, one of which is erroneous, there is no error in refusing to give which is defective, and, if an instruction contains two distinct propositions the entire instruction as asked. (Chicago etc. R. R. v. Champlon, 357.)

3. JURY TRIAL—NEGLIGENCE, INSTRUCTIONS, WHEN DO NOT REQUIRE A REVERSAL.—If the court can see from the whole record that even under correct instructions a different verdict could not have been rightfully rendered, or that the exceptant could not have been prejudiced by the erroneous instruction, it will not, for such error, reverse the judgment. (Richmond Ry. etc. Co. v. Garthright, 839.)

4. TRIAL — INSTRUCTIONS — COMPROMISE.—An instruction that any proposed compromise of a claim for injury should not be considered as an acknowledgment of any liability on the part of defendant, should be given, especially if there is evidence that he visited plaintiff in regard to a compromise. (Pelton v. Schmidt, 462.)

5. INSTRUCTIONS — CONTRACTS.—There is no error in instructing a jury that they may adopt that construction of a contract which the parties themselves have placed upon it. (Merchants' etc. Bank v. Frazee, 341.)

6. INSTRUCTIONS IN FELONY CASES.—Upon a trial in felony cases, the court must give in its charge to the jury the law applicable to the case, whether requested to do so or not. What law is applicable to the case is determined by the charge contained in the indictment and the evidence adduced at the trial. (Miers v. State, 705.)

7. INSTRUCTIONS — CRIMINAL LAW — REASONABLE DOUBT.—A charge to the jury, in a criminal case, that, "if they believe the evidence, they must find the defendant guilty," is erroneous, and justifies a reversal of judgment, because it does not require belief of the evidence to the exclusion of all reasonable doubt. (Shields v. State, 17.)

8. JURY TRIAL—INSTRUCTIONS, REVERSAL FOR REFUSAL OF.—If a court has permitted evidence to be given before a jury during a trial for murder or threats made by the decedent against the defendant, and of the defendant's reputation for peace and quietude, but refuses to instruct the jury respecting the consideration which may be given to such evidence, such refusal cannot be treated as harmless error, on the ground that from the conviction it appears that the jury did not believe it. The appellate court cannot conjecture what the jury would have done if furnished with proper instructions for its guidance. (State v. Cushing, 883.)

INSURANCE.

1. INSURANCE, WHAT IS A CONTRACT OF.—A contract to indemnify a person from loss arising from the insolvency of his customers is a contract of insurance, and a corporation authorized to make it is an insurance corporation. (Shakman v. United States etc. Co., 920.)

2. **INSURANCE, APPLICATION, ABSENCE OF.**—If an insurer issues a policy without an application or any representation in regard to the title to the property upon which the insurance is effected, he cannot complain, after a loss, that the interest of the assured was not correctly stated or that an existing encumbrance was not disclosed. (*Morotock Ins. Co. v. Rodefer*, 846.)

3. **INSURANCE, SILENCE RESPECTING PROPOSAL TO CHANGE TERMS OF.**—If, after contract of insurance is effected, a memorandum is sent to the assured in effect modifying such terms, he is not deemed to have accepted or acquiesced in this modification, because of his silence respecting it, where it is not shown that the insurer was influenced in his conduct by the silence of the assured. (*Shakman v. United States etc. Co.*, 920.)

4. **INSURANCE, FIRE.—A WAIVER OF A FORFEITURE**, by a fire insurance company, caused by any act of the company, after a loss, and with full knowledge of all the facts, need not be based upon any new agreement, or an estoppel. (*Home Ins. Co. v. Kennedy*, 521.)

5. **INSURANCE, FIRE—EFFECT OF FAILURE TO DECLARE FORFEITURE—WAIVER OF BREACH OF WARRANTY.**—A fire insurance company, after a loss, waives all defenses based upon a breach of warranty, and a resulting forfeiture, if, with a knowledge of the facts amounting to such breach, it fails to declare a forfeiture, but continues to recognize its liability by demanding successive amended proofs of loss, and making repeated peremptory calls for arbitration, under a stipulation which applies only to the measure of damages; and notice, by the company's secretary, in returning the first proof of loss for correction, that the company "neither admits nor denies liability nor waives any of its rights under said policy," does not affect such waiver of defenses. (*Home etc. Ins. Co. v. Kennedy*, 521.)

6. **INSURANCE, EQUITY, WHEN WILL SET ASIDE A COMPROMISE.**—One who has been induced to accept in full satisfaction of a loss under a policy of insurance one-half of the amount due through fraud and imposition upon him and willful misrepresentation made by the agents of the insurer, he being, as they knew, ignorant of his legal rights under the contract, may maintain an equitable action to rescind such contract of satisfaction. (*Titus v. Rochester etc. Ins. Co.*, 426.)

7. **INSURANCE — ARBITRATION—SUCCESSIVE REMEDIES.** If one clause in a fire insurance policy provides that, in case of loss, an estimate shall be made by the insured and the company, and another clause provides that in case they differ the subject shall be referred to appraisers selected as therein provided, the remedies are successive, and neither party can insist upon the second who has not shown himself willing and ready to enter upon the first. (*Mozer v. Sun Ins. Office*, 690.)

8. **INSURANCE, FIRE—WAIVER OF ARBITRATION.**—The denial, by an insurance company, of its liability under a fire policy issued by it, upon the ground of a forfeiture, by reason of a breach of warranty, is a waiver of its right to insist upon arbitration as a means for ascertaining the amount of the plaintiff's damage, although such means are provided for in the policy. (*Home etc. Ins. Co. v. Kennedy*, 521.)

9. **INSURANCE, ENCUMBRANCE UPON PROPERTY.**—Though a policy of insurance provides that if an encumbrance shall be placed on the property without notice to, or consent by, the insurer, the policy shall become void, no recovery can be had if the condition is violated, though such violation does not increase the risk, and though a statute of the state requires every insurer before issuing a policy to examine the building or structure insured and the insurable value

thereof, and that in the absence of any change increasing the risk without the consent of the insurer and also of intentional fraud, in case of total loss, the whole amount mentioned in the policy shall be recovered. (*Webster v. Dwelling House Ins. Co.*, 658.)

10. **INSURANCE—LIENS INVALIDATING.**—A provision in an insurance policy avoiding it for false representations or warranties by the insured in reference to liens and encumbrances on the insured property includes liens created by operation of law as well as those created by contract. (*Capital City Ins. Co. v. Autrey*, 121.)

11. **INSURANCE — LIENS VITIATING — MISREPRESENTATIONS.**—A judgment lien duly recorded against property before making application for, or the issuance of a policy of insurance thereon, constitutes a breach of warranty on the part of the assured that there are no liens or encumbrances on the property and that his ownership is absolute, unqualified, and undivided, and is such a misrepresentation as vitiates the policy containing a condition that it shall be void if the exact interest of the insured is not truly stated therein. (*Capital City Ins. Co. v. Autrey*, 121.)

12. **INSURANCE—INTEREST OF INSURED—MISREPRESENTATIONS.**—If a policy of insurance provides that it shall be void unless the exact interest of the insured is truly stated, a statement by him that he is the absolute, unqualified, and undivided owner of the property insured vitiates the policy, when there are others interested in such property to the extent that they are to perform certain services in relation thereto, and participate in the proceeds of the sale thereof. (*Capital City Ins. Co. v. Autrey*, 121.)

13. **INSURANCE—CONDITION AGAINST CHATTEL MORTGAGE.**—Whether certain machinery included in a mortgage of real estate is personal property, so that its mortgage constitutes a breach of the condition in the policy against personal property being or becoming encumbered by a chattel mortgage, is a question respecting which the insurer must assume the burden of proof, where the character of such machinery is such that it may be a part of the realty. (*Morotock Ins. Co. v. Rodefer*, 846.)

14. **INSURANCE—MORTGAGE—CHANGE OF INTEREST.**—A CONDITION in a policy of insurance against "any change in the interest, title, or possession of the subject of the insurance, whether by legal process or judgment, or voluntary act of the insured, or otherwise," is not violated by the existence of a mortgage on the property insured at the time the policy was issued. This condition refers to subsequent changes in the interest, title, or possession of the property. (*Morotock Ins. Co. v. Rodefer*, 846.)

15. **INSURANCE—MORTGAGE.—A CONDITION** in a policy of insurance that it shall be void if the interest of the assured is not the unconditional and sole ownership, is not violated by an encumbrance existing on the property when the insurance was effected. (*Morotock Ins. Co. v. Rodefer*, 846.)

16. **INSURANCE, CHANGE INCREASING RISK, CONSTRUCTION OF STATUTE.**—A statute requiring every insurer before issuing a policy to examine the building or structure to be insured, and to fix the insurable value thereof, and that recovery may be had notwithstanding any subsequent change not affecting the risk, applies only to the condition of the building or structure, and does not impair the effect of the condition in the policy against the making of any subsequent encumbrance on the property without notice to, and consent by, the insurer. (*Webster v. Dwelling House Ins. Co.*, 658.)

17. **INSURANCE — CONDITIONS — DUTY TO FURNISH CERTIFICATE OF LOSS.**—If a policy of insurance provides that the insured must furnish a certificate of a magistrate or notary as to his loss if required to do so by the insurer, the insured is under no obli-

gation to furnish such certificate unless required to do so, and notice to him to comply with the conditions of the policy is not notice to furnish the certificate. (*Moyer v. Sun Ins. Office*, 690.)

18. **INSURANCE—CONDITIONS IN POLICY—WAIVER.**—If the insured, in good faith and within the stipulated time, does what he plainly intends as a full compliance with the requirements of the policy, good faith equally requires that the insurer shall promptly notify him of his objections, so as to give him the opportunity to obviate them, and mere silence, or failure to notify him, as to what further information is desired, or mere notice that "strict compliance with the requirements of the policy will be required," misleading the insured, to his disadvantage, constitutes a waiver by estoppel to object to the proofs furnished or to require other or further proofs. (*Moyer v. Sun Ins. Office*, 690.)

19. **INSURANCE, FIRE—MONEY REPRESENTS HOUSE DESTROYED.**—The money due upon an insurance policy upon a house represents to the owner of the property the house lost, and the destruction of the house by fire is an involuntary conversion of the house into money, as fully as if it had been sold under an execution or deed of trust. (*Chase v. Swayne*, 742.)

20. **INSURANCE—PROOF OF LOSS—WAIVER.**—If an assured in good faith and within the time stipulated, does what he plainly intends as a compliance with the requirements of his policy in respect to proofs of loss, the failure of the insurance company to notify him of any objections to the proofs furnished constitutes a waiver of objections to such proofs, and of any other or further proof. (*Moyer v. Sun Ins. Office*, 690.)

21. **INSURANCE.—A JOINT ACTION MAY BE MAINTAINED BY A HUSBAND AND WIFE** on a policy of insurance issued to them upon a dwelling used as a homestead, though the title thereto was vested wholly in the wife. (*Webster v. Dwelling House etc. Ins. Co.*, 658.)

22. **A POLICY OF INSURANCE ISSUED TO A HUSBAND AND WIFE** cannot be avoided on the ground that the real property described therein was wholly hers and the personal property wholly his, while in the application it was represented as theirs jointly. By the use of this word they did not necessarily affirm that they were tenants in common, but merely that they together owned the property, and that no other person was interested in it, it being in their joint possession and use as husband and wife. (*Webster v. Dwelling House Ins. Co.*, 658.)

23. **INSURANCE AGENT, POWERS OF.**—An agent of a corporation, permitted to insure persons from loss from the insolvency of their customers, and who is authorized, on behalf of his principal, to solicit insurance, transmit applications, and collect premiums, has power to make an agreement that where customers are not rated in Dun's Commercial Agencies, as required in the original contract of insurance, the insured may use, as to them, the rating of Bradstreet's Mercantile Agencies. (*Shakman v. United States etc. Co.*, 920.)

24. **INSURANCE—GENERAL AGENTS, WHO ARE.**—One constituted the agent of an insurance corporation to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as a general agent. (*Goode v. Georgia etc. Ins. Co.*, 817.)

25. **INSURANCE—CLERKS OF AGENTS.**—An insurer is responsible for the acts of, and is affected by notice given to, the clerks and employes of his general agents, who are known to assist such general agents in the discharge of their duties. (*Goode v. Georgia etc. Ins. Co.*, 817.)

26. INSURANCE—CLERKS OF AGENTS.—General agents of insurance corporations authorized to contract for risks, receive, and collect premiums, and deliver policies may confer upon a clerk or other subordinate authority to exercise the same powers. (*Goode v. Georgia etc. Ins. Co.*, 817.)

27. INSURANCE, WAIVER OF CONDITIONS.—If an insurer pleads as a defense that the plaintiff, in making out the application for insurance, falsely stated that there was no lien and no other insurance on the property insured, the plaintiff should be permitted to prove that a clerk of a general agent of the insurer solicited the insurance, and was truly informed respecting the lien and the other insurance, and that it was by his advice that the applicant did not disclose these facts. (*Goode v. Georgia etc. Ins. Co.*, 817.)

28. INSURANCE AGAINST LOSS BY INSOLVENCY, CONSTRUCTION OF CONTRACT.—If a policy of insurance against loss by insolvency of customers provides that, in calculating losses, no credit shall be included therein exceeding a credit of thirty per cent of the lowest capital rating of the customers in specified books, though a credit is given exceeding such rating, the assured does not lose the right of indemnity altogether, but his indemnity is restricted to thirty per cent of such rating. (*Shakman v. United States etc. Co.*, 920.)

29. INSURANCE AGAINST LOSS BY INSOLVENCY OF CUSTOMERS, CONSTRUCTION OF.—If a policy, as written, purports to indemnify a party from all loss within one year from July 1, 1889, from the insolvency of his customers, provided they are rated in Dun's Mercantile Agencies, but on objection being made that the assured should be permitted to use Bradstreet's rating as well as Dun's, at the time of the delivery of the policy, November 8, 1889, the agent of the assured wrote thereon a memorandum extending the liability to persons rated in Bradstreet's Agency, the liability of the insurer is not limited to the business transacted after the latter date, but extends, as to both classes of customers, to all business done with them after the commencement of the term of insurance named in the policy. (*Shakman v. United States etc. Co.*, 920.)

30. INSURANCE, LIFE—EFFECT OF FALSE ANSWERS AS TO SPECIFIC AILMENTS.—A policy of insurance is avoided by false answers of the insured as to his freedom from specific diseases, without reference to their materiality as to the risk, as answers respecting specific ailments are warranties, whether material to the risk or not. (*Mutual etc. Ins. Co. v. Simpson*, 757.)

31. INSURANCE, LIFE—"DISEASE"—WARRANTY AS TO SPECIFIC AILMENT.—The word "disease" may include, and is often used to designate, ailments more or less trivial; and an insurance company may, if it elects, inquire about any ailment, and take a warranty concerning it, lest it may affect the risk, although it cannot be known that it will. (*Mutual etc. Ins. Co. v. Simpson*, 757.)

32. INSURANCE, LIFE—FALSE ANSWER AS TO HEADACHE—INSTRUCTIONS—REVERSIBLE ERROR.—If an applicant for insurance answers that he has never been subject to "headache—severe, protracted, or frequent," and there is testimony, under proper pleadings, showing the answer to be false, it is reversible error to instruct the jury that "temporary illness of the assured in the course of every-day life, brought on by excessive exercise or overwork, is not embraced in said application," and that the answers of the assured have reference "to such diseases or ailments as indicate a vice in the constitution, or are so serious as to have some bearing on the general health," and in the continuance of life. (*Mutual etc. Ins. Co. v. Simpson*, 757.)

33. INSURANCE—ACCIDENT.—AN INJURY INTENTIONALLY INFLICTED on an assured by another person is an accidental injury within the meaning of a policy of insurance against injuries from external violence and accidental means, though the policy provides that the insured shall not be liable for intentional injuries. The word "intentional," as here used, refers to the acts of the insured alone. (*Button v. American etc. Acc. Assn.*, 900.)

See Attachment, 2; Homestead, 1.

INTEREST.

1. INTEREST IS NOT THE MERE INCIDENT of a debt, attaching only to contracts, express or implied, for the payment of money, but is compensation for the use of, or for the detention of, money. (*Sullivan v. McMillan*, 239.)

2. INTEREST.—IF A SPECIAL DEPOSIT or pledge of moneys is made, the pledgee is not liable for interest until he refuses, after demand, to make restitution of the amount of the pledge. (*Anderson v. Pacific Bank*, 228.)

3. DAMAGES—INTEREST ON.—Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for failure to keep a contract interest attaches as an incident. (*Sullivan v. McMillan*, 229.)

4. DAMAGES—INTEREST ON.—As soon as it is the legal duty of one to pay a claim, he is liable for interest, and as he must have been in default before an action could be maintained against him, and as his default consisted in withholding money due, he is liable for interest on the claim in suit from the date of the writ thereon. (*Sullivan v. McMillan*, 239.)

5. DAMAGES—INTEREST ON UNLIQUIDATED DEMANDS.—In the allowance of interest the distinction formerly existing between liquidated and unliquidated demands is practically obliterated, and whenever a verdict liquidates a claim and fixes it as of a prior date, interest should be allowed on the claim from that date. (*Sullivan v. McMillan*, 239.)

See Legacies, 1, 3.

INVENTIONS.

See Railroads, 29, 30.

INVESTMENTS.

See Trusts, 7, 8.

JAILS.

See Sheriffs, 1.

JOINT LIABILITY.

See Negligence, 2, 3.

JUDGMENTS.

1. JUDGMENT WITHOUT JURISDICTION IS VOID.—Hence a judgment directing foreclosure proceedings, and a sale, to enforce an assessment for building a sidewalk in a city is void, where the court is without jurisdiction of the amount of the demand, and there is no lien upon the lot sold. A sale thereunder does not confer any title upon the purchaser. (*Higgins v. Bordages*, 766.)

2. JURISDICTION OF ABSENTEES.—Process cannot go beyond the state, and compel a person in another state to return to the state where an action is pending, and to there make a defense, though he is a native of, and has a domicile in, such state. Hence a personal judgment against one who was not in the state when the action was commenced nor afterward, and who did not appear voluntarily, nor otherwise, is void. (*De La Montanya v. De La Montanya*, 165.)

3. JUDGMENT, FRAUD IN PROCURING.—It cannot be successfully contended that there was fraud in the recovery of a judgment because the plaintiff, as a witness in his own behalf, in testifying to the facts constituting his alleged cause of action, made no mention of a chattel mortgage and the seizure of the property in question under it for the payment of the debt secured thereby, under which mortgage it is claimed by the defendants that they rightfully took the property, they not being present or represented at the trial. (*Nye v. Sochor*, 896.)

4. RES JUDICATA.—Under plea of the general issue, a former recovery may be shown in evidence. (*Little v. Barlow*, 249.)

5. RES JUDICATA—EVIDENCE.—If the matter in issue in a former suit does not appear upon the record offered, under the plea of the general issue, as evidence of such former adjudication, it may be shown by extrinsic evidence. (*Little v. Barlow*, 249.)

6. RES JUDICATA—EVIDENCE.—To sustain the contention of *res judicata*, the complete record in the former suit, including the judgment therein, and not detached portions thereof, must be offered in evidence. (*Little v. Barlow*, 249.)

7. RES JUDICATA—CONCLUSIVENESS.—A former recovery, when pleaded in bar and proved, is conclusive upon the parties. (*Little v. Barlow*, 249.)

8. RES JUDICATA—EVIDENCE OF UNDER GENERAL ISSUE—CONCLUSIVENESS.—If evidence offered under a plea of the general issue to support a contention of *res judicata* shows that the same subject matter has already been litigated and adjudicated between the parties by the final judgment of a court of competent jurisdiction, it is as conclusive a bar to any further recovery as though it had been urged by special plea in bar. (*Little v. Barlow*, 249.)

9. JUDGMENT—WHEN NOT RES JUDICATA.—A judgment of the appellate court, reversing the judgment of the superior court, and remanding the cause to that court for further proceedings is not final, and does not conclude the parties, in the supreme court, upon a subsequent appeal, from a later judgment of the superior court. (*Board of Trade v. Nelson*, 312.)

10. JUDGMENTS—LIEN OF—PRIORITIES.—Under a statute providing that the docketing of a judgment shall make it "a lien on the real property, in the county where docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the date of the rendition of the judgment," the lien of docketed judgments attaches to after-acquired lands in the same county at the moment that the title vests in the judgment debtor, and the proceeds of a sale under such judgments must be distributed pro rata among the judgment creditors without reference to the date when their judgments were docketed. (*Moore v. Jordan*, 576.)

11. JUDGMENT.—A MOTION MAY BE ENTERTAINED TO VACATE A JUDGMENT. though the moving party does not come into court, nor make an affidavit of merits, nor otherwise submit himself

to its jurisdiction, where the ground of the motion is that the judgment, or the part sought to be vacated, is void because the court did not have jurisdiction of the person of the defendant, the process having been constructively served on him beyond the state. (*De La Montanya v. De La Montanya*, 165.)

12. JUDGMENT NUNC PRO TUNC as of the date of the submission of a cause for decision may be entered where it appears that the defendant had ceased to be a corporation after such submission. The forfeiture of the charter of the corporation is equivalent to the death of a natural person, and the judgment in the one case as in the other may be entered, nunc pro tunc, as of a day in the lifetime of the party where it might have been entered in such lifetime but for some delay of the court. (*Shakman v. United States etc. Co.*, 920.)

See Appeal, 1, 2; Equity, 1-3; Fraudulent Conveyances, 4-6; Injunctions, 8-10; Insurance, 11.

JUDICIAL NOTICE.

See Corporations, 24; Evidence, 8.

JUDICIAL SALES.

JUDICIAL SALES—SETTING ASIDE—INADEQUACY OF PRICE.—While inadequacy of price alone does not justify the setting aside of a judicial sale, yet when such inadequacy is very great, slight circumstances tending to show that interested parties were misled, or by accident or mistake prevented from attending the sale, or preventing it, it may be set aside. (*Rogers etc. Hardware Co. v. Cleveland Building Co.*, 494.)

JURISDICTION.

See Appeal, 1; Habeas Corpus; Judgments, 1; Larceny, 2; Marriage and Divorce, 2; Prohibition; Receivers, 2, 3; Statutes, 7.

LACHES.

See Partition, 4.

LAKES.

See Waters, 8-12.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—LEASES—COVENANT FOR QUIET ENJOYMENT.—A guardian cannot bind his ward nor the ward's estate by a covenant for quiet enjoyment contained in a lease of the ward's land; but a guardian executing a lease containing such covenant binds himself individually and becomes personally liable for its breach. (*Chestnut v. Tyson*, 101.)

2. LANDLORD AND TENANT—LEASES—COVENANTS FOR QUIET ENJOYMENT—BREACH OF NOTICE.—If a tenant is evicted under a judgment obtained by a stranger having a paramount title, and brings an action against the landlord to recover for a breach of a covenant for quiet enjoyment contained in his lease, it is not necessary to the maintenance of the action that the tenant aver and prove that he notified the landlord of the pendency of the action under which he was evicted. (*Chestnut v. Tyson*, 101.)

3. LANDLORD AND TENANT—LEASE—COVENANT FOR QUIET ENJOYMENT—BREACH OF AND RIGHT TO RECOVER FOR.—If, in an action by a tenant to recover for the breach of a covenant for quiet enjoyment contained in the lease, the gist of the action is the deprivation of the possession and use of the leased

premises for a part of the term embraced in the covenant, the fact alone that the tenant was deprived of such possession under a judgment of eviction in an action of unlawful detainer, does not deprive him of the right to maintain his action, provided the other elements essential to the maintenance of the action are sufficiently alleged and proved. (*Chestnut v. Tyson*, 101.)

4. LANDLORD AND TENANT—LEASES—BREACH OF COVENANT FOR QUIET ENJOYMENT—EVICTION—NOTICE OF SUIT.—If a tenant evicted under a judgment obtained by a stranger having title paramount to the landlord, brings an action against the landlord upon a breach of covenant for quiet enjoyment contained in the lease, and seeks to recover special damages for expenses incurred in defending the action under which he was evicted, he must allege and prove, in order to maintain his action, that he gave the landlord certain and explicit notice, either oral or in writing, of such action resulting in his eviction, and that he expressly requested him to attend and defend such action. (*Chestnut v. Tyson*, 101.)

5. LANDLORD AND TENANT—LEASES.—COVENANTS FOR QUIET ENJOYMENT do not warrant against the wrongful eviction of the covenantee by a third person, nor afford any remedy for damages consequent upon such wrongful eviction; and if the gravamen of an action is an eviction by strangers to such covenant, the plaintiff must allege and prove that such third person had lawful title superior to that held by the covenantor at the time of the conveyance by him to the plaintiff, and the latter must also specify who are the holders of such paramount title. (*Chestnut v. Tyson*, 101.)

6. LANDLORD AND TENANT—LEASES—BREACH OF COVENANT FOR QUIET ENJOYMENT—PLEADING.—An allegation by a tenant in an action against his landlord to recover for a breach of covenant for quiet enjoyment contained in his lease, that he was evicted from the leased premises under judgment and writ of restitution issued in an action by strangers claiming their right of possession and title under and through such landlord, and that said judgment was obtained and plaintiff evicted under title paramount to that of the landlord, is insufficient as an averment of breach of covenant, or of title paramount in the strangers at the time of the execution of the lease. (*Chestnut v. Tyson*, 101.)

7. LANDLORD AND TENANT—DISTRESS LAWS—CONSTRUCTION.—Laws which enlarge the common-law remedy by distress must be strictly interpreted. (*Kellogg Newspaper Co. v. Peterson*, 300.)

8. LANDLORD AND TENANT—LEASE ATTEMPTING TO RESERVE TITLE TO CROPS TO SECURE THE PAYMENT OF RENT.—If land is let under an agreement that a cash rent shall be paid, that the title of the crops raised shall remain in the lessor, in whose name they shall be placed in a warehouse by the lessee, that they shall then be sold, and the rent paid out of the proceeds, and the residue, if any, shall go to the lessee, and that no part of the crop shall at any time be subject to his disposal, the contract is an attempt to create a secret lien on the growing crop to secure the payment of the rent, and, when not executed in the manner prescribed for chattel mortgages, cannot accomplish that purpose, and the crops raised are subject to attachment against the lessee. (*Stockton Sav. etc. Soc. v. Purvis*, 210.)

9. LANDLORD AND TENANT—FORFEITURE BY ASSIGNMENT.—If a lease contains a condition that it shall not be assigned without the written consent of the lessor, and provides for a forfeiture if the condition is broken, the covenant is broken by the lessee's voluntary assignment for the benefit of creditors, and the lease may be forfeited for the breach, because such an assignment transfers

the lessee's interest by his voluntary act, and not by operation of law. (*Medinah Temple Co. v. Currey*, 320.)

10. **LANDLORD AND TENANT—ASSIGNMENT—WAIVER OF FORFEITURE—RENT.**—If a lessee violates a condition of his lease by making a voluntary assignment for the benefit of creditors, for which breach the lease may, by its terms, be forfeited, and the assignee occupies the premises for a time without electing whether to accept or to refuse the lease, the landlord's right to declare a forfeiture, because of such assignment, is not waived by his receiving rent from the assignee for the period covered by the latter's occupation of the premises. (*Medinah Temple Co. v. Currey*, 320.)

11. **LANDLORD AND TENANT—LIEN FOR RENT.**—Except as to crops grown or growing upon the demised premises, a landlord has no lien for rent upon his tenant's property, until seizure by distress or other proceeding. Hence, as against the landlord's right of distress, the tenant may sell his property, and confer title thereto, where the sale is made in good faith on the part of the buyer and seller. (*Kellogg Newspaper Co. v. Peterson*, 300.)

See Assignment for Benefit of Creditors.

LARCENY.

1. **TO CONSTITUTE LARCENY** there must be a felonious taking and carrying away of personal property. There must be such a taking that the accused acquires dominion over the property, followed by such an asportation or carrying away, as to supersede the possession of the owner, for an appreciable period of time. (*Molton v. State*, 97.)

2. **LARCENY—JURISDICTION.—IF GOODS ARE STOLEN IN ONE STATE OR COUNTRY**, and taken by the thief into another the courts of the latter have not jurisdiction to try him for his offense, unless such jurisdiction has been expressly conferred by statute. (*Strouther v. State*, 852.)

3. **LARCENY—INTENT—APPROPRIATION.**—If the property of another is taken with intent, on the part of the taker, to retain it until he is paid a reward for its restoration to its owner and in the event of not receiving such reward, not to return it at all, the taking is larceny. (*Dunn v. State*, 714.)

4. **LARCENY—INTENT—APPROPRIATION.**—If one person takes the property of another with intent to hold it for the purpose of obtaining a reward for its return, but without any intention of depriving the owner of the property permanently, and with intent to return it in case no reward is offered, the taking is not larceny. (*Dunn v. State*, 714.)

5. **LARCENY—TAKING OF POSSESSION NECESSARY.**—Although an accused may, with intent to steal, have killed an animal, and may have been near enough to take possession and carry it away, yet the offense of larceny was not complete until the possession of the owner was severed by the taking of actual possession by the accused. (*Molton v. State*, 97.)

6. **LARCENY—CONFESSION AS EVIDENCE.**—A statement or confession made by an accused at his preliminary examination, after he has been duly cautioned, is admissible against him, although the examining magistrate is the owner of the property which the defendant is accused of stealing. (*Tabor v. State*, 726.)

7. **LARCENY—EVIDENCE.**—Family quarrels between the prosecutor and the accused antedating, and not in any manner connected with, the larceny are not admissible in evidence. (*Tabor v. State*, 726.)

8. **LARCENY.—EVIDENCE** that, on the night before a trial for larceny the parties having the accused in charge were drinking wine and playing cards, is irrelevant and inadmissible. (*Tabor v. State*, 726.)

9. **LARCENY — EVIDENCE — ELECTION.**—If, on a trial for theft of a hog, the evidence tends to show that another hog was lost by the owner of both, but it does not certainly connect the accused with the theft of more than one hog, and he admits the killing of only one, while the meat of but one was found in his possession, the prosecution cannot be compelled to elect as to which hog a conviction will be claimed. (*Tabor v. State*, 726.)

LEASE.

See *Landlord and Tenant*; *Sales*, 1.

LEGACIES.

1. **LEGACIES, WHEN PAYABLE.**—If a statute declares that legacies are due and deliverable at the expiration of a year after the testator's decease, no order of the probate court is necessary to make them bear interest after such year. (*In re Williams*, 224.)

2. **LEGACY, RESIDUARY, WHAT IS NOT.**—A provision for the payment of certain legacies after which certain others shall be paid does not make the latter residuary legacies. (*In re Williams*, 224.)

3. **LEGACIES, WHEN BEAR INTEREST.**—Though a will declares that the executor shall not be required to pay certain legacies until such time as it may be practicable to do so, having regard to the beneficial management of the estate, they bear interest commencing one year from the testator's death, if the statute declares that legacies are due and deliverable at the expiration of one year after such decease, and bear interest after they are due and deliverable. The pendency of a contest of the will of the decedent, owing to which no distribution of the estate nor payment of the legacies is possible, does not deprive the legatees of their right to interest. (*In re Williams*, 224.)

LEGISLATURE.

1. **CONSTITUTIONAL LAW—LEGISLATIVE POWERS.**—The legislature of a state is clothed with all powers of legislation that do not conflict with the constitution of the state, or of the United States, and it cannot part with such governmental powers. (*People v. Kirk*, 277.)

2. **COMMON LAW—LEGISLATIVE POWERS.**—The powers of the legislature are in no manner limited or restricted by the common law of a particular state, which owes its existence to an act of the legislature. (*People v. Kirk*, 277.)

3. **CONSTITUTIONAL LAW—UNWISE OR DETRIMENTAL LEGISLATION.**—The propriety or impropriety of legislation is a matter of which the legislative department of the state is the sole judge, and, unless an act infringes upon some provision of the state or federal constitution, or attempts to part with governmental power, the courts will not declare it invalid, because it may be unwise or detrimental to the best interests of the state. (*People v. Kirk*, 277.)

4. **CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.**—The constitutional maxim which prohibits the legislature from delegating its power to any other body or authority is not violated by vesting municipal corporations with certain powers of legislation as to matters purely of local concern, of which the par-

ties immediately interested are supposed to be better judges than the legislature. (*Chicago v. Stratton*, 325.)

5. **STATUTES—GRANT OF MEANS TO ACCOMPLISH END.**—A grant of legislative power to do a certain thing carries with it the power to use all necessary and proper means to accomplish the end; and the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. (*Chicago v. Stratton*, 325.)

6. **POLICE POWER—NATURE OF.**—**LEGISLATIVE POWER** to subserve the general welfare by all needful and proper regulations in the interest of health and safety, is inherent in the sovereignty of the state, and cannot be bartered away by contract or otherwise. (*Chicago etc. R. R. Co. v. State*, 557.)

7. **CONSTITUTIONAL LAW—STATUTES DEPENDING UPON A CONTINGENCY.**—It is competent for the legislature to pass a law, the ultimate operation of which may, by its own terms, be made to depend upon a contingency. Hence, while it cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. (*Chicago v. Stratton*, 325.)

See Contempt, 3; Elections; Police Power, 3, 5; Waters, 8, 9, 12.

LICENSE.

LICENSE, RIGHT TO REVOKE.—An oral license to enjoy a permanent privilege on the land of another, as to maintain a ditch thereon intended for permanent use, is revocable by the licensor, although money has been expended thereon by the licensee. (*Hathaway v. Yakima Water etc. Co.*, 874.)

LIMITATIONS OF ACTIONS.

1. **LIMITATIONS OF ACTIONS—REAL ESTATE—TEMPORARY ABSENCE.**—A statute of limitations, providing that the temporary absence of defendant from the state shall not be accounted or taken as a part of the time limited, applies to all suits alike, including actions for the recovery of real estate, and, therefore, applies to an action of trespass to try title, but does not apply to persons who were nonresidents of the state at the time the cause of action accrued. (*Huff v. Crawford*, 763.)

2. **LIMITATIONS OF ACTIONS—REAL ESTATE—TEMPORARY ABSENCE.**—A statute of limitations, providing that the temporary absence of defendant from the state shall not be accounted or taken as a part of the time limited, is applicable to real as well as to personal actions. (*Wilson v. Daggett*, 766.)

3. **LIMITATIONS OF ACTIONS—REAL ESTATE—ABSENCE OF DEFENDANTS.**—In an action of trespass to try title where the defendant has held possession by an agent, and has been absent from the state, and a resident of another state, during the time necessary to complete the bar, the running of the statute of limitations, concerning absent defendants, is suspended during the defendant's absence, if he was a resident of the state at the time the adverse possession was taken by his agent, but, if he was not, the statute does not apply. (*Huff v. Crawford*, 763.)

4. **LIMITATIONS OF ACTIONS—VISIT BY NONRESIDENT—"RETURN."**—If a nonresident person comes to this state for a temporary purpose only, after having taken adverse possession of land by tenant, and remains here but a short time upon business, his visit is not "a return to the state," within the meaning of a statute of limitations respecting absent defendants, and his absence, after such visit, does not suspend the running of the statute in his favor. (*Wilson v. Daggett*, 766.)

5. LIMITATIONS BY ACTIONS—POSSESSION OF NONRESIDENT BY TENANT—TEMPORARY PRESENCE.—A person who has at all times been a nonresident of this state, but who was temporarily within the state before taking adverse possession of land by tenant, though he was absent when such possession was taken, and has ever since been absent, is not a person "without the limits of this state," within the meaning of a statute of limitations respecting absent defendants. (*Wilson v. Daggett*, 766.)

6. LIMITATIONS OF ACTIONS—POSSESSION OF NONRESIDENT BY TENANT.—As applied to real actions, where adverse possession of land has been taken by tenant, a statute of limitations providing that the temporary absence of defendant from the state shall not be accounted, or taken as a part of the time limited, does not apply to those who were not residents of the state when possession was taken, unless, perhaps, they took possession in person. (*Wilson v. Daggett*, 766.)

7. LIMITATIONS OF ACTIONS.—DEBTS AGAINST A DECEDENT'S ESTATE evidenced by his written obligation under seal for the payment of money are not barred by the statute of limitations until the expiration of ten years from maturity. (*Cobb v. Garner*, 136.)

8. LIMITATIONS OF ACTIONS—NEGOTIABLE INSTRUMENTS.—A PAYMENT BY ONE JOINT DEBTOR, or an extension of time procured by him, without the knowledge, assent, or subsequent ratification by the other, does not stop the running of the statute of limitations as to the latter. Hence, such acts, by one joint debtor on a promissory note, will not keep the note alive against his codebtor. (*Boynton v. Spafford*, 274.)

9. CONSTITUTIONAL LAW.—A STATUTE OF LIMITATION WHICH ATTEMPTS TO CUT OFF A RIGHT OF A PROPERTY owner without affording him a just and reasonable opportunity to try his rights in the courts savors of spoliation and pillage, and is unconstitutional. (*Hayes v. Douglas County*, 925.)

10. STATUTE OF LIMITATIONS.—SUMMONS issued but neither docketed, nor returned served, nor followed by an alias summons, does not stop the running of the statute of limitations. (*Neal v. Nelson*, 590.)

MACHINERY.

See Fixtures.

MANDAMUS.

MANDAMUS—RAILROADS—VIADUCTS.—The duty of railroad companies to construct or repair viaducts, which is imposed upon them by a city charter, and ordinance, may be enforced by a writ of mandamus, especially where authority to proceed in that way is expressly conferred by the charter. (*Chicago etc. R. R. Co. v. State*, 557.)

MARRIAGE AND DIVORCE.

1. DIVORCE—JURISDICTION OVER CHILDREN NOT IN THE STATE.—In a suit for divorce against a defendant who had taken his children, and fled with them from the state before it was commenced, a judgment awarding to plaintiff the custody and care of such children is void, if the process was served beyond the state. (*De La Montanya v. De La Montanya*, 165.)

2. DIVORCE AGAINST ABSENTEE, JURISDICTION TO AWARD ALIMONY.—A court in a suit for divorce has no jurisdiction to award alimony as against a defendant when he was not within the state when the suit was commenced, nor afterward, nor did

he appear in the action voluntarily or otherwise. (*De La Montanya v. De La Montanya*, 165.)

3. **DIVORCE, JUDGMENT AGAINST ABSENTEE.**—A judgment in a suit for divorce awarding plaintiff the care, custody, and control of her minor children, and declaring that she shall have the right at any future time to apply to the court for an allowance, based upon constructive service of process, is void, though the defendant was a native of, and domiciled within, the state, if he and the children were, at the commencement of the action, and ever thereafter, beyond the state. (*De La Montanya v. De La Montanya*, 165.)

MARRIED WOMEN.

See Equity, 1; Specific Performance, 5.

MASTER AND SERVANT.

1. **MASTER AND SERVANT—NEGLIGENCE—BLASTING.**—If a servant, about to blast rock when it is almost dark, fails to cover the blast, or to give notice sufficient in time for those near by to make their retreat to a safe place, he is guilty of negligence, and, if a third person is injured thereby, both the servant and his master are liable in damages for such injury. (*Gates v. Latta*, 584.)

2. **MASTER AND SERVANT—DUTY TO EMPLOYÉS—NEGLIGENCE—FELLOW-SERVANTS.**—The duty of an employer is to provide a safe place in which his employés may work, suitable materials, tools, and machinery to use while at work, reasonably competent fellow-servants with whom to work, and such instruction to the young and inexperienced as may be necessary to warn them against the peculiar dangers incident to the kind of work in which they are to be engaged. But he is not liable to them for injuries due to their incompetency, or carelessness, or to the negligence or malice of their coemployés. (*Prescott v. Ball Engine Co.*, 683.)

3. **MASTER AND SERVANT—INCOMPETENT SERVANTS—RIGHTS OF COEMPLOYÉS.**—If the master finds it necessary, as he may at times, to employ and retain incompetent servants, he should either inform their coemployés of that fact, or give them a reasonable opportunity to acquire knowledge of such fact, before he can screen himself from the consequences of such incompetency. (*Chicago etc. R. R. Co. v. Champion*, 357.)

4. **MASTER AND SERVANT—COEMPLOYÉS—ASSUMPTION OF RISKS.**—If a master has exercised reasonable care in the employment of competent servants, the employé assumes the risk arising out of the negligence of such coemployés engaged in the same line of business. (*Chicago etc. R. R. Co. v. Champion*, 357.)

5. **MASTER AND SERVANT—COEMPLOYÉS—NONASSUMPTION OF RISKS.**—If a master knowingly employs and retains in his service an incompetent servant, an employé who enters his service, in the same line of business, in ignorance of such incompetency, and who, in the exercise of ordinary care, could not discover such incompetency, does not assume the risk arising out of the negligence of the incompetent coemployé. (*Chicago etc. R. R. Co. v. Champion*, 357.)

6. **MASTER AND SERVANT—ASSUMPTION OF RISKS.—IF DEFECTS COMPLAINED OF** are as open and obvious to the servant as they are to the master, the servant cannot recover for an injury arising therefrom. (*Louisville etc. R. R. Co. v. Stutts*, 127.)

7. **MASTER AND SERVANT—DEFECTS—NOTICE—ASSUMPTION OF RISKS.**—If a servant while engaged in his employment acquires knowledge of any defects in the materials, machinery, or instrumentalities used, and notice thereby of an increased risk of danger, and afterward continues in the service, without objection

or notice to the master, he assumes the increased risk, and, although he may continue in the service a reasonable time, after notice to the master of the defect, relying on his promise to remedy it, without assuming the risk of danger therefrom, yet, if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is thereafter guilty of contributory negligence, and cannot recover for injury received through such defect. (Louisville etc. R. R. Co. v. Stutts, 127.)

8. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE. If a workman, whose duty it is to select material for his use from a stock furnished by his employer or a vice-principal, through haste, carelessness, or mistake in judgment, selects unsuitable and unsafe material, while suitable and safe material is in the stock furnished, or if, being suitable when selected, it is so attached to machinery by him as to render it unsafe, and either he or his fellow-servant is, from either of these causes, injured, the party injured is guilty of contributory negligence, and has no cause of action against his employer or the vice-principal. (Prescott v. Ball Engine Co., 683.)

9. MASTER AND SERVANT—VICE-PRINCIPALS.—A workman in a manufactory, whose duty is to maintain a good and suitable supply of material from which other workmen may select material for their own use, is a vice-principal, and not a fellow-servant of such workmen. (Prescott v. Ball Engine Co., 683.)

10. MASTER AND SERVANT—DUTY AND NEGLIGENCE OF SERVANT.—An employé must use his senses in all that relates to his employment, and exercise attention and care in the selection of materials from the mass provided for general use, and in the manner of their general use, and to provide with reasonable diligence for the safety of himself and his coemployés in his management of his own share of the work to be done. (Prescott v. Ball Engine Co., 683.)

See Railroads, 16-21.

MECHANIC'S LIEN.

1. MECHANIC'S LIEN—CONSTRUCTION OF STATUTE.—Under a statute providing that "all liens for work and labor done or things furnished, as specified in this act, shall be upon an equal footing, without reference to the date of filing the account or lien; and in all cases where a sale shall be ordered and the property sold, which may be described in any account or lien, the proceeds arising from such sale, if not sufficient to discharge all the liens against the same, without reference to the date of filing the account or lien, shall be paid pro rata on the respective liens," each lienholder is entitled, under foreclosure proceedings and a sale thereunder, to share pro rata in the proceeds of the sale, if there is not enough to satisfy the several claims. (Oriental Hotel Co. v. Griffiths, 790.)

2. MECHANIC'S LIEN—CONSTRUCTION OF STATUTES.—The construction placed upon mechanic's lien statutes, that when the erection of any building is begun, that this constitutes the "inception" of all subsequent liens, is consistent with the entire body of the statute laws of this state on the subject. It preserves the rights of all those who contribute to the construction of the building, and affords an easy solution and just result in case of intervening liens. (Oriental Hotel Co. v. Griffiths, 790.)

3. MECHANIC'S LIEN—PRIORITY OF, OVER MORTGAGE.—A lien or mortgage existing at "the inception" of a mechanic's lien is protected, but a contract lien created after "the inception" of the mechanic's lien is subordinate thereto. (Oriental Hotel Co. v. Griffiths, 790.)

4. MECHANIC'S LIEN—EQUALITY OF RIGHT—INTERVENING MORTGAGE.—If, after work has commenced on a building, and after mechanics' liens have attached, a mortgage is executed thereon, those who perform labor or furnish materials subsequent to the execution of the mortgage are also entitled to a lien under statutes placing every holder of a mechanic's lien upon an equal footing, and extending the lien in favor of each from the beginning to the completion of the work. (*Oriental Hotel Co. v. Griffiths*, 790.)

5. MECHANIC'S LIEN—CONTRACTS—NOTICE—INTERVENING MORTGAGE.—Persons contract with reference to, and in view of, the laws in force, and are chargeable with notice of rights that may arise under such laws. Hence, an intervening mortgage, though in form a deed of trust, will not be allowed to destroy the statutory right to a mechanic's lien that may be acquired after the execution of the mortgage and during the completion of the building, which is covered by the mortgage, and upon which work had commenced prior to the execution in the instrument. (*Oriental Hotel Co. v. Griffiths*, 790.)

6. MECHANIC'S LIEN—INTERVENING MORTGAGE—PRIORITY—FORECLOSURE AND DISTRIBUTION OF PROCEEDS.—If, after work has been commenced upon a hotel building, to be erected under contract, and after mechanics' liens have attached, a mortgage is executed on the lot and building, to secure an issue of bonds to raise money for the completion of the building, and other contractors and materialmen perform labor and furnish materials for the completion of the building subsequent to the recording of such mortgage, the mechanics' liens all have priority over the mortgage, though it is declared on its face to be a first lien; and the holders thereof are entitled to a decree ordering the sale of the lot and building as a whole, the proceeds to be applied to the discharge of their several claims, if sufficient, the surplus going to cancel the mortgage, but if insufficient, the proceeds to be paid pro rata to the mechanic's lienholders. (*Oriental Hotel Co. v. Griffiths*, 790.)

7. MECHANIC'S LIEN—DISPLACEMENT OF, BY CONTRACT LIEN.—An express statement in a deed of trust, given to secure the payment of certain mortgage bonds issued and sold by a hotel company, that it is to constitute a first and paramount lien on the property covered, does not affect mechanic's lienholders who were not parties to the agreement, where the deed discloses that the money obtained from the sale of such bonds was for the purpose of completing buildings to be erected upon the mortgaged property, and where work on such buildings had commenced before the execution of the deed of trust. A mechanic's lien given by statute cannot be displaced by the assertion of a lien created by contract. (*Oriental Hotel Co. v. Griffiths*, 790.)

See Receivers, 2.

MEETINGS.

See Corporations, 23.

MENTAL ANGUISH.

See Telegraph Companies.

MISDEMEANOR.

See Statutes, 27.

MISREPRESENTATIONS.

See Insurance, 11, 12.

MISTAKE.

1. EQUITY.—IGNORANCE OF LAW AS A GROUND FOR RELIEF.—If ignorance of the law exists on one side, and that ignorance is known to, and taken advantage of by, the other, the former will be relieved, especially if the mistake was encouraged or induced by the misrepresentation of the party seeking to profit by it. (*Titus v. Rochester etc. Ins. Co.*, 426.)

2. CONTRACTS—RESCISSION FOR MISTAKE.—If a contract between a borough and a water company provides that the water to be furnished by the latter to the former shall be drawn only from certain stipulated land, and it subsequently develops, owing to a mutual mistake of the parties, that there is not sufficient water on such lands to supply the borough, this is not alone sufficient to justify a cancellation and rescission of the contract. (*Du Bois Borough v. Du Bois etc. Water Works Co.*, 678.)

See Executors and Administrators, 6.

MORTGAGES.

1. MORTGAGOR AND MORTGAGEE—GROWING CROPS.—While a mortgagor remains in possession, he is entitled to reserve to his own use the income and profits of the mortgaged estate, and therefore the crops growing thereon. This right terminates only when the mortgagor's right of possession ends upon the sale of the property or the appointment of a receiver authorized to collect its rents and profits. (*Simpson v. Ferguson*, 201.)

2. A MORTGAGE UPON A GROWING CROP must, as against a subsequent mortgagee in good faith, be executed with the formalities required by the Civil Code. (*Simpson v. Ferguson*, 201.)

3. MORTGAGE OF REAL PROPERTY AND OF CROPS GROWING THEREON, CONFLICTS BETWEEN.—If a mortgage purporting to include certain real property and the rents, issues, and profits thereof is executed in the mode prescribed for a mortgage of real property, but not in that required for a mortgage of growing crops, and subsequently the mortgagor mortgages the growing crops in the mode prescribed by law, the latter mortgagee is entitled to such crops in preference to the holder of the former mortgage. (*Simpson v. Ferguson*, 201.)

4. A MORTGAGE OF ANIMALS DOES NOT EXTEND TO THEIR SUBSEQUENTLY BEGOTTEN INCREASE, where, as in California, such mortgage is a lien only, and is not a conveyance of the legal title. (*Shoobert v. De Motta*, 207.)

5. UNDER A MORTGAGE CONDITIONED THAT THE MORTGAGOR WILL SUPPORT THE MORTGAGEE during life, the latter has the right to support where he shall choose to reside, subject to the qualification that the place selected shall not impose needless expense on the mortgagor. The latter has no right to insist that such support shall be received at his place of residence. (*Tuttle v. Burgett*, 649.)

See Building and Loan Associations, 5, 11; Contracts, 6; Equity, 5; Evidence, 10; Insurance, 14, 15; Mechanic's Lien, 3-6.

MOTIONS.

MOTIONS—TO STRIKE OUT EVIDENCE.—If evidence is admitted without objection, a subsequent motion to strike it out comes too late. (*Chicago etc. R. R. Co. v. Champion*, 357.)

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS CAN BIND TAXPAYERS ONLY in the mode prescribed by law, and cannot substitute any other. (*Violet v. Alexandria*, 825.)

2. MUNICIPAL CORPORATIONS—EXERCISE AND DELEGATION OF POWERS.—Powers conferred upon a municipal corporation must be exercised by the municipality; and, so far as they are legislative, cannot be delegated to others. (*Chicago v. Stratton*, 325.)

3. MUNICIPAL CORPORATIONS—POWER TO PURCHASE MATERIALS AND TO EMPLOY LABOR FOR LIGHTING STREETS.—A city which has power, under its charter or general legislative authority, to own and to operate a plant of its own for the purpose of lighting its streets, also has the power to purchase all the materials and to employ all the labor necessary for carrying it on, as this is a matter exclusively within its general discretionary powers, and is not subject to judicial intervention or control, except in cases of fraud, or when it is shown that such power or discretion is being grossly abused, to the detriment or oppression of the public rights or interests. The courts will, therefore, enforce such a contract, made by a city, which is not, upon its face, oppressive, and where no fraud is shown in its making or object. (*Rockebrandt v. Madison*, 348.)

4. MUNICIPAL CORPORATIONS—POWER TO REGULATE HACKS.—If the charter of a city confers upon its mayor and city council the power to "regulate hacks," and all other vehicles, an ordinance providing that no agent of any transfer company shall go within the depot of the city for the purpose of soliciting patronage, is a valid exercise of the power conferred to "regulate hacks," and, as such ordinance is, in its nature and essence, a police regulation, its policy or reasonableness cannot be inquired into by the courts. (*Lindsay v. Mayor*, 44.)

5. MUNICIPAL CORPORATIONS—ORDINANCE TO REGULATE HACKS—EFFECT OF, UPON PRIOR CONTRACT.—Though a hackman may, under a contract with a railroad company, owning a city depot, have the right and privilege to enter the premises to solicit patronage, an ordinance subsequently enacted, prohibiting hackmen from going within such depot to solicit patronage, is not unconstitutional and void, as impairing the obligation of a contract, because the contract must be deemed to have been entered into subject to the power of the city to regulate hacks. (*Lindsay v. Mayor*, 44.)

6. MUNICIPAL CORPORATIONS—ORDINANCES—EFFECT OF UPON PRE-EXISTING RIGHTS.—If pre-existing private rights are restrained or limited by a city ordinance, passed in the valid exercise of a power with which the municipal authorities are clothed, such restraint or limitation is *damnum absque injuria*, because all contracts and all rights are subject to such regulations as the city may adopt for the promotion of good order and the public benefit. (*Lindsay v. Mayor*, 44.)

7. MUNICIPAL CORPORATIONS—POWER AS TO LOCATION OF LIVERY STABLES.—An express legislative grant of power to a municipality to direct the location of livery stables in its midst, includes the power to prohibit or forbid the location of stables within residence districts; and, in the exercise of this power, the city council may impose whatever conditions and restrictions it may see fit, in relation to such districts. (*Chicago v. Stratton*, 325.)

8. MUNICIPAL CORPORATIONS—ORDINANCES—DELEGATION OF POWER AS TO LOCATION OF LIVERY STABLES.—An ordinance of a city, which has statutory power to regulate the location of livery stables in its midst, making it unlawful to locate, build, or keep a livery stable in any block in which two-thirds of the buildings are residences, unless the owners of a majority of the lots consent in writing, is not a delegation of legislative power to the property owners of such block, but is simply a prohibition against the location of such stables, which is avoided by the happening of the

contingency provided for, to wit, the consent of a majority of the lot-owners in the block. The ordinance is, therefore, valid. (*Chicago v. Stratton*, 325.)

9. MUNICIPAL INDEBTEDNESS, WHEN AGAINST PROHIBITION.—Under a law forbidding a municipality to incur any liability for any purpose exceeding in any year the income and revenue thereof, and declaring that the trustees shall not audit any liability in excess of the available money in the treasury that may be legally appropriated for such purpose, a contract running over a number of years, and which, in the aggregate, requires the payment of more money than will be in the municipal treasury during any one year, but under which the annual payments do not exceed the income in any year, is valid and enforceable. Under such a law the municipality can never be liable for but one year's obligations incurred under the contract, and if they exceed the moneys in the treasury applicable to their payment, the balance is not a claim against the city, and is lost to the creditor. Therefore, at no time can its obligations under the contract exceed the revenue of any year applicable to their satisfaction. (*McBean v. Fresno*, 191.)

10. MUNICIPAL CORPORATIONS, CONTRACTS EXTENDING BEYOND OFFICIAL TERMS OF THE OFFICERS AUTHORIZING THEM.—A contract may be made by a municipal corporation running for a period of years, and extending beyond the official term of the officers who authorized it, if, at the time of its execution, it was fair, just, and reasonable, and prompted by the necessities of the situation, or was in its nature advantageous to the municipality. Therefore a contract providing for the disposition of the sewage of a municipality for a period of five years is enforceable. (*McBean v. Fresno*, 191.)

11. MUNICIPAL CORPORATIONS, IMPROVEMENTS MADE BEYOND MUNICIPAL LIMITS.—A city having authority to establish, construct, and maintain sewers may contract for the taking care and disposing of sewage after it reaches a point beyond the city limits. The disposition of the outfall is an essential part of the maintenance of a sewer system. (*McBean v. Fresno*, 191.)

12. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LOCAL ASSESSMENTS.—An assessment for local improvements cannot be enforced until the person of whom it is exacted shall have an opportunity to appear and contest its legality, justness, and correctness. (*Violett v. Alexandria*, 825.)

13. LOCAL ASSESSMENTS for street improvements are an exercise of the taxing power, and their enforcement, where the person whose property is assessed, has had no opportunity to appear and contest their legality, justness, and correctness, cannot be permitted without denying him the due process of law guaranteed by the constitution of the United States. (*Violett v. Alexandria*, 825.)

14. LOCAL ASSESSMENTS FOR STREET extensions and improvements may be imposed upon the real property benefited thereby. (*Violett v. Alexandria*, 825.)

15. STREET ASSESSMENTS IN PROPORTION TO FRONTAGE.—Under a statute authorizing a municipality to impose assessments for street improvements and extensions according to the benefit to the property assessed, such assessments cannot be required by an ordinance to be according to the frontage of the property upon the street improved or extended. (*Violett v. Alexandria*, 825.)

16. ASSESSMENT NOT INCLUDING ALL THE PROPERTY BENEFITED.—Where an assessment is made by law chargeable to the lots and parcels benefited thereby, and officers are authorized to ascertain and determine what parcels are benefited by a proposed improvement, such officers should include in the assessment district

all the lands which, in their judgment, fairly exercised, would be benefited; and if, instead of so doing, they impose an assessment only on the lands directly fronting upon the improvement, others being also benefited thereby, the assessment is unequal and invalid. (*Hayes v. Douglas County*, 925.)

17. **ASSESSMENT BY FRONTAGE.**—If the cost of a street improvement is directed by statute to be assessed against the lots chargeable therewith, in proportion to the benefit secured thereto, an assessment according to the frontage rule, and without any actual view or consideration by the officers making the assessment of the benefits actually accruing to each parcel by reason of the improvement, is invalid. (*Hayes v. Douglas County*, 925.)

18. **AN ASSESSMENT BY THE FRONTAGE RULE** is presumed to be erroneous and invalid, when the property is required to be assessed according to the benefits accruing to it. This presumption can only be rebutted by proving that the board or officers authorized to make the assessment considered and passed upon all questions made material by the statute, and thereby reached a conclusion that the assessment computed by the frontage rule will, as to each parcel assessed, represent its proportion of the benefits accruing thereto. (*Hayes v. Douglas County*, 925.)

19. **ASSESSMENTS, APPEAL FROM.**—A statute authorizing an appeal from an assessment for street assessments, which does not permit the appellant to raise any question except about the proper amount of benefits to his particular lot, and which declares that the appeal shall be the only remedy of the owner of any parcel of land for the redress of any grievance he may have by reason of the improvement, cannot deprive him of his right to enjoin the enforcement of the assessment by a suit in equity, where such assessment is imposed in an unequal and irregular manner. The legislature cannot be presumed to have intended that the appeal should be the exclusive remedy as to the matters which cannot be redressed by it. (*Hayes v. Douglas County*, 925.)

20. **A MUNICIPAL CORPORATION IS LIABLE** at common law for permitting a nuisance in the streets under its control. (*Zanesville v. Fannan*, 664.)

21. **MUNICIPAL CORPORATIONS—ORDINANCES—REPAIR OF VIADUCT BY RAILROADS—PARTIES.**—Under a charter authorizing a city to require, by ordinance, two or more railroad companies, owning or operating separate lines of track, to repair viaducts to be crossed thereby, an ordinance requiring two of such companies to do so is not rendered invalid by the fact that the city does not make other companies, engaged in operating one or more of said tracks as lessees of the owners, parties to the proceedings. They are not necessary parties, because the city may proceed against the owners of the tracks operated by the lessees. (*Chicago etc. R. R. Co. v. State*, 557.)

22. **MUNICIPAL CORPORATIONS—RAILROADS—VALIDITY OF ORDINANCE AS TO REPAIR OF VIADUCTS.**—If a city has power, under its charter, to determine, by ordinance, the proportion of a viaduct, and approaches, to be constructed by two or more railroad companies owning or operating separate lines of track to be crossed thereby, or to determine the cost thereof to be borne by each, an ordinance requiring the companies to repair specific portions of a viaduct, if not within the letter of the city's charter, is clearly within its declared scope and purpose, and is valid. (*Chicago etc. R. R. Co. v. State*, 557.)

23. **MUNICIPAL CORPORATIONS—ORDINANCES—RAILROADS—REPAIR OF VIADUCTS—VIOLATING OBLIGATION OF CONTRACTS.**—An ordinance which requires two railroad companies

to repair specific portions of a viaduct previously erected by them jointly with the city does not violate prior contract obligations. (Chicago etc. R. R. Co. v. State, 557.)

24. MUNICIPAL CORPORATIONS, OBSTRUCTION IN STREETS, RIGHT OF RAILWAYS TO MAINTAIN.—A statute providing that, if it be necessary in the location of a railway to occupy any street, the municipal officers and the company having charge of the railway may agree upon the terms, manner, and condition of such occupancy, but that every such company shall be answerable for injuries done to private and public property, does not authorize any obstruction of the public streets amounting to a nuisance, nor does it divest the municipal officers of their power, nor absolve them from their duty, to keep the streets free from such obstructions. The railway company must exercise its rights with proper regard for those of the public in the streets. (Zanesville v. Fannan, 664.)

25. MUNICIPAL CORPORATION, OBSTRUCTION IN STREETS, LIABILITY FOR, WHEN A RAILWAY IS ALSO LIABLE.—The fact that by law a railway corporation using a street is answerable for obstructions maintained by it therein does not relieve the municipality from liability. A citizen injured by such obstruction may maintain an action either against the railway or against the municipality, at his election. (Zanesville v. Fannan, 664.)

26. A MUNICIPAL CORPORATION IS NOT ANSWERABLE TO A PROPERTY HOLDER for damages arising from the use of the streets by a railway corporation, which are in the nature of compensation for additional burdens in the streets arising from the proper construction and operation of the railway therein, such as he would be entitled to recover in an appropriation proceeding commenced by the railway corporation. It is otherwise as to the improper use or obstruction of the street by a railway corporation, and which it is not authorized to make. (Zanesville v. Fannan, 664.)

See Attachment, 7-10; Police Power, 6, 7.

MURDER.

See Homicide.

NAMES.

IDEM SONANS.—The christian names "July" and "Julia" are idem sonans. (Dickson v. State, 694.)

NAVIGATION.

See Waters, 2-12.

NEGLIGENCE.

1. NEGLIGENCE, DUTY OF ONE PERSON TO ANOTHER.—Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause injury to the person and property of the other, the duty arises to use ordinary care and skill to avoid such danger. (Huber v. La Crosse etc. Ry. Co., 940.)

2. NEGLIGENCE—USE OF PROPERTY UNDER ONE'S CONTROL.—One is under a common-law obligation to so use that which he controls as not to injure another. (Mayer v. Thompson-Hutchinson Building Co., 88.)

3. NEGLIGENCE—WHO ARE JOINTLY LIABLE.—One who superintends the construction of a building as agent of the contractor

corporation, although he may be, in fact, an officer of the corporation, is jointly liable with the contractor, in an action on the case for an injury to a third person, resulting from culpable negligence in the construction of the walls of the building. (*Mayer v. Thompson-Hutchinson Building Co.*, 88.)

4. **NEGLIGENCE — BUILDING — EVIDENCE—PAYMENT OF MEN.**—In an action against a contractor for personal injuries resulting from the negligent construction of a building, the court does not err in refusing to allow a witness to state whether the workmen on the building were paid by the number of brick they laid, or by the day, as this fact is most too remote to be considered in determining whether the building was properly constructed. (*Mayer v. Thompson-Hutchinson Building Co.*, 88.)

5. **NEGLIGENCE — BUILDING — EVIDENCE — RECORD OF CONTRACTOR CORPORATION.**—In an action against a contractor for personal injuries resulting from the negligent construction of a building, the record of the incorporation of the contractor, and the contract entered into for the construction of the building, are admissible in evidence. (*Mayer v. Thompson-Hutchinson Building Co.*, 88.)

6. **NEGLIGENCE — BUILDING — DUTY TO ERECT SAFEGUARDS—LIABILITY.**—It is the duty of a contractor, in erecting the walls of a brick school building, adjacent to a schoolhouse and lot, occupied and used by teachers and pupils, to put on the outside thereof safeguards to prevent injury to persons having a right to be in close proximity to the walls. If this duty is neglected, and a person is injured by a brick falling from one of the walls before it is completed, the contractor cannot escape liability for his negligence upon the ground that it is not customary to erect safeguards on the outside of the walls, as they can be built with safety from the inside. (*Mayer v. Thompson-Hutchinson Building Co.*, 88.)

7. **NEGLIGENCE—BUILDING—SAFEGUARDS, WHEN NOT EXCUSED.**—A contractor, in erecting a building, is not excused from performing his duty to put safeguards on the outside of the walls during their construction by the fact that he cannot do so without occupying adjacent property, which he is forbidden to do by its owner; and his failure to construct them is culpable negligence, rendering him liable for injuries resulting from their absence. (*Mayer v. Thompson-Hutchinson Building Co.*, 88.)

8. **NEGLIGENCE—BUILDING—FALLING BRICK—LIABILITY.** If a brick falls from a wall, which is being built, by reason of a defect in its construction, and injures a person, the contractor is liable for negligence in constructing the wall; and if an employé allows, or causes, the brick to fall during the course of his employment, and there are no safeguards, the contractor is liable for resulting injuries, because he did not erect safeguards; but, after the wall is properly constructed and completed, the contractor is not liable for an injury caused by a brick falling therefrom in consequence of an intentional or negligent act of an employé, while not acting within the scope of his employment, although no safeguards had been erected, as the proximate cause of the injury, in such a case, is the act of such person, and not the failure to construct safeguards. (*Mayer v. Thompson-Hutchinson Building Co.*, 88.)

9. **NEGLIGENCE—AGENT'S LIABILITY TO THIRD PERSONS.**—The mere relation of agency does not exempt a person from liability for any injury to third persons resulting from his neglect of duty through nonfeasance, for which he would otherwise be liable; and an agent cannot excuse himself on the plea that his principal is liable. (*Mayer v. Thompson-Hutchinson Building Co.*, 88.)

10. NEGLIGENCE—PROXIMATE CAUSE.—If an injury results from the negligent act or omission of a wrongdoer, such act or omission is deemed the proximate cause, unless the consequences are so unnatural and unusual that they could not, by the highest practical care, have been foreseen, and provided against. (*Reid v. Evansville etc. R. R. Co.*, 391.)

11. NEGLIGENCE—PROXIMATE CAUSE.—If the injury complained of followed in unbroken sequence, without an efficient intervening cause, even though the wrongdoer could not have foreseen the particular result, he is liable, if he could reasonably have anticipated some injurious consequences, but it is otherwise if there was an intervening efficient cause in itself sufficient to break the causal connection between the original wrong and the injury. (*Reid v. Evansville etc. R. R. Co.*, 391.)

12. NEGLIGENCE—PROXIMATE CAUSE.—If injury is attributable to two causes, both proximate, one the result of negligence and the other not, and the injury would not have occurred but for the negligent act, the party guilty of the negligent act is liable. (*Reid v. Evansville etc. R. R. Co.*, 391.)

13. NEGLIGENCE.—PROXIMATE CAUSE IS THAT CAUSE which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred. The cause must be efficient; it is not every intervening agency that shields the wrongdoer from responsibility when injury results from his wrongful act. (*Reid v. Evansville etc. R. R. Co.*, 391.)

14. NEGLIGENCE IS NOT THE PROXIMATE CAUSE of an accident, unless, under all the circumstances, it might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident was the natural consequence of the negligence; it must also have been the probable consequence. The mere failure to ward against a result which could not have been reasonably anticipated is not actionable negligence. (*Huber v. La Crosse etc. Ry. Co.*, 940.)

15. NEGLIGENCE—PROXIMATE CAUSE.—If an original wrong only becomes injurious in consequence of the intervention of a distinct wrongful act or omission by another, the injury must be imputed to the last wrong as the proximate cause, and not to that which was more remote. (*Pickett v. Wilmington etc. Co.*, 671.)

16. NEGLIGENCE—PROXIMATE CAUSE.—He who has the last clear chance to avert injury, notwithstanding the previous negligence of the injured party, is solely responsible for such injury resulting from his failure to exercise ordinary care. (*Pickett v. Wilmington etc. R. R. Co.*, 611.)

17. NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTIONS.—An instruction that plaintiff's previous negligence is immaterial, if defendant's subsequent negligence was the proximate cause of the injury to plaintiff, is proper. (*Pickett v. Wilmington etc. R. R. Co.*, 611.)

18. NEGLIGENCE, QUESTION FOR JURY.—Whether the negligence of the defendant was the proximate cause of an injury, so that it and the result stand in the relation of cause and effect, is a question for the jury, where the evidence is not clear, or the proper inference to be drawn from the evidence is in doubt. (*Huber v. La Crosse etc. Ry. Co.*, 940.)

19. NEGLIGENCE. CONTRIBUTORY.—DRUNKENNESS does not exempt a person from the responsibility of contributory negligence. The law exacts from one voluntarily intoxicated the same care and precaution to avoid injury as it would from a sober person

of ordinary prudence under like circumstances; so, if intoxication renders a person reckless or indifferent to consequences, or inadvertent, or thoughtless, and he fails to exercise due care, his failure or omission will not be excused, because superinduced by his intoxication. (*Johnson v. Louisville etc. R. R. Co.*, 39.)

20. **NEGLIGENCE—CONTRIBUTORY—TRAPDOORS.**—A truckman who enters a store, upon invitation of the owner, to obtain receipts for goods delivered is not required to watch for an open trap-door on the premises, of the existence of which he has no knowledge or notice. His failure to watch for and to see such door is not contributory negligence. (*Pelton v. Schmidt*, 462.)

21. **A CHILD IS PRESUMED TO POSSESS ONLY SUCH DISCRETION** as is common to children, and is, therefore, held answerable only to the exercise of such care as is reasonably to be expected from children of his age and capacity. (*Railroad Co. v. Mackey*, 641.)

22. **CONTRIBUTORY NEGLIGENCE CANNOT BE IMPUTED** to a child four and one-half years of age. (*Evers v. Philadelphia Traction Co.*, 674.)

23. **CHILDREN, NEGLIGENCE, WHEN WILL NOT BE IMPUTED TO.**—A child under fourteen years of age will not be presumed, as a matter of law, to be capable of contributory negligence. Therefore, the absence of such negligence need not be averred in a complaint to recover for personal injuries suffered by him from the negligent act of another. (*Railroad Co. v. Mackey*, 641.)

24. **NEGLIGENCE—CONTRIBUTORY—ALLOWING INFANT ON STREET—QUESTION FOR JURY.**—Whether the parents of a child, four and one-half years old, are guilty of contributory negligence preventing recovery for his death by being killed by an electric-car, is for the jury to determine, when it appears that such parents had eight children and were in reduced circumstances, and that the child killed was permitted to go to a coal-box on the street while his mother was attending to another child, and that the child was killed after another child, under direction of the mother, had attempted to take him home, and before she could return after the failure to so get him home had been reported to her. (*Evers v. Philadelphia Traction Co.*, 674.)

25. **PLEADING—NEGLIGENCE, CONTRIBUTORY, ON THE PART OF A CHILD, WHEN NEED NOT BE DENIED.**—A complaint averring an injury to a child of tender years in permitting a train of cars to remain for more than five minutes obstructing a crossing and then negligently starting them up without warning, need not negative the presumption of contributory negligence on its part. (*Railroad Co. v. Mackey*, 641.)

26. **NEGLIGENCE—PLEADING.**—An allegation specifying the act, the doing of which caused an injury, and averring generally that it was negligently done, states a cause of action, though it is not apparent from the complaint how the injury resulted from the negligence alleged. (*Railroad Co. v. Mackey*, 641.)

See Appeal, 14, 15; Carriers, 3, 4, 9; Custom; Damages, 17; Injunctions, 10; Master and Servant, 1, 10; Suretyship, 2.

NEGOTIABLE INSTRUMENTS.

1. **ONE OF SEVERAL MAKERS OF A NOTE IS ENTITLED TO PAY IT** and to proceed against his comakers for contribution, and if the creditor refuses to accept such payment such maker is thereby released, as to the part due from the comakers, if they subsequently become insolvent. (*O'Connor v. Morse*, 155.)

2. NEGOTIABLE INSTRUMENTS—WHO IS MAKER AND NOT A SURETY.—A buyer of cotton who signs a note with the seller for the purpose of satisfying a third person's claim to, or lien upon, the cotton bought, is a maker of the note, and not a surety thereon, as he is directly interested in, and benefited by, such settlement. (*Wimberly v. Windham*, 70.)

3. NEGOTIABLE INSTRUMENTS.—AS BETWEEN TWO INDORSERS, whose names appear on the back of a promissory note, parol evidence is admissible to prove their agreement that each should be liable for one-half only. (*Kiel v. Choate*, 936.)

4. NEGOTIABLE INSTRUMENTS—SECURITY AS DISCHARGE OF INDORSER.—The giving of a judgment or other security by the maker or a prior indorser of a note does not discharge a subsequent indorser. (*First Nat. Bank v. Peltz*, 686.)

5. NEGOTIABLE INSTRUMENTS—INDORSEMENT BY MAKER AND PAYEE.—If the maker of a note, who is also its payee, puts his name upon its back, he intends to assume the responsibility of second indorser, and not guarantor. (*Hately v. Pike*, 304.)

6. NEGOTIABLE INSTRUMENTS — INDORSEMENT — INSTRUCTIONS.—An instruction that the indorsement of a note before delivery is a guaranty of its payment is clearly inapplicable to a note payable to the order of the maker. (*Hately v. Pike*, 304.)

7. NEGOTIABLE INSTRUMENTS—INDEMNITY—EVIDENCE—ESTOPPEL.—If a note is made payable to the order of the payee, who indorses it, and, after procuring a third person to indorse it for his accommodation, discounts it at a bank, and it is not paid at maturity, such third party indorsing may, in an action against him on the note by the bank, prove that he has been indemnified against liability on the note by a judgment against the payee, and that he has satisfied that judgment by the procurement of the bank whereby he has not only lost his security for indemnity, but the bank has advanced its own judgment against the payee to the position of a prior lien. These facts, if proved, would raise an estoppel against the bank. (*First Nat. Bank v. Peltz*, 686.)

8. NEGOTIABLE INSTRUMENTS, BLANKS IN, RIGHT OF HOLDER TO FILL UP.—If a promissory note is executed with a blank therein appropriate for designating a place of payment, and the holder subsequently fills up this blank so as to make the note payable at a specified bank, and negotiates it to an innocent holder, its enforcement cannot be resisted in his hands on the ground of an unauthorized and unlawful alteration thereof. (*Cason v. Grant County etc. Bank*, 418.)

9. NEGOTIABLE INSTRUMENTS—DEFENSES—BREACH OF WARRANTY.—In an action on a non-negotiable promissory note, given for the purchase price of a stallion sold for breeding purposes, an answer setting up a breach of the implied warranty that the horse is reasonably fit for such purposes is sufficient, where the note is subject to equities. (*Merchants' etc. Bank v. Frazee*, 341.)

10. NEGOTIABLE INSTRUMENTS—NON-NEGOTIABLE NOTE—EQUITIES—DEFENSES.—A promissory note, though payable to order at a bank in this state, which contains a clause waiving all defenses based upon any extensions of time for its payment that may be given by its holder to the maker, is not negotiable, under the statute, as an inland bill of exchange. Such a clause destroys the negotiability of the instrument, and an indorser for value, before maturity, takes it subject to, and charged with, all the equities and defenses against it. (*Merchants' etc. Bank v. Frazee*, 341.)

See Agency, 3; Corporations, 16, 17; Evidence, 14-17; Limitations of Actions, 8; Suretyship, 3-5.

NEW TRIAL.

1. **APPEAL—ASSIGNMENT OF ERROR—NEW TRIAL.**—It is not proper practice to assign as error that which is cause for a new trial, such as a refusal to give correct instructions submitted. (Merchants' etc. *Bank v. Frazee*, 341.)

2. **NEW TRIAL—WANT OF EVIDENCE.**—The insufficiency of evidence to sustain answers to interrogatories which could in no event control the general verdict, is not ground for a new trial for want of evidence. (Grand Rapids etc. *R. R. Co. v. Diether*, 385.)

3. **NEW TRIAL MAY BE GRANTED SOLELY FOR THE PURPOSE** of correcting error in instructions as to the amount of damages which the plaintiff is entitled to recover. (Farmers' etc. *Mfg. Co. v. Albemarle etc. R. R. Co.*, 606.)

4. **NEW TRIAL MAY BE GRANTED SOLELY** upon the ground of error in instructions as to the amount of damages to which plaintiff is entitled, but the new trial thus granted is for inquiry into that subject alone. (Pickett v. *Wilmington etc. R. R. Co.*, 611.)

5. **JURY TRIAL—VERDICT, EXCESSIVE.**—In an action to recover for personal injuries suffered by the plaintiff, a verdict in his favor will not be set aside as excessive, unless the sum awarded is so great as to furnish ground for the belief that the jury were actuated by partiality or prejudice. (Richmond Ry. etc. *Co. v. Garthright*, 839.)

6. **NEW TRIAL—EXCEPTIONS TAKEN JOINTLY.**—If an exception is taken to several acts of the court jointly, or, if several acts of the court are assigned, as a cause for a new trial jointly and not severally, all of the acts complained of must be erroneous, in order to sustain the exception, or cause for a new trial. (Gray v. *Elzroth*, 400.)

See Appeal, 13.

NONRESIDENTS.

See Limitations of Actions, 2-7.

NOTICE.

1. **NOTICE, CONSTRUCTIVE.—EVERY PURCHASER OF REAL PROPERTY** is deemed to have constructive notice of all conveyances of record made by any of the persons from whom he derives title. (Pillow v. *Southwestern etc. Imp. Co.*, 804.)

2. **NOTICE.—POSSESSION TO BE CONSTRUCTIVE NOTICE OF CLAIM OF TITLE** must be open, visible, and exclusive, and is shown by any use of the land that indicates an intention to appropriate it for the benefit of the possessor. Such use may be any to which the land is adapted, and is calculated to apprise the world that the property is occupied. (Tate v. *Pensacola Gulf etc. Co.*, 251.) See Injunctions, 1; Police Power, 4; Receivers, 1; Statutes, 19, 20; Vendor and Purchaser, 2.

NUISANCE.

NUISANCE—WHAT WILL NOT EXCUSE.—Pecuniary interest will not excuse a nuisance which endangers public safety. (Mayer v. *Thompson-Hutchinson Building Co.*, 88.)

See Municipal Corporations, 20.

OBSTRUCTIONS

See Highways; Municipal Corporations, 24, 25; Waters, 3, 4, 6.

OFFICERS.

1. **ELIGIBILITY TO OFFICE MEANS** qualified to take office at the time when the official term begins, and does not require such qualification to exist at the time of the election to such office. (*Kirkpatrick v. Brownfield*, 422.)

2. **JUDICIAL DUTIES, WHAT ARE.**—Where an inquiry to be made involves questions of law, as well as of fact, and fixes a legal right, and its decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial. (*Payton v. McQuown*, 437.)

3. **PUBLIC OFFICER, WHEN MAY NOT ACT BY DEPUTY.**—When an official duty is not ministerial, it cannot be performed by a deputy. Therefore, though the clerk of a court is authorized to grant injunctions, and the statute provides that any duty enjoined thereby upon a ministerial officer, and any act permitted to be done by him may be performed by his legal deputy, such statute relates only to the discharge of ministerial duties, and does not authorize a deputy to perform the duty of determining whether an injunction shall issue. (*Payton v. McQuown*, 437.)

See Injunctions, 4; Quo Warranto; States, 2.

PARENT AND CHILD.

See Trusts, 6.

PARLIAMENTARY LAW.

1. **PARLIAMENTARY LAW.—A QUORUM OF A LEGISLATIVE BODY** is a majority of all the members thereof, in the absence of constitutional provision or rule prescribed by the power creating the body. (*State v. Ellington*, 580.)

2. **PARLIAMENTARY LAW—QUORUM.**—Although a quorum of a body is actually present at the time a vote is taken, the presiding officer is powerless to make the members vote, or to count those not voting for the purpose of making up a quorum, in the absence of a rule or express authority to that effect. (*State v. Ellington*, 580.)

3. **PARLIAMENTARY LAW—QUORUM — PRESUMPTION.**—If the records of a legislative body show that less than a quorum of its members were present when the roll was called and a vote taken, the presumption that a quorum shown to be present earlier in the day continued present when such vote was taken is overcome. (*State v. Ellington*, 580.)

4. **PARLIAMENTARY LAW—QUORUM — PRESUMPTION.**—It being shown that there was a quorum of a legislative body present in the morning, and it not appearing that there had been an adjournment, it is presumed that there continued to be a quorum present when certain proceedings were had that day. (*State v. Ellington*, 580.)

PARTITION.

1. **PARTITION OF LANDS IN ANOTHER STATE** cannot be made by a court of equity by compelling the parties to execute conveyances to one another in pursuance of the partition, though they are cotenants under the same source of title to a whole tract, a part only of which lies in the state wherein the suit is pending. (*Pillow v. Southwestern etc. Imp. Co.*, 804.)

2. **PARTITION—ADVERSE POSSESSION.**—The fact that the defendant is in adverse possession of property sought to be partitioned, claiming title thereto in severalty, does not prevent a court of equity from proceeding with the suit for partition, and determining all the questions which may arise therein, if he claims under one who was

a joint heir with the complainant, or with those under whom the complainant claims. (*Pillow v. Southwestern etc. Imp. Co.*, 804.)

3. **CONSTITUTIONAL LAW—PARTITION—JURY TRIAL.**—A statute authorizing courts of equity, in suits for partition, to settle all questions of law which may arise in the case, and which is construed as permitting them to proceed though the defendant holds adversely and in severalty, is not unconstitutional, though it may result in denying the defendant the right to try his title before a jury. (*Pillow v. Southwestern etc. Imp. Co.*, 804.)

4. **PARTITION—LACHES.**—A complainant in a suit for partition is not guilty of such laches in asserting his rights that a court of equity should deny him relief, where he has commenced his suit before the statute of limitations has extinguished his title, and it is of record. (*Pillow v. Southwestern etc. Imp. Co.*, 804.)

PARTNERSHIP.

1. **A PARTNERSHIP CANNOT BE FORMED FOR AN ILLEGAL PURPOSE** or one contrary to public policy. (*Jackson v. Brick Assn.*, 638.)

2. **A PARTNERSHIP OR ASSOCIATION, FORMED FOR THE ILLEGAL PURPOSE** of controlling and enhancing the price of brick, and in restraint of trade therein, cannot maintain an action in the partnership or association name for brick sold and delivered. The remedy, when one exists, is by an action in the names of the several persons constituting the unlawful association. (*Jackson v. Brick Assn.*, 638.)

See Corporations, 25, 28; Pleading, 12.

PAYMENT.

See Suretyship, 5-7; Tender, 2.

PERCOLATION.

See Waters, 18-20.

PLEADING.

1. **PLEADING.—ALLEGATA AND PROBATA MUST CORRESPOND**, and however full and convincing may be the proof as to any essential fact, this alone is insufficient unless the fact is averred. (*Tate v. Pensacola Gulf etc. Co.*, 251.)

2. **PRACTICE.—THE DEFENSE** that a partnership or association was formed for illegal purposes, when it does not appear on the face of the complaint, may be interposed by answer. (*Jackson v. Brick Assn.*, 638.)

See Deeds, 8; Fraud, 3, 4; Landlord and Tenant, 6; Negligence, 25, 26.

PLEDGE.

PLEDGE, WHAT IS.—Under the Civil Code of California every contract by which the possession of personal property is transferred as security only is a pledge. (*Anderson v. Pacific Bank*, 228.)

See Banks, 1-3; Interest, 2.

POLICE POWER.

1. **POLICE POWER—DEFINITION.**—The limit of the exercise of police power has not been defined with precision; but it is determined by "the gradual process of judicial inclusion and exclusion." (*Chicago etc. R. R. Co. v. State*, 557.)

2. POLICE POWER.—THE ESSENTIAL QUALITY of the police power, as a governmental agency, is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. (Chicago etc. R. R. Co. v. State, 557.)

3. POLICE POWER—COURTS.—THE LEGISLATURE cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights, but it must appear to the court, when such regulation is called in question, that there is a clear and real connection between the assumed purpose of the law and its actual provisions. (Chicago etc. R. R. Co. v. State, 557.)

4. POLICE POWER—HEARING.—PREVIOUS NOTICE, and an opportunity to be heard, by persons affected thereby, is not indispensable to a valid exercise of the police power of the state, although a portion of that power has been delegated to a municipal corporation. It is enough that such persons are enabled, in maintaining their rights, to invoke the equal protection of the law, by any appropriate proceeding. (Chicago etc. R. R. Co. v. State, 557.)

5. POLICE POWER—LEGISLATURE—PRIVATE PROPERTY—STATUTES.—The legislature, in the exercise of its police power, does not have absolute power over private property, and cannot, at will, impose upon property burdens so unreasonable as to work a practical confiscation thereof; but courts will not interfere to prevent the enforcement of statutes relative to an exercise of the police power, on account of any mere difference of opinion between them and the law-making branch of the government respecting the wisdom or necessity of particular measures. (Chicago etc. R. R. Co. v. State, 557.)

6. POLICE POWER—DELEGATION OF, TO MUNICIPAL CORPORATIONS.—The police power of the state may be asserted directly by the legislature, or it may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations, or other agencies, provided for its exercise. (Chicago etc. R. R. Co. v. State, 557.)

7. POLICE POWER—MUNICIPAL CORPORATIONS—RAILROADS—VIADUCTS.—A charter provision authorizing a city, by ordinance, to require railroad companies to construct and keep in repair viaducts in streets therein, crossed by their tracks, is a valid exercise of the police power of the state over the subject to which it applies, where the sole purpose of the legislation is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible. (Chicago etc. R. R. Co. v. State, 557.)

POLLUTION.

See Waters, 17.

POWERS.

POWERS COUPLED WITH TRUST.—Mere powers are discretionary with the donee, and courts cannot exercise them, but it is different with powers coupled with a trust. In this class of cases, the power is so given that it is considered a trust for the benefit of other parties, and becomes imperative. (Randolph v. East Birmingham Land Co., 64.)

See Trusts, 2.

PREFERENCES.

See Corporations, 13.

PRESUMPTIONS.

See Corporations, 27; Evidence, 5; Parliamentary Law, 3, 4.

PRINCIPAL AND AGENT.

See Agency.

PRINCIPAL AND SURETY.

See Suretyship.

PRIORITY.

See Judgments, 10; Mechanic's Lien, 3, 6

PROBATE SALES.

See Executors and Administrators; Guardian and Ward.

PROFITS.

See Damages, 3-6; Sales, 7, 8

PROHIBITION.

PROHIBITION—USURPATION OF JURISDICTION.—A writ of prohibition is the proper remedy to prevent a usurpation of jurisdiction by a court in entertaining an application for the release, on habeas corpus, of a person charged with crime. (*State v. Murphy*, 491.)

PROMOTERS.

See Corporations, 1.

PROOF OF LOSS.

See Insurance, 20.

PROXIMATE CAUSE.

See Negligence, 10-18; Railroads, 3, 26.

PUBLIC POLICY.

See Associations.

PUNISHMENT.

See Statutes, 27.

QUORUM.

See Parliamentary Law.

QUO WARRANTO.

QUO WARRANTO—RIGHT TO RECOVER OFFICE.—In an action of quo warranto to recover an office, the right of plaintiff to recover depends upon his right and title to the office, and not upon the want of such right in another. (*State v. Ellington*, 580.)

RAILROADS.

1. **A RAILWAY CORPORATION CROSSING A HIGHWAY** with its roadway must, with reasonable promptness, restore the highway to its former condition of usefulness. (*Zanesville v. Fannan*, 664.)

2. **RAILWAY CORPORATION—DUTY TO FENCE RIGHT OF WAY.**—A statute imposing on railway corporations a penalty for stock killed by collision with an engine or train does not impose on such corporations the duty of fencing their rights of way. (*Jolliffe v. Brown*, 868.)

3. **CARRIERS—WHEN INSURERS OF GOODS.**—Railroads that undertake to carry freight for hire are insurers of the goods, and in the absence of any stipulation in the contract of carriage, are exempt from liability only when the failure to deliver occurs through the act of God or the public enemy. (*Reid v. Evansville etc. Co.*, 391.)

4. **CARRIER'S DELAY IN FORWARDING—LOSS BY FIRE—NEGLIGENCE—PROXIMATE CAUSE.**—If a railroad company, specially contracting against loss by fire, negligently delays to forward the goods, and they are destroyed by fire communicated from a burning building, while standing upon the railroad track, the company is not liable for the loss, unless it is shown that its negligence caused the fire, and that such negligence was the proximate cause of the loss. (*Reid v. Evansville etc. R. R. Co.*, 391.)

5. **RAILROADS—BAGGAGE—DELAY IN SHIPPING—LOSS—LIABILITY.**—If a railway company negligently fails to ship the trunk of a passenger upon the limited express train taken by such passenger, but does send it by a later train, and the trunk is destroyed by a flood coming upon the later train, the company is liable for the loss though the flood was an act of God. (*Wald v. Pittsburg etc. R. R. Co.*, 332.)

6. **RAILROADS—BAGGAGE—DUTY AS TO SENDING.**—There is an implied undertaking on the part of a railway company that the baggage of a passenger upon a limited express train shall go on the same train, and the company must send it on that train, unless the passenger gives some direction, or does something, or omits to do something, which authorizes it to send the baggage by some other train. If, therefore, the passenger and baggage become separated, through the carrier's own action, the company bears the risk. (*Wald v. Pittsburg etc. R. R. Co.*, 332.)

7. **RAILWAY CORPORATIONS.—PASSENGERS** cannot recover if they voluntarily assume a position of peril from which injury results to them. (*Jammison v. Chesapeake etc. Ry. Co.*, 813.)

8. **PROXIMATE CAUSE, WHAT IS NOT.**—The failure of a railway corporation to stop its train at the station to which it sold one of its passengers a ticket is not the proximate cause of an injury subsequently received by him from going out of the car in which he was riding in search of a conductor, and, while standing on the platform, being thrown therefrom by the jerking motion of the train in passing around a curve. Had he remained in his seat, he would have received no other injury than the inconvenience resulting from his being carried beyond his station and the expense of returning thereto. (*Jammison v. Chesapeake etc. Ry. Co.*, 813.)

9. **DAMAGES—EXEMPLARY—GROUND FOR.**—The only true ground for allowing exemplary damages against a railroad company, in favor of a passenger, is personal injury to the latter caused by the negligence of the former, or, in the absence of such injury, then only for insult, indignity, contempt, or the like, from which the law imputes bad motive. (*Hansley v. Jamesville etc. R. R. Co.*, 600.)

10. **DAMAGES—EXEMPLARY—NEGLIGENCE OF RAILROAD COMPANY.**—If a railroad company, without inflicting any personal injury, insult or indignity upon a passenger, negligently, and by reason of defective and inadequate means of conveyance, fails to carry him according to contract, his right of action is *ex contractu* and not in tort, and he can recover only compensatory damages and is not entitled to vindictive, punitive or exemplary damages. (*Hansley v. Jamesville etc. R. R. Co.*, 600.)

11. **RAILROADS—EJECTING PERSONS—REFUSAL TO PAY FARE.**—If a person boards a railroad train, but uses obscene and

Insulting language, refuses to pay his fare, and is guilty of reprehensible conduct generally, the conductor is justified in ejecting him from the car. (*Johnson v. Louisville etc. R. R. Co.*, 39.)

12. RAILROADS—NEGLIGENCE—EJECTION OF DRUNKEN PERSON—LIABILITY.—If the conductor of a railroad train knows that a person on the train is so intoxicated that he does not possess the powers of locomotion, that he is unconscious of danger, and that he cannot appreciate his position and surroundings, or his duty to avoid passing trains, and he puts him off at a place dangerous to one in his condition, and at which he is killed, the conductor is guilty of negligence, and the railroad company is liable for damages resulting from such ejection, although the deceased may have been a trespasser on the train, and might have been legally ejected in a proper manner and at a proper place. (*Johnson v. Louisville etc. R. R. Co.*, 39.)

13. RAILROADS—NEGLIGENCE—QUESTION OF FACT FOR JURY.—Whether or not a railroad company was guilty of negligence in not sending a passenger's baggage by the train on which he traveled, and to have it so carried throughout the journey, is a question of fact for the jury, and it is error not to submit it to them. (*Wald v. Pittsburg etc. R. R. Co.*, 332.)

14. RAILWAYS—EXCURSION TRAINS, LIABILITY FOR WRONGS OF PERSONS IN CHARGE OF.—A railway corporation cannot relieve itself from liability by placing its road, trainmen, and cars under the control of a stranger. Therefore, if a passenger is wrongfully ejected from a train, the corporation cannot escape liability therefor by proving that the train had been hired for an excursion, and was not in charge nor under the control of the corporation at the time the wrong was done. (*Chesapeake etc. Ry. Co. v. Osborne*, 407.)

15. DEFINITIONS—"KICKED."—In railroad language, a car is "kicked" by the locomotive when it is put in motion by a push from the locomotive and caused to go under the influence of the momentum thus acquired. (*Chicago etc. R. R. Co. v. Champion*, 357.)

16. RAILROADS—DUTY TO EMPLOYEES.—A railroad company is not an insurer of the absolute safety of its ways and machinery and its duty is performed by guarding against such dangers and defects as are reasonably probable. The company is not bound to its employes to take precautions against all possible dangers, especially when voluntarily assumed by them at their own convenience and risk. (*Louisville etc. R. R. Co. v. Stutts*, 127.)

17. RAILROADS—DEFECTS IN WAYS OR MACHINERY—ASSUMPTION OF RISKS.—A railroad employé accepts as necessarily incident to his employment all natural and patent dangers in the ways, works, and machinery of the company, as contradistinguished from dangers arising from latent defects, which might, by the exercise of reasonable care on the part of the company or its officers, be discovered and remedied. (*Louisville etc. R. R. Co. v. Stutts*, 127.)

18. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—If a railroad engineer, without exercising ordinary prudence or precaution to avoid danger, rushes into a place, known by him to be dangerous, with his engine at a high rate of speed, he is guilty of contributory negligence, and cannot recover for an injury thus received. (*Louisville etc. R. R. Co. v. Stutts*, 127.)

19. MASTER AND SERVANT—INSTRUCTION PROPERLY REFUSED.—It is not error to refuse to give the following instruction: "If you find from the evidence, that in the reasonable and careful operation of railroads there is no way in which a reasonably careful and intelligent man can acquire the experience necessary to render

him a skillful and competent yard brakeman, except by actual service in that capacity, and that in the exercise of ordinary care, in the reasonable and careful operation of railroads, it is necessary to employ and put into the service as yard brakemen men who have had no former experience as such, then I instruct you that where a man enters the employ of a railroad company as a yard brakeman, he impliedly assumes the risks of accident caused by the inexperience of his fellow yard brakemen in that service." The instruction is faulty, because it entirely ignores the question of a servant's knowledge as to the necessity for the employment of inexperienced and incompetent coservants in the same service. (*Chicago etc. R. R. Co. v. Champion*, 357.)

20. MASTER AND SERVANT—INSTRUCTION PROPERLY REFUSED.—If the jury, in an action against a railroad company for personal injuries, has been substantially instructed that the plaintiff must prove the material allegations of his complaint, it is not error to refuse to give the following instruction: "Among the risks assumed by the employé is that arising out of the negligence of a co-employé engaged in the same service. The railroad company is presumed to have discharged its duty to its employé, and when an employé brings an action to recover damages for an injury received in the service of the company, the burden is on the employé to overcome this presumption." The first part is too narrow—not sufficiently comprehensive; and the second part is already covered. (*Chicago etc. R. R. Co. v. Champion*, 357.)

21. NEGLIGENCE—INSUFFICIENT PLEA OF CONTRIBUTORY NEGLIGENCE.—In an action against a railroad company for the negligent killing of the plaintiff's intestate, while he was an employé of the defendant, a plea "that the injuries to plaintiff's intestate now complained of, if any he received, would not have occurred but for his faults or negligence, and that his faults and negligence contributed proximately and directly to produce said injuries," is too general, and is demurrable, on the ground that it does not state the facts relied upon as constituting the alleged negligence of the plaintiff's intestate. (*Johnson v. Louisville etc. R. R. Co.*, 39.)

22. NEGLIGENCE INFERABLE FROM THE VIOLATION OF A STATUTE.—If a railway train is left standing in or across a street in a city for a length of time forbidden by law, a neglect of duty is implied. (*Railroad Co. v. Mackey*, 641.)

23. NEGLIGENCE, CONTRIBUTORY, OF CHILD INATTEMPTING TO PASS OVER A FREIGHT TRAIN.—Whether the presence of a train of cars on a crossing should be intended as notice to a child nine years of age that it is likely to be moved at any time depends upon the degree of intelligence and judgment possessed by the child, and that is a question for the jury. (*Railroad Co. v. Mackey*, 641.)

24. RAILWAY TRAIN, CHILDREN, WHEN TRESPASSERS.—If a train of cars has been left across a public street for a time greater than that allowed by law, a boy, who attempts to pass the obstruction thus created by climbing on the cars, is not necessarily a trespasser, and it should be left to the jury to determine, from all the circumstances, whether he was a trespasser or not. (*Railroad Co. v. Mackey*, 641.)

25. NEGLIGENCE—PLEADING.—A complaint alleging that the defendant negligently, unlawfully, and without due care on the part of its servants left a long train of cars, attached to a locomotive, standing over, obstructing, and blocking a crossing for a period of more than five minutes, and that while the train was so unlawfully standing on such crossing, the plaintiff, a child of tender years and incapable of judgment, was lawfully passing along such street, going to a point beyond such crossing, and that after remaining at the

crossing for more than five minutes, and receiving no warning, he, in full view of defendant's engineer and other servants, attempted to pass over the obstruction, and that while plaintiff was so doing, defendant's servants, without warning or notice, negligently started the cars suddenly and violently backward, whereby plaintiff received personal injuries, states a good cause of action against the defendant, where a statute makes the permitting of a train for five minutes to remain across any road, street, or alley an offense punishable by fine. (*Railroad Co. v. Mackey*, 641.)

26. NEGLIGENCE—PROXIMATE CAUSE.—When, by the exercise of ordinary care, a railway engineer can see that a human being is lying, apparently helpless, on the track in front of his engine, in time to stop the train by the use of the appliances at his command, and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to exercise such ordinary care. Such failure is the proximate cause of the injury, although the party injured was originally guilty of negligence in getting upon the track. (*Pickett v. Wilmington etc. R. R. Co.*, 611.)

27. ELECTRIC RAILWAYS, CARE TO PREVENT INJURY FROM ELECTRICITY.—An electric railway corporation, which has employed an electric light company to change the location and method of using street lamps, is bound to exercise toward the employes of the latter reasonable care and caution in the management and control of its railway and electric current, so as not to injure such employes while engaged in their work. It is bound to avoid acts the nature and probable consequences of which may be to inflict injury on persons thus employed, and is liable for such injuries as may result from an omission on its part to exercise such care. (*Huber v. La Crosse etc. Ry. Co.*, 940.)

28. ELECTRIC RAILWAY, INJURIES WHICH IT COULD NOT ANTICIPATE.—If an electric railway has taken all reasonable and proper precautions against any probable injury to persons and property in the streets or elsewhere, except possibly those whose duty it is to repair span and trolley wire or the wires of an electric light company, and the persons who are required to perform those duties are understood to be familiar with the application of electricity, of such uses, and with the appliances required and employed for their safety, and the dangers against which they should guard, and one of these persons is injured because a span wire has become charged by the coiling over it and the trolley wire a portion of the latter, and there is no reasonable ground for supposing that a prudent and careful operative would have failed to notice it under the circumstances, but he, not noticing it, exposed himself to danger, and received injury. The railway corporation is not liable to him for the reason that his injury, under the circumstances, was a consequence which the corporation could not reasonably anticipate. (*Huber v. La Crosse etc. Ry. Co.*, 940.)

29. NEGLIGENCE—NEW INVENTION, FAILURE TO USE.—It is incumbent upon a railway company, whose cars are propelled by steam or electricity, especially in a large and populous city, to use ordinary and reasonable care to avail itself of new inventions and improvements known to it, which will contribute to the safety of its passengers and prevent accidents to others, whenever the utility of such improvement has been tested and demonstrated; but it is not required to have in use the latest improvements which skill and ingenuity have devised to prevent accidents. (*Richmond Ry. etc. Co. v. Garthright*, 839.)

30. NEGLIGENCE, INSTRUCTION AS TO NEW INVENTIONS. It is error to instruct the jury that if an accident might have been avoided by the use of a Sprague motor on the street-car, then the

defendant was guilty of negligence in not using it, if it had not been shown by the evidence that that motor was a better and safer appliance than the one in use, nor that it had been tested, and its superiority over the other demonstrated. (Richmond Ry. etc. Co. v. Garthright, 839.)

31. RAILROADS—STREET RAILWAYS AS AN ADDITIONAL SERVITUDE.—The operation of street railways does not impose an additional servitude upon a public street. (San Antonio etc. Ry. Co. v. Limburger, 730.)

32. RAILROADS — STREET RAILWAYS — DANGEROUS TRACKS—DAMAGES.—A street railway company is answerable in damages to an abutting property owner for allowing its rails to project above the surface of the street, or to become dangerous in other respects. (San Antonio etc. Ry. Co. v. Limburger, 730.)

33. RAILROADS—INTERFERENCE OF STREET RAILWAYS WITH ACCESS TO BUSINESS HOUSES.—The right of a street-car company to run its cars over its track is not superior to the right of another person in the use of the street. Hence, if there is a multiplicity of tracks in a narrow street, an abutting lotowner has the right, though it interferes with the passage of the cars, to load and unload invoices of goods in front of his storerooms facing the street occupied by such railways, but he must not make the cars wait longer than such reasonable time as is necessary for his purpose. (San Antonio Ry. Co. v. Limburger, 730.)

34. RAILROADS—STREET RAILWAYS—DAMNUM ABSQUE INJURIA.—The original purposes for which a street was dedicated embrace the operation of a street railway, and if the owner of adjacent property suffers a loss by reason of such operation, it is damnum absque injuria. (San Antonio etc. Ry. Co. v. Limburger, 730.)

35. STREET RAILWAYS—RIGHTS IN STREET.—Street-cars have a right to expeditiously transport passengers on the surface of the streets, but they have no exclusive rights either at crossings or between them. (Evers v. Philadelphia Traction Co., 674.)

36. STREET RAILWAYS.—THE PEOPLE OF A CITY AND THEIR vehicles have the same right to pass along an intersecting street as a car has to cross it. (Richmond Ry. etc. Co. v. Garthright, 839.)

37. STREET RAILWAYS—NEGLIGENCE.—The fact that more caution must be exercised in running street-cars over crossings than on the street between them warrants no inference that cars can be run without caution except on approaching crossings. Rapid running at crossings is itself evidence of negligence; rapid running between them is not. (Evers v. Philadelphia Traction Co., 674.)

38. STREET RAILWAYS — NEGLIGENCE—QUESTION FOR JURY.—If a young child attempts to cross a street in the middle of the block, about sixty feet from a rapidly moving electric-car, and in plain view of the motorman thereon, who is not looking in front of his car, but in another direction, and who pays no attention to calls from persons on the sidewalk, while his car strikes and kills such child, the question of negligence on the part of the motorman is purely a question of fact, to be determined by the jury. (Evers v. Philadelphia Traction Co., 674.)

39. STREET RAILWAYS.—IF A COLLISION between a street-car and a truck is caused by the crowded and overloaded condition of the car, the railway corporation is answerable to a person injured thereby. (Richmond Ry. etc. Co. v. Garthright, 839.)

40. NEGLIGENCE—STREET RAILWAYS—RIDING ON BUMPER.—One who, finding a street-car full of passengers with no standing room either in the car or upon the platform, takes passage on

the bumper wholly outside the car, without the knowledge or assent of the conductor, is guilty of contributory negligence, and cannot recover for injury received while thus riding. (*Bard v. Pennsylvania Traction Co.*, 672.)

41. **STREET RAILWAYS.—IT IS GROSS NEGLIGENCE** in a street railway corporation to overcrowd and load down its cars with passengers beyond any reasonable limit, so that it is not able to control and readily stop its cars as they approach an intersecting street, and thereby to prevent an accident. (*Richmond Ry. etc. Co. v. Garthright*, 839.)

See Corporations, 8, 11; Damages, 10; Mandamus; Municipal Corporations, 21-26; Police Power, 7; Receivers, 5; Statutes, 25, 26.

REAL PROPERTY.

1. **REAL PROPERTY—POSSESSION BY AGENT.**—The possession of land by an agent has the same effect as possession by a tenant. (*Huff v. Crawford*, 763.)

2. **NEGLIGENCE—TRAPDOORS—RIGHT TO MAINTAIN.**—A person may lawfully keep and use a trapdoor in his store, subject to the duty to properly guard it to avoid injury to those who lawfully come into the store upon business under an express or implied invitation from the owner. (*Pelton v. Schmidt*, 462.)

3. **NEGLIGENCE—TRAPDOORS—DUTY AND LIABILITY OF OWNER.**—An owner who invites a truckman to enter his store to obtain a receipt for goods delivered is required to give him notice of an open trapdoor on the premises, of which the truckman has no knowledge. The failure of the owner to give such notice renders him liable for injury resulting therefrom. (*Pelton v. Schmidt*, 462.)

See Conflict of Laws, 2; Notice; States, 1.

REASONABLE DOUBT.

See Instructions, 7.

RECEIVERS.

1. **RECEIVER, NOTICE OF APPLICATION FOR.**—The appointment of a receiver of the property of a person, made without notice to him of the application therefor, is void, though the statute of the state wherein the appointment is made is silent upon the subject of such notice. Perhaps where imperative necessity exists for immediate action, a temporary receiver may be appointed to act as such until notice can be given of the application. (*Larsen v. Winder*, 864.)

2. **MECHANICS' LIENS—CONFLICT OF JURISDICTION.**—The appointment of a receiver by a federal court for property already charged with a mechanic's lien under a judgment rendered in a state court, does not withdraw the property from the jurisdiction of the state court, nor prevent a valid sale thereof under special execution issued by the state court. (*Rogers etc. Hardware Co. v. Cleveland Building, Co.*, 494.)

3. **RECEIVERS—SUITS AGAINST—CONFLICT OF LAWS—JURISDICTION.**—If a railroad in the hands of a receiver appointed by a circuit court of the United States is sold by order of that court, but possession is retained by the receiver, after the sale, under the order of such court, one who claims damages for injuries alleged to have been received while in the employment of the receiver, after the sale and its confirmation, but before delivery of the property, may sue the receiver in a state court without the consent of the court which appointed him, and his claim is not affected by a failure to present it to the federal court. After the circuit court has discharged

its receiver and turned over the property to the purchaser, its jurisdiction ceases, and the state court, though the suit was commenced prior to such delivery, has the power to proceed to adjudicate the rights of the parties and to enforce its own judgment according to the laws of the state. (*Houston etc. Ry. Co. v. Crawford*, 752.)

4. A RECEIVER OF AN INSOLVENT BUILDING AND LOAN ASSOCIATION is charged with the duty of collecting the assets and winding up the affairs of the corporation, and, for that purpose, he is authorized to make such assessments against the shareholders as, when collected, will extinguish its liabilities, and, upon default in the payment of the assessments, to maintain actions at law for their recovery. (*Eversmann v. Schmitt*, 632.)

5. RECEIVER'S SALE—RAILROADS—PURCHASER UNDER ORDER OF COURT.—One who buys a railroad at a sale made under an order of a court holding the custody of the property, by a receiver, takes the property subject to such liability only as may be imposed upon him by the terms of the order. (*Houston Ry. Co. v. Crawford*, 752.)

6. RECEIVER'S SALE—RAILROADS—LIABILITY OR PURCHASER.—If a railroad is in the hands of a receiver, and the court orders it sold, and directs possession to be delivered to the purchaser subject to the payment of such claims against the receiver as may be established before the court within a given time, the purchaser is not liable for a claim which has not been presented in accordance with the order imposing the liability. (*Houston etc. Ry. Co. v. Crawford*, 752.)

7. RECEIVER'S SALE—RAILROADS—CLAIMS FOR WHICH PURCHASER IS LIABLE.—If a railroad in the hands of a receiver is sold by order of a court of competent jurisdiction, but remains in the receiver's hands, by order of such court, after the confirmation of the sale, claims arising, before the delivery of the property, out of the operation of the road by the receiver, whether under contract or for tort, have the right to payment out of the revenue accruing from the operation of the road superior to the lien of prior mortgage debts; and, in case such funds are invested in permanent improvements, the purchaser is liable for such claims to the extent of the funds thus invested, though he would not be liable for claims arising prior to the sale. (*Houston etc. Ry. Co. v. Crawford*, 752.)

See Building and Loan Associations, 4, 11.

REFERENCE.

PRACTICE.—THE FINDINGS OF A REFEREE will not be set aside as contrary to the evidence, unless they appear to be against the clear preponderance thereof. (*Guetzkow Co. v. Andrews*, 909.)

REFORMATION OF INSTRUMENTS.

See Equity, 4, 5.

REPLEVIN.

REPLEVIN—PROOF OF FRAUD THOUGH NOT PLEADED.—RESCISSION OF SALE.—Under a petition in replevin, containing a general allegation of ownership, right of possession, and unlawful detention, the plaintiff may prove fraud which induced a previous sale of the property in controversy by the plaintiff to the defendant, and a rescission of the sale because of such fraud, although the fraud is not specially pleaded. (*Phenix Iron Works Co. v. McEvony*, 527.)

RESALES.

See Sales, 7, 8.

RESCISSION.

See Contracts, 6; Equity, 6-8; Mistake, 2; Replevin; Sales, 9-11.

RES GESTAE.

See Agency, 2.

RES JUDICATA.

See Judgments, 4-9.

RESTRAINT OF TRADE.

See Associations; Partnership, 2.

REVOCATION.

See License.

REWARD.

See Larceny, 3, 4.

RIPARIAN RIGHTS.

See Waters, 13-22.

SAFEGUARDS.

See Negligence, 6.

SALES.

1. CONDITIONAL SALES.—A LEASE OF PERSONAL PROPERTY, containing conditions for the payment of rent at stated times, and on the last payment of rent the property to belong to the lessee, in the meantime the title to be retained by the lessor, is in effect a conditional sale, and, not being recorded, the stipulation for retention of title by the lessor is void as to third parties. (Clark v. Hill, 574.)

2. A SALE OF CHATTELS IS NOT COMPLETE until the property has been delivered to the purchaser so as to impose any obligation on him to pay the purchase price. (Maler v. Freeman, 151.)

3. SALES—SYMBOLICAL DELIVERY.—If personal property sold is not susceptible of an actual, immediate, and complete delivery, a symbolical delivery is sufficient. Hence, heavy machinery and appliances, sold in good faith, may be delivered by locking the doors of the room containing the property, and delivering the keys to the purchaser. (Kellogg Newspaper Co. v. Peterson, 300.)

4. SALES—NO ABSOLUTE PRICE—INVENTORY TO FIX PRICE.—If a stock of goods is sold, in payment of a debt, and delivered, the sale is complete, especially where the parties so intend, and the title passes, though no absolute price is fixed, and the value of the goods is to be determined by an inventory to be afterward taken, the difference between the amount of the debt and the value of the goods to be paid to the party entitled thereto. Hence, the purchaser's title is not affected by the levy of an attachment, sued out by a creditor of the seller, upon the goods before the completion of the inventory. (Francis Chenoweth Hardware Co. v. Gray, 37.)

5. SALES—HORSES—SPECIFIC PURPOSE OR USE.—There is an implied warranty in the sale of a stallion for breeding purposes, where such sale is made by one who raises horses of that kind, deals in them, and therefore knows their qualities, that the animal shall be reasonably fit for breeding purposes. (Merchants' etc. Bank. v. Frazee, 341.)

6. SALES—SPECIFIC PURPOSE OR USE.—If an article purchased is to be manufactured or produced for a specific purpose or use, there is an implied warranty that the article is reasonably fit or suitable for the purpose or use for which it was ordered. (Merchants' etc. Bank v. Frazee, 341.)

7. DAMAGES, PROSPECTIVE PROFITS ON GOODS KNOWN TO BE PURCHASED FOR RESALE.—If one who sold goods to another knew that the latter purchased to fulfill a contract which he had theretofore made to sell them to a third person, and there is no market price for such goods, and they are furnished by the first vendor, but not according to contract, for which reason the second vendee refuses to keep and pay for them, the measure of damages, in an action by the first vendee against his vendor, is the price agreed to be paid by the second vendee, whether it was communicated to the first vendor at the time of his sale or not, unless that price was such as to yield an extraordinary and unusual profit, such as could not reasonably be presumed to have been contemplated by the first vendor at the time of entering into his contract. In such a case, he is not liable beyond such sum as would yield a fair and reasonable profit to his vendee. (Guetzkow Co. v. Andrews, 909.)

8. DAMAGES, PROFITS TO BE REALIZED FROM A RESALE. Where goods are purchased to fill a contract of sale already made by the vendee, and the vendor knows that fact, the price for which the goods have been resold will be presumed to be a reasonable price in an action against the original vendor for not delivering goods of the character sold. This presumption may be rebutted, however, by proving that such price would yield an extravagant or extraordinary profit. In that event, the first vendor is not liable for damages computed upon the price of such extraordinary profits, nor to any damages whatever, unless there is evidence before the court to show what would amount to a reasonable profit on the transaction. (Guetzkow Co. v. Andrews, 909.)

9. SALE—RESCISSION—TENDER.—If a stallion sold for breeding purposes turns out not to be reasonably fit for such purposes, and timely notice of this fact is given, but the seller and buyer agree that the latter shall keep the horse another season to give him a better trial, the death of the horse during the season in which he is to have a final trial renders it unnecessary to make another tender of the horse before that season has expired. (Merchants' etc. Bank v. Frazee, 341.)

10. SALES—RESCISSION—RETURN OF PURCHASE MONEY. It is not essential to the rescission of a contract of sale procured by fraud that the seller should return, or offer to return, what he has received thereunder, if the party guilty of fraud has rendered a return unjust to the seller. Hence, if the property has been damaged by the fraudulent vendee, to an amount equal to, or greater than, the purchase money received, no offer to return the money is necessary. (Phenix Iron Works Co. v. McEvony, 527.)

11. SALES—RIGHT OF RESCISSION, NOT AFFECTED BY PLEDGE OR MORTGAGE.—One who takes a pledge or mortgage of personal property as security for a pre-existing debt is not a bona fide purchaser, so as to be protected from the rescission of a contract whereby such property was previously sold to the pledgor or mortgagor. (Phenix Iron Works Co. v. McEvony, 527.)

12. SALES—EVIDENCE IRRELEVANT AND INADMISSIBLE.—In an action on a contract to recover the purchase price of goods sold, evidence as to the extent of defendant's business, and as to the quantity of goods annually consumed by him of the character purchased, or which would be suitable for his business, is irrelevant

and inadmissible upon the issue involved. (Beck etc. Lithographing Co. v. Houppert, 77.)

See Damages, 3; Replevin.

SEAL.

See Corporations, 12; Deeds, 3.

SEARCH OF PERSON.

See Arrest, 10; Attachment, 5, 6; Sheriffs, 1; Trial, 2, 4.

SERVITUDES.

See Railroads, 31.

SETOFF.

See Banks, 4-6.

SEWERS.

See Municipal Corporations, 11.

SHERIFFS.

1. SHERIFFS—SEARCH OF VISITORS TO JAIL.—A sheriff has no legal authority to use force in searching or examining persons who seek to visit prisoners in the jail, although he may suspect them of crime, or of criminal purposes; but he may require them to submit their persons to a proper and orderly search, or be denied access to the prisoners. (Shields v. State, 17.)

2. DAMAGES, ERRONEOUS INSTRUCTION RESPECTING.—An instruction in an action against a sheriff, in which it is alleged that he had wrongfully and unlawfully taken property of the plaintiff, that the jurors may consider the value of the property and the circumstances in which it was taken, and also any sense of wrong suffered and feelings of humiliation and disgrace engendered by the wrongful taking, is erroneous, there being no allegation in the complaint that the taking was with unnecessary violence, or that there was any intent to harass or oppress the plaintiff. Nor is the error in the instruction rendered harmless by the further instruction that they cannot give anything by way of exemplary damages. (Fish v. Nethercutt, 892.)

3. OFFICIAL BOND OF SHERIFF, ACTS WHICH CONSTITUTE BREACH OF.—The seizure by a sheriff of the goods of one person under process against another, is such an official act as constitutes a breach of his official bond. (Fish v. Nethercutt, 892.)

SILENCE.

See Estoppel; Insurance, 3.

SLANDER.

1. SLANDER—WORDS IMPUTING ADULTERY.—In Indiana, it is by statute actionable slander to charge a woman with adultery. (Gray v. Elzroth, 400.)

2. SLANDER—PROOF OF WORDS CHARGED.—To sustain an action for slander it is not required to prove the charge to have been made in the precise words alleged in the complaint, but it is necessary to prove that defendant spoke the words in substance, or substantially as alleged. It is not enough to prove the speaking of similar or equivalent words. (Gray v. Elzroth, 400.)

3. **SLANDER—IMPLIED MALICE—DAMAGES.**—The speaking of the actionable words being shown, and their falsity admitted or proved, the law infers malice unless they were privileged, and the plaintiff then becomes entitled to compensatory damages at least, without regard to the existence of express malice, or malice in fact. If express malice is shown, plaintiff may recover punitive or exemplary damages. (*Gray v. Elzroth*, 400.)

4. **SLANDER—EVIDENCE IN MITIGATION OF DAMAGES.**—Rumors currently circulated and reported in the neighborhood where plaintiff lives are not admissible in evidence in mitigation of damages in an action for slander. (*Gray v. Elzroth*, 400.)

5. **SLANDER—EVIDENCE IN MITIGATION OF DAMAGES.**—In actions for slander, general rumors or general suspicions that plaintiff is guilty of the acts complained of, may be given in evidence in mitigation of damages, as bearing upon the value of plaintiff's character. (*Gray v. Elzroth*, 400.)

6. **SLANDER OF WIFE BY HUSBAND.**—A husband who previously to his marriage, had carnal knowledge of his wife is not guilty of slander in imputing to her a want of chastity, and stating that he was not the father of her child, born after marriage, and that she had also had carnal intercourse with another man besides himself. (*Baxter v. State*, 720.)

7. **SLANDER—INDICTMENT — SUFFICIENCY.**—An indictment for slander, alleging that the accused did falsely and maliciously impute a want of chastity to a certain female by saying that a certain man was monkeying with her and doing what he pleased with her, meaning that the said man was having carnal knowledge of her, is good. (*Dickson v. State*, 694.)

8. **SLANDER—INNUENDO—PROOF OF.**—An innuendo in criminal slander is an explanatory averment of the meaning, which charges no fact and neither adds to, nor qualifies, any previous allegation, and does not admit of being sustained by evidence. (*Dickson v. State*, 694.)

9. **SLANDER—EVIDENCE TO PROVE INNUENDO.**—On the trial of an indictment for slander, it is not competent to prove by a witness, who heard the slanderous words, what he understood them to mean. In such cases, the innuendo as alleged in the indictment does not admit of being sustained by proof. (*Dickson v. State*, 694.)

10. **SLANDER—INNUENDO—PROOF OF—HARMLESS ERROR.** In a trial for criminal slander, an error of the court in admitting evidence of the meaning of the innuendo as alleged in the indictment is harmless, if the words alleged themselves clearly and unequivocally indicated the meaning intended to be conveyed. (*Dickson v. State*, 694.)

11. **SLANDER BY IMPUTING WANT OF CHASTITY** to a female is only predicable upon the fact that such female is a chaste woman. (*Baxter v. State*, 720.)

See Witnesses, 3.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE—CONTRACT TO CONVEY LAND.**—If a vendee is in possession of premises under an assertion and exercise of right and by permission of the vendor after paying part of the purchase price, the mere lapse of time does not bar the remedy of the vendee for specific performance of the contract to convey. (*Tate v. Pensacola Gulf etc. Co.*, 251.)

2. **SPECIFIC PERFORMANCE—CONTRACT TO CONVEY LAND.**—If a vendee takes and retains possession of premises with

the vendor's consent, under a contract to purchase, his mere delay in bringing suit, or even in paying the price, does not prevent him from compelling a conveyance upon a subsequent payment or tender of the amount due, nor is his right to such relief cut off until the vendor places a limit on the lapse of time by a demand of payment at or before a specified day, and by notice that the agreement is to be rescinded unless the demand is complied with, and the vendee makes default thereon. (*Tate v. Pensacola Gulf etc. Co.*, 251.)

3. SPECIFIC PERFORMANCE—CONTRACTS TO CONVEY LAND.—In a suit for specific performance of a contract to convey land, the vendor, to make the plaintiff's delay available as a defense, must have performed, or been ready and willing to perform, all the terms of the contract stipulated for on his own part. (*Tate v. Pensacola Gulf etc. Co.*, 251.)

4. SPECIFIC PERFORMANCE—EVIDENCE OF INCREASE IN VALUE.—In an action to enforce specific performance of a contract for the conveyance of land evidence of an increase in value of the land must be limited to a time at or near the making of the contract and to the value at that time as compared with its value at or near the time that suit is brought. Evidence of the value of the land seven or eight years before such contract was made as compared with its value after suit is brought is too remote to be admissible. (*Tate v. Pensacola Gulf etc. Co.*, 251.)

5. SPECIFIC PERFORMANCE—NOTICE OF EQUITIES—MARRIED WOMAN'S TITLE.—A vendee of real estate who purchases with notice of the equities of an occupying tenant under a contract to purchase, cannot defeat specific performance of the contract of a former grantor because of the intervention of the title of a married woman between him and such grantor, especially when she has conveyed all of her interest in the land. (*Tate v. Pensacola Gulf etc. Co.*, 251.)

6. SPECIFIC PERFORMANCE—UNREASONABLE DELAY.—Although a court of equity does not regard time as of the essence of a contract, unless it is so expressly stipulated, yet it does require of one who seeks specific performance, that he shall not be guilty of unreasonable delay. (*Tate v. Pensacola Gulf etc. Co.*, 251.)

STABLES.

See Municipal Corporations, 7, 8.

STATES.

1. CONFLICT OF LAWS.—THE DOCTRINE OF COMITY, by which rights given as to property of a certain nature in one state are enforceable in another, does not extend to property subsequently acquired in this state, though of the same nature, and is totally inapplicable to real property. (*La Selle v. Woolery*, 855.)

2. SUITS AGAINST OFFICERS OF THE STATE.—If officers or agents of the state invade a private right in a mode not authorized by law, any person injured thereby is entitled, at least, to a preventive remedy, although the state may be affected by the proceeding. (*Herr v. Central Kentucky Lunatic Asylum*, 414.)

See Arrest, 4, 5; Injunctions, 4; Judgments, 2; Waters, 7.

STATUTE OF FRAUDS.

See Boundaries; Fraudulent Conveyances, 9.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTES.

1. **CONSTITUTIONAL LAW—TITLE OF STATUTE.**—A statute which, in its title, amends the penal code of the state simply by reference to the code sections, is valid, and not obnoxious to a constitutional provision requiring that the caption or title of statutes shall embrace the subject matter therein. (*Tabor v. State*, 726.)

2. **CONSTITUTIONAL LAW—TITLE OF STATUTE—HOW CONSTRUED.**—The legislature having acted in the selection of a title for a statute, its power to do so and to embrace legislation within such caption is construed liberally in favor of the constitutionality of the enactment. (*Tabor v. State*, 726.)

3. **CONSTITUTIONAL LAW—TITLE OF STATUTE.**—If the title of a statute is sufficiently comprehensive to embrace all its provisions, it cannot be rendered insufficient by the striking out or disregarding of certain sections as unconstitutional, though, had those sections not been incorporated in the act as passed, the title would have been insufficient. (*Jolliffe v. Brown*, 868.)

4. **STATUTES—EXPRESSION OF SUBJECT IN TITLE.**—If the main purpose of an act, as expressed in its title, is to confer power on a board of park commissioners to extend a boulevard or driveway which borders upon any public waters of the state, the constitutional provision, that every act shall embrace but one subject, which shall be expressed in its title, is not violated by provisions in the act to defray the cost of the work, and making an appropriation of the sub-merged lands between the boulevard, as constructed, and the former shore, for that purpose, as these provisions are germane to the real purpose of the law. (*People v. Kirk*, 277.)

5. **CONSTITUTIONAL LAW.**—Acts of the assembly should not be adjudged void upon mere doubts of their constitutionality. (*State v. Bargus*, 628.)

6. **CONSTITUTIONAL LAW.**—The constitutionality of a statute may be questioned by motion made in the trial court. (*State v. Chandler*, 483.)

7. **CONSTITUTIONAL LAW—JURISDICTION.**—If the constitutionality of a statute is questioned by motion in the trial court, and the cause is for that reason transferred to the supreme court, the latter court acquires jurisdiction to hear and determine the whole case upon the merits. (*State v. Chandler*, 483.)

8. **STATUTES—CONSTRUCTION.**—The decisions of a court of last resort in one state, sustaining the validity of a statute in its entirety, are entitled to great respect by the courts of another state, when passing upon the validity of an entirely similar statute enacted in the latter state, and are generally held to be controlling when the law has been enacted after such decisions were made. (*Rouse v. Donovan*, 457.)

9. **STATUTES—CONSTRUCTION—ADOPTION FROM ANOTHER STATE.**—If a statute or controlling word therein has received adjudication in the state where the statute originated, and that statute in substance, or its controlling word, has been adopted in another state, it is presumed that it was adopted with the meaning which had theretofore attached to it in the state of its origin. (*State v. Chandler*, 483.)

10. **CONSTITUTIONS — STATUTES — CONSTRUCTION — JUDICIAL LEGISLATION.**—It is a legitimate and recognized rule of construction for a court, in interpreting constitutions and statutes, to find out their true meaning, from the language used, the subject matter, and purposes of those framing them; but to ingraft upon a constitution or law something that has been omitted, and which the

court believes ought to have been embraced, is judicial legislation, which is forbidden by the constitution. (*Chase v. Swayne*, 742.)

11. **STATUTES—CONSTRUCTION.**—If a court ascertains that the meaning and intent of a law embraces that which is not expressed in the language, this becomes a part of the law, the same as if it had been so written. (*Chase v. Swayne*, 742.)

12. **STATUTES—CONSTRUCTION OF, WHEN AMBIGUOUS.**—If a statute is ambiguous in its terms or susceptible of two constructions, the evil results and hardships which may follow one construction may be properly considered by the court, and it is right that the court shall place upon the statute that interpretation of which it is fairly susceptible, which will attain the just solution of the questions involved and protect the rights of all the parties. (*Oriental Hotel Co. v. Griffiths*, 720.)

13. **STATUTES—CONSTRUCTION—WATER COMPANIES.**—Under a statute authorizing a court, on bill filed by any citizen using water, and alleging impurity or deficiency in supply, to compel the water company to correct the evil complained of, a municipality has the same right as a citizen to file a bill to compel a water company, with whom it has contracted, to correct abuses complained of. (*Du Bois Borough v. Du Bois etc. Water Works Co.*, 678.)

14. **STATUTES—RETROSPECTIVE OPERATION.**—A statute does not operate retroactively from the mere fact that it relates to antecedent events. (*Chicago etc. R. R. Co. v. State*, 557.)

15. **STATUTES—RETROACTIVE OPERATION.**—A statute giving a city power to require railroad companies to construct and keep in repair "any viaduct or viaducts" includes those in existence, as well as those subsequently constructed. (*Chicago etc. R. R. Co. v. State*, 557.)

16. **CONSTITUTIONAL LAW.—A TRIVIAL DIFFERENCE BETWEEN THE POPULATION** of counties cannot justify the enactment of a general law which shall apply to one and not to the other of them. (*State v. Bargus*, 628.)

17. **CONSTITUTIONAL LAW.—THE UNIFORMITY OF OPERATION EXACTED** by the constitution requires that laws shall operate in all parts of the state where are found the objects which are the subject of the legislation. The validity of a statute must be determined, not by its form, but by its substance and practical operation. (*State v. Bargus*, 628.)

18. **CONSTITUTIONAL LAW—AMENDMENT OF CODE.**—A statute amending the penal code of a state by taking the word "hog" out of one section thereof and inserting it in another, together with "cattle," and making the theft of a hog a felony, regardless of value, is valid and constitutional. (*Tabor v. State*, 726.)

19. **DUE PROCESS OF LAW.**—A statute providing that no action shall be maintained to avoid any special assessment levied pursuant thereto for which improvement bonds have been issued, and making such bonds conclusive proof of the regularity of all proceedings upon which they are based, is an attempt to deprive property owners of due process of law, where no actual notice is provided for, and the time within which they may bring an action may have lapsed before they have any notice of the proceeding by which their property is sought to be made answerable for the supposed charges against it, and the whole time within which it is possible to commence such action may not exceed for ty days. (*Hayes v. Douglas County*, 925.)

20. **A STATUTE SO LIMITING THE RIGHT TO BRING AN ACTION** to avoid an assessment that it may expire within forty days after such assessment has been levied, and before the property owner

has any actual notice thereof or of the proceedings on which it is based, is unreasonable and void. (*Hayes v. Douglas County*, 925.)

21. **CONSTITUTIONAL LAW—CLASS LEGISLATION—ATTORNEYS' FEES AS COSTS.**—A statute giving the plaintiff in every action for wages in which he shall recover the sum named in his complaint or bill of particulars such costs as the court may allow, not exceeding five dollars, for his attorneys' fees, if, before bringing such action, he has made a written demand for the sum due him, is in conflict with the provision of the state constitution affirming the right to possess and protect property, and declaring that government is instituted for the equal benefit and protection of all persons. (*Coal Company v. Rosser*, 622.)

22. **CONSTITUTIONAL LAW—ATTORNEYS' FEES, STATUTES ALLOWING.**—A statute undertaking to compel an unsuccessful litigant to pay the attorneys' fees of his opponent, where the former has not been guilty of any wrongful or negligent act, is unconstitutional. (*Coal Co. v. Rosser*, 622.)

23. **CONSTITUTIONAL LAW—ATTORNEYS' FEES, STATUTE GRANTING.**—A statute granting to a certain class of litigants the right to recover attorneys' fees as part of their costs of suit is unconstitutional, as class legislation, unless the right to recover such fees is restricted to cases in which the unsuccessful litigant has been wrongfully acting, and the attorneys' fees may be regarded as a penalty imposed upon him therefor. (*Jolliffe v. Brown*, 868.)

24. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—A statute authorizing the issue of execution against the individual members of a limited partnership association to the extent of the unpaid portions of their stock subscriptions, after judicial investigation and determination thereof, and after execution against the association has been returned unsatisfied, is not in conflict with constitutional provisions requiring due process of law. (*Rouse v. Donovan*, 457.)

25. **CONSTITUTIONAL LAW—DAMAGES.**—A statute imposing on a railway corporation for all stock injured by collision with a train or engine the penalty of double its value, if within forty-eight hours the engineer and brakeman do not report the accident to the division superintendent, with the name of the owner of the stock, if known, and the superintendent does not immediately thereafter transmit such report to the owner, when known, and when not known, then to the agent of the corporation nearest the place of the accident, to be by him kept in a conspicuous place in his office for the inspection of the public, is unconstitutional, because the penalty is imposed whether the failure to give notice is willful or not, and although the corporation may not have been in fault in killing the stock, and such killing may have been due to the fault of its owner, and he may have had full knowledge thereof at the time of the occurrence. (*Jolliffe v. Brown*, 868.)

26. **CONSTITUTIONAL LAW — EVIDENCE — BURDEN OF PROOF.**—A statute declaring that, in all actions against railway corporations for injuries to stock by collision with moving trains, it should be prima facie evidence on the part of the defendant to show that the track was not fenced so as to turn stock therefrom, is not unconstitutional, though such corporations are not required to fence their tracks. It merely establishes a prima facie rule of evidence. (*Jolliffe v. Brown*, 868.)

27. **CONSTITUTIONAL LAW.**—A statute authorizing the punishment of misdemeanors by confinement in a workhouse is not for that reason unconstitutional. (*State v. Chandler*, 483.)

28. **STATUTORY REMEDIES, WHEN CUMULATIVE.**—A remedy given by a statute for a right existing independent of it without

excluding remedies already known to the law is cumulative merely. (Zanesville v. Fannan, 664.)

See Constitutions, 1; Insurance, 16; Legislature, 7; Mechanic's Lien, 1, 2; Railroads, 22, 25.

STOCK.

See Building and Loan Associations.

STOCKHOLDERS.

See Building and Loan Associations; Corporations, 25, 28.

STREET RAILWAYS.

See Railroads, 31-41.

SUBMERGED LAND.

See Waters, 8-10.

SUBROGATION.

See Fraudulent Conveyances, 8.

SUBTERRANEAN WATERS.

See Waters, 18-20.

SUMMONS.

See Limitations of Actions, 10.

SURETYSHIP.

1. A SURETY IS, by the Civil Code of California, one, who, at the request of another and for the purpose of securing him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor. (O'Connor v. Morse, 155.)

2. NEGLIGENCE—BUILDING—NONLIABILITY OF SURETIES ON CONTRACTOR'S BOND—EVIDENCE.—The sureties on a contractor's bond, given to the owner of a building, guaranteeing the faithful performance of the work provided for in the contract, are not liable in an action against the contractor for personal injuries resulting from the negligent construction of the building; and the bond, having no office to perform on the trial, is not admissible in evidence. (Mayer v. Thompson-Hutchinson Building Co., 88.)

3. PRINCIPAL AND SURETY.—THE MAKER OF AN ACCOMMODATION NOTE given as collateral security for the payment of another note is a surety, and will be released by any act which would release any other surety. (O'Connor v. Morse, 155.)

4. PRINCIPAL AND SURETY—BANK, RELEASE BY.—If a bank at which a note is payable and to which it belongs had, when it became due, moneys of the maker on deposit more than sufficient to pay it, and, instead of applying the moneys to such payment, permitted them to be drawn out by the maker, who subsequently became insolvent, his surety on the note is thereby released. (Pursfull v. Pineville Banking Co., 409.)

5. SURETY, RELEASE OF BY REFUSAL TO ACCEPT PAYMENT.—If one of several sureties or of persons who have made an accommodation note as collateral security for another note, offer to pay the latter, and take an assignment thereof, and the holder refuses to accept such payment and give such assignment, and the

maker afterward becomes insolvent, the surety is released. (O'Connor v. Morse, 155.)

6. A SURETY IS ENTITLED TO AT ONCE PAY THE DEBT and to thereupon proceed against his principal, and a creditor refusing such payment releases the surety. (O'Connor v. Morse, 155.)

7. A SURETY TENDERING PAYMENT OF A DEBT IS RELEASED if the creditor refuses to accept it. (O'Connor v. Morse, 155.)
See Corporations, 9, 10; Fraudulent Conveyances, 7-9; Negotiable Instruments, 2; Sheriffs, 3; Trial, 8.

SURFACE WATERS.

See Waters, 18-22.

TAXES.

TAXES FOR UNAUTHORIZED PURPOSE.—A tax levied by a county to pay the expenses of placing stones in the state building at the Columbian World's Fair Exposition is unauthorized and void. (Hayes v. Douglas County, 925.)

See Injunctions, 5.

TELEGRAMS.

See Evidence, 4, 5.

TELEGRAPH COMPANIES.

TELEGRAPH CORPORATIONS—DAMAGES.—Mere mental pain and anxiety are too vague for legal redress, where no injury is done to person, property, health, or reputation. Hence, an action cannot be sustained for the nondelivery of a telegram, when the only resulting injuries were the leaving of the person to whom it was addressed in ignorance of the fatal illness of his mother, and depriving him of the comfort of being with her in such illness and attending the funeral. (Morton v. Western Union Tel. Co., 648.)

TENDER.

1. TENDER.—MONEY PAID INTO COURT on a tender need not be the identical money with which the original tender was made. (Grand Rapids etc. R. R. Co. v. Diether, 385.)

2. TENDER, WHEN EQUIVALENT TO PAYMENT.—An offer on the part of a surety to pay money need not, on its refusal, be followed by the depositing of the money in the name of the creditor with some bank. Such offer and refusal are equivalent to actual payment, for the purpose of releasing the surety. (O'Connor v. Morse, 155.)

THEATERS.

See Constitutions, 6.

THREATS.

See Homicide, 7, 8.

TIMBER.

See Deeds, 10.

TIME.

See Contracts, 1.

TORTS.

See Damages, 9.

TRAP-DOORS.

See Negligence, 20.

TREES.

See Deeds, 9.

TRESPASSERS.

See Railroads, 24; Arrest, 9.

TRESPASS TO TRY TITLE.

See Limitations of Actions, 1.

TRIAL.

1. **JURY TRIAL, RIGHT TO.**—A constitutional provision, whether state or federal, guaranteeing the right to trial by jury does not apply to cases in which the right to a jury trial did not exist prior to its adoption. (*Pillow v. Southwestern etc. Imp. Co.*, 804.)

2. **EVIDENCE ILLEGALLY OBTAINED — UNLAWFUL SEARCH—CARRYING CONCEALED WEAPONS.**—On a trial for carrying concealed weapons, evidence of the discovery of a pistol found concealed upon the defendant's person by an officer, prior to his arrest, while making a forcible search of his person, is admissible against the defendant, although the search was unauthorized and unlawful. (*Shields v. State*, 17.)

3. **EVIDENCE ILLEGALLY OBTAINED—ADMISSIBILITY OF.** However unfair or illegal may be the methods by which evidence may be obtained in a criminal case, it is admissible, if relevant, where the accused was not compelled to do any act criminating himself, or where a confession or admission was not extorted from him, or drawn from him by appliances to his hopes or fears. (*Shields v. State*, 17.)

4. **EVIDENCE ILLEGALLY OBTAINED—ILLEGAL SEARCH.** Evidence obtained by an illegal and unauthorized search of one's person is admissible to fix the guilt of a criminal offense upon him, and does not violate a constitutional guaranty that a person accused shall not be compelled to give evidence against himself, or "that the people shall be secure in their persons, homes, papers, and possessions, from unreasonable seizure or searches," etc. (*Shields v. State*, 17.)

5. **EVIDENCE.**—A GENERAL OFFER TO PROVE RELEVANT facts is competent, and should be admitted. Objection to the mode of proof or the sufficiency of the facts when proved must be made later. (*First Nat. Bank v. Peltz*, 686.)

6. **UPON DEMURRER TO THE EVIDENCE** the court must accept as true all of the plaintiff's evidence and all just inferences which can be properly drawn from it by the jury, and reject all evidence of the defendant which conflicts with that of the plaintiff and all inferences which do not necessarily result from it. (*Richmond Ry. etc. Co. v. Garthright*, 839.)

7. **TRIAL—FRAMING ISSUES—DISCRETION.**—It is within the sound discretion of the trial court to frame the issues; and the complaining party must show that the exercise of such discretion operated to his injury before he can assign it as error on appeal. (*Pickett v. Wilmington etc. R. R. Co.*, 611.)

8. PRACTICE.—THE FINDING that a person who had occupied the relation of a surety, had offered to pay the debt for the purpose of proceeding against his cosureties, and that such offer was refused by the creditor, and that such person at the trial offered to prove the solvency of the cosureties at the time of making such offer and their subsequent insolvency, and that the evidence was excluded, is equivalent to a finding that they were so solvent, and subsequently became insolvent. (*O'Connor v. Morse*, 155.)

See Appeal; Contempt, 4, 5; Instructions.

TROVER.

TROVER—CONVERSION.—If one buys personal property of which symbolical delivery has been made, a third person's refusal to allow the property to be removed, and a subsequent sale and delivery thereof by such third person, whereby the purchaser loses the property, are wrongful acts, and constitute a conversion. (*Kellogg Newspaper Co. v. Peterson*, 300.)

TRUST FUND.

See Corporations, 13.

TRUSTS.

1. TRUSTS—WHAT WORDS WILL CREATE.—A gift in a deed, expressed to be for the "use and benefit" of another, is sufficient to fasten a trust upon the conscience of the trust donee. (*Randolph v. East Birmingham Land Co.*, 64.)

2. POWERS OR TRUSTS must, in all cases, be construed according to the intention of the parties, to be gathered from the whole instrument. (*Randolph v. East Birmingham Land Co.*, 64.)

3. TRUSTS—CONSTRUCTION OF, AS TO POWERS.—A court of equity will never favor a construction that confers upon a trustee absolute and uncontrollable powers. (*Randolph v. East Birmingham Land Co.*, 64.)

4. TRUSTS—DISCRETIONARY POWERS.—COURTS WILL NOT INTERFERE with the exercise of discretionary powers by trustees, where they are acting in good faith, without fraud or collusion, and without selfish, corrupt, or improper motives; but they will interfere where the exercise of discretion by trustees is infected with fraud or misbehavior, or is mischievously and ruinously exercised, or where they decline to undertake the duty of exercising discretion. (*Randolph v. East Birmingham Land Co.*, 64.)

5. TRUSTS—FAILURE OF COURTS WILL NOT ALLOW a clear trust to fail for want of a trustee; nor will they allow a trust to fail by reason of any act or omission of the trustee. (*Randolph v. East Birmingham Land Co.*, 64.)

6. TRUSTS—DEED TO FATHER IN TRUST FOR HIS SON.—If a father purchases land for the "use and benefit" of his minor son, and joins in the execution of a conveyance of the property, made to himself as trustee for his son, which conveyance gives the father power to manage and control the trust estate until the son is twenty-one years old, and, in the meantime, to use and appropriate the rents, profits, and income therefrom: to lease, mortgage, or sell the same; and to reinvest the proceeds in such a manner as he may think best for his son's use and benefit, the father becomes a trustee for the son, assuming the same responsibilities and obligations that a third person would, if the land were conveyed to him by a deed creating the same trust. The powers so conferred are not purely discretionary, but create a trust, coupled with an interest, requiring

the trustee to perform active duties, and a court of equity will interfere to prevent a wrongful exercise of such duties. (*Randolph v. East Birmingham Land Co.*, 64.)

7. TRUSTS—INVESTMENTS.—If there are no directions in an instrument of trust, or rules of court, or statutory provisions in relation to investments, they must be governed by sound discretion and good faith. In the absence of statutory direction, or specific authority, trustees are not permitted to invest trust funds in the stock or shares of any private corporation, although the stock is considered good by discreet business men who evince their confidence by investing their own funds therein; and no court can sanction such investments where they are against the policy of the state and expressly forbidden by its laws. (*Randolph v. East Birmingham Land Co.*, 64.)

8. TRUSTS—INVALID SALE OF LAND—INVESTMENT.—A trustee having authority to lease, mortgage, or sell land held in trust, and to reinvest the proceeds, but who is not authorized by the trust deed to invest the trust funds in stock or shares of private corporations, cannot sell the land so held in trust to a land company and take in payment therefor stock of such company, especially where such investments, by trustees, are forbidden by the laws of the state. Such a sale is a violation of good faith on the part of the trustee, and is void. (*Randolph v. East Birmingham Land Co.*, 64.)

9. TRUSTS—INVALID SALE OF LAND—TITLE—BONA FIDE PURCHASERS WITHOUT NOTICE.—If a trustee sells land to a private corporation in violation of his trust, and such land is afterward sold at a judicial sale to persons who had knowledge of the conditions of the trust and of the illegal sale to their vendor, such parties are not bona fide purchasers for value without notice, and, as against the cestui que trust, acquire no right to the land. (*Randolph v. East Birmingham Land Co.*, 64.)

See Chattel Mortgages, 3; Powers.

ULTRA VIRES.

See Corporations, 8-11.

VARIANCE.

See Forgery, 3.

VENDOR AND PURCHASER.

1. VENDOR AND VENDEE—CONTRACT TO CONVEY—SUBSEQUENT PURCHASERS.—Persons acquiring title to land with notice of a pre-existing contract of sale made by their vendor are bound thereby to the same extent as such vendor. (*Tate v. Pensacola Gulf etc. Co.*, 251.)

2. VENDOR AND VENDEE.—ACTUAL POSSESSION is notice to all the world of whatever rights the occupant really has in the premises, and a vendor cannot convey to any other person without affecting him with such notice. Actual knowledge of such possession on the part of those sought to be charged with such notice is not necessary. Notice in such cases is a legal deduction from the fact of possession. (*Tate v. Pensacola Gulf etc. Co.*, 251.)

3. VENDOR AND VENDEE—PURCHASER'S DUTY TO INQUIRE INTO TITLE.—If a party other than the grantor is in possession of land, it is the purchaser's duty to inquire into the title thereto, and the presumption of law is, that upon such inquiry he ascertains the true state of the title. (*Tate v. Pensacola Gulf etc. Co.*, 251.)

See Notice; Specific Performance.

VENIRE.

See Forgery, 2.

VERDICT.

See Appeal, 14-16; Indictment.

VIADUCTS.

See Mandamus; Municipal Corporations, 21-23; Police Power, 1.

VICE-PRINCIPAL.

See Master and Servant, 9.

WAIVER.

See Attachment, 10; Insurance, 4, 5, 8-18, 20-27; Landlord and Tenant, 10.

WAREHOUSEMEN.

See Carriers, 10.

WARRANTY.

See Damages, 6; Sales, 5, 6, 9.

WATER COMPANIES.

See Statutes, 13.

WATERS.

1. WATERS AND WATERCOURSES.—A watercourse consists of water flowing in a certain direction by a regular channel having a well-defined and substantial existence, but the water need not flow continually—the stream may be dry at times. (*Tampa Water Works Co. v. Cline*, 262.)

2. WATER AND WATERCOURSES.—NAVIGABLE STREAMS include all those which afford a channel for useful commerce, and such streams are public highways by common right. (*Farmers' etc. Mfg. Co. v. Albemarle etc. R. R. Co.*, 606.)

3. WATER AND WATERCOURSES.—NAVIGABLE STREAMS —OBSTRUCTION—DAMAGES.—If a navigable stream is obstructed by being crossed by a bridge without a draw therein for the passage of boats, the damage to a boatowner who is compelled to unload his cargo, but who, instead of procuring another conveyance, leaves the cargo exposed to the elements, is the value of the boat for the time it is delayed, and reasonable wages paid to the crew, but he is not entitled to recover for injury to the cargo from exposure, or for the cost of unloading or loading it. (*Farmers' etc. Mfg. Co. v. Albemarle etc. R. R. Co.*, 606.)

4. WATERSAND WATERCOURSES—OBSTRUCTION OF NAVIGABLE STREAM—SPECIAL INJURY—DAMAGES.—The obstruction of a navigable stream by the construction of a bridge across it without any draw to permit the passage of boats renders the wrongdoer liable to a boatowner whose business requires him to pass the bridge with his boat, and it is immaterial whether such boat is licensed, or does business as a common carrier, or whether other individuals own boats engaged in navigating the stream. (*Farmers' etc. Mfg. Co. v. Albemarle etc. R. R. Co.*, 606.)

5. WATERSAND WATERCOURSES.—NAVIGABLE STREAMS. A fresh water stream above tide water is navigable and a public highway only when it is susceptible of being used in ordinary con-

dition, for a highway of commerce, over which there may be trade, travel, transportation, or valuable floatage for a season or considerable portion of the year. All fresh water streams which have the requisite volume of water only occasionally and for brief periods, as the result of freshets, are unnavigable and private property. (*Bayzer v. McMillan Mill Co.*, 133.)

6. **WATERS AND WATERCOURSES—NAVIGABLE STREAMS.** A fresh water creek above tide water not declared public by law, not navigated by boats, keels, or lighters of any kind, and not utilized for any kind of transportation of commodities, except sawlogs and lumber, and for this only at spasmodic and occasional periods in the winter or spring as the result of freshets, is not a navigable stream, but is private property, which may be obstructed without liability for damages. (*Bayzer v. McMillan*, 133.)

7. **WATERS, NAVIGABLE—STATE CONTROL OVER SUBMERGED LANDS.**—In this country, each state, subject to the limitations of the federal constitution, has absolute control of all navigable waters, within its limits. The disposition of lands lying under such waters is a question for the several states to determine for themselves; and each state has power to convey lands so submerged, and held by the state, when the conveyance will not impair the remaining public interest in the lands and waters. (*People v. Kirk*, 277.)

8. **WATERS—NAVIGABLE LAKES—LEGISLATIVE RIGHT TO EXTEND DRIVEWAY.**—Under the legislation of Illinois, a board of park commissioners is authorized to extend a driveway over and upon the waters of Lake Michigan, where the rights of navigation, of commerce, and of fishery are not taken away, or materially infringed, but remain substantially in the public as before. (*People v. Kirk*, 277.)

9. **WATERS—NAVIGABLE LAKES—LEGISLATIVE RIGHT TO APPROPRIATE SUBMERGED LANDS.**—After a board of park commissioners has, under statutory authority, lawfully extended a driveway over and upon the waters of Lake Michigan, the submerged lands lying between the shore and the inner line of such extension shall be appropriated, as directed by the statute, to paying for the improvement, and to this end, the board is authorized to sell and convey such lands. (*People v. Kirk*, 277.)

10. **WATERS—NAVIGABLE LAKES—SALE OF SUBMERGED LANDS WITHIN LINE OF IMPROVEMENT.**—Under a statute authorizing a board of park commissioners to extend a driveway over a navigable lake, to appropriate the submerged lands lying between the shore and the inner line of such extension toward defraying the cost of the improvement, and to sell and convey such lands to accomplish that end, the board is not bound to sell such lands for cash, but has power to convey them directly to shore owners, who have performed work on the improvement, if the board thereby receives their full value. (*People v. Kirk*, 277.)

11. **WATERS—TITLE TO LAND UNDER NAVIGABLE LAKES.** The title to, and right of dominion over, lands covered by Lake Michigan, within the boundaries of the state of Illinois, is held by the state, in its sovereign capacity, in trust for the people of the entire state, for the purposes of navigation and fishery; and the governmental powers of the state over such lands cannot be relinquished or given away. (*People v. Kirk*, 277.)

12. **WATERS—LEGISLATIVE POWER OVER NAVIGABLE LAKES.**—The legislature, which represents not only the state, that holds the title to land under navigable lakes, but also the people, for whose use the title is held, possesses the sovereign power of parliament over the waters of such lakes and the submerged lands covered by the same. (*People v. Kirk*, 277.)

13. WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—A lower proprietor or owner of land bordering on a surface stream of water flowing in a well-defined channel has, in the absence of any modification of relative rights by contract or prescription, no right to throw the water back on him above, and is subject to the burden of receiving it from the proprietor above substantially undiminished in quantity and uncorrupted in quality, and this right arises, not from any supposed grant or from prescription, but *ex jure naturae* and as an incident to the soil. (*Tampa Water Works Co. v. Cline*, 262.)

14. WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—The right to the benefit and advantage of the water flowing in a well-defined channel past one owner's land is subject to similar rights of all the proprietors on the bank of the stream to the reasonable enjoyment of the natural bounty, and it is therefore only for an unauthorized and unreasonable use of the common benefit that any one owner has a just cause to complain. (*Tampa Water Works Co. v. Cline*, 262.)

15. WATERS AND WATERCOURSES.—RIPARIAN RIGHTS of an owner to the ordinary use of water flowing in a well-defined natural channel past his land, extends to the supplying of natural wants, including the use of the water for domestic purposes of home or farm. (*Tampa Water Works Co. v. Cline*, 262.)

16. WATER AND WATERCOURSES—RIGHT OF APPROPRIATION.—The fact that an individual or a corporation has a contract with a city to supply its inhabitants with water, and has expended large sums of money in the erection of a plant, does not confer any additional rights to appropriate water flowing in a natural and well-defined channel through the lands of different owners. (*Tampa Water Works Co. v. Cline*, 262.)

17. WATER AND WATERCOURSES—RIGHT OF LAND-OWNER—POLLUTION.—An owner has the right to take rock out of, or otherwise use, his own land as he desires, provided that, in so doing he does not divert or pollute a natural stream of water flowing through his land. (*Tampa Water Works Co. v. Cline*, 262.)

18. WATER AND WATERCOURSES—SUBTERRANEAN STREAMS.—In the absence of affirmative proof that subsurface water is supplied by a definite flowing stream, the presumption is that it comes from ordinary percolations. (*Tampa Water Works Co. v. Cline*, 262.)

19. WATER AND WATERCOURSES—SURFACE AND SUBTERRANEAN STREAMS.—The only difference in the application of the law to surface and subterranean streams is in ascertaining the character of the streams, and if underground currents of water flow in defined and known channels, the rules of law which govern the use of similar streams flowing upon the surface are applicable to them, but if it does not appear that the waters which come to the surface are supplied by a definite flowing stream, they are presumed to be formed by the ordinary percolations of water in the soil. (*Tampa Water Works Co. v. Cline*, 262.)

20. WATERS AND WATERCOURSES—RIGHT TO PERCOLATING WATER.—The owner of land through which subsurface water, without any distinct, definite, and known channel, percolates or filters to the land of another, is not prohibited from digging into his land and appropriating the water to any useful purpose of his own, though by so doing the water may be entirely diverted from the land to which it would otherwise naturally pass, but if such subterranean water has assumed the proportions of a well-defined and constant stream, the owner of the land through which it flows is not authorized to divert it, or improperly use it, any more than if the stream ran upon the surface. (*Tampa Water Works Co. v. Cline*, 262.)

21. WATERS, RIGHT OF LANDOWNERS TO PROTECT THEIR PROPERTY FROM.—Surface water caused by the falling of rain or the melting of snow, and that escaping from running streams, is regarded as a common enemy, against which anyone may defend himself, though in so doing he inflicts injury upon another. (*Cass v. Dicks*, 859.)

22. WATERS, EMBANKMENTS TO PREVENT DRAINAGE OR FLOW OF.—A landowner may lawfully construct upon his land embankments to prevent the flow thereon or thereto of surface waters, though in so doing he deprives another landowner of the right to drain seepage and other surface water accumulating on the lands of the latter, and thereby inflicts upon him serious injury. (*Cass v. Dicks*, 859.)

See Injunctions, 4.

WITNESSES.

1. WITNESSES—CREDIBILITY.—A party to an action may change his evidence upon a second trial if he has a legitimate opportunity to do so, although the jury may properly consider such change as affecting his credibility. (*Pelton v. Schmidt*, 462.)

2. WITNESSES—COMPETENCY.—In an action to recover for personal injury, a fellow-servant is competent to testify as to the custom or usage of the manufactory in which he is employed, so far as such matters rest on his own knowledge. (*Prescott v. Ball Engine Co.*, 683.)

3. HUSBAND AND WIFE—WITNESSES AGAINST EACH OTHER.—In an action for slander uttered by a husband against his wife, she is incompetent as a witness against him. (*Baxter v. State*, 720.)

4. HUSBAND AND WIFE—WITNESSES AGAINST EACH OTHER.—A statute providing that husband and wife cannot testify against each other, except in a criminal prosecution for an offense committed by one against the other, must be construed to mean an act of personal violence committed by one against the other. (*Baxter v. State*, 720.)

5. WITNESSES—WHEN INCOMPETENT.—A witness is incompetent to testify as to whether a person in one end of a railroad car was in "a senseless condition" or "stupidly drunk," where he saw such person in conversation with others, but could not hear anything that was said, had no conversation with him, and occupied a seat at the other end, and on the opposite side of the car. (*Johnson v. Louisville etc. R. R. Co.*, 39.)

6. WITNESS—PRACTICE.—OBJECTION TO THE COMPETENCY of a witness must be made, if it is known, before his examination in chief, or, at least, cannot be made after his cross-examination. (*Pillow v. Southwestern Imp. Co.*, 804.)

7. WITNESSES CANNOT BE IMPEACHED or contradicted, except as to such matters as they have testified. (*Anderson v. State*, 722.)

8. WITNESSES—IMPEACHMENT FOR WANT OF CHASTITY. Evidence of general bad reputation for chastity is admissible to impeach a witness, whether male or female. (*State v. Sibley*, 477.)

9. WITNESS—REPUTATION FOR TRUTH AND VERACITY, PLACE OF.—If a witness' reputation for truth and veracity is attacked, it is error to exclude testimony in rebuttal respecting the reputation which such witness had in a certain city for truth and veracity, though such city is five or six miles distant from the place of residence. (*State v. Cushing*, 883.)

10. WITNESSES—EXPERT TESTIMONY.—The effect of alcoholic drunkenness upon a person is not a subject for expert testimony. (Johnson v. Louisville etc. R. R. Co., 39.)

See Accessories, etc.

WORDS AND PHRASES.

See Definitions.

WORKHOUSE.

See Statutes, 27.



Library Use Only

Library Use Only

UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 190 709 4

